EDITORIAL

Commission v. Belgium: A First Glimpse into the Interpretation of the Anti-tax Avoidance Directive

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Commission *v.* Belgium *is the first CJEU judgment on the interpretation of the Anti-tax Avoidance Directive (ATAD). Addressing the seemingly narrow issue of Belgium's alleged failure to implement double taxation relief for CFC income, the case provides broad guidance on the meaning of the 'minimum level of protection' under Article 3 ATAD, the relationship between special and general rules, the dual and balancing objectives of the ATAD to combat tax avoidance while preventing new barriers to the Internal Market, and the interpretation of the specific controlled-foreign company rules in Articles 7 and 8 ATAD. The case of* Commission v. Belgium *has also drawn quite some attention because AG Kokott's Opinion has addressed a lingering concern: Was the adoption of the ATAD even covered by the European Union's legislative competences?*

Keywords: ATAD, CFC, double taxation, minimum harmonization, GAAR, anti-abuse, competence, Belgium

I BACKGROUND AND ISSUES

1. The Anti-tax Avoidance Directive (ATAD)[1] was hastily adopted in an atmosphere of (unnecessary) urgency in 2016 and went far beyond the OECD BEPS project.[2] The ATAD has not only stretched the boundaries of Union competence under Article 115 TFEU,[3] but has also demonstrated that more time and deliberation would probably have prevented the serious shortcomings in legislative drafting,[4] has raised fundamental issues with regard to the interpretation of a 'minimum harmonization' in the tax area that protects Member States (rather than the freedom of taxpayers), and has put the spotlight on the relationship between the special rules of the Directive – from the interest barrier (Article 4 ATAD) to anti-hybrid measures (Article 9, 9a and 9b ATAD) – and the general anti-abuse rule, which is placed squarely in between those special rules (Article 6 ATAD).[5] Some of these questions have been addressed in the case of *Commission v. Belgium*, where AG Kokott's Opinion of 22 May 2025[6] and the CJEU's Judgment of 26 February 2026[7] came out on different sides and have thereby provided significant clarity and interesting perspectives on some hotly

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1 *See* e.g., Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193/1, as amended by Council Directive (EU) 2017/952 of 29 May 2017, [2017] OJ L 144/1 (with regard to hybrid mismatches with third countries).

2 Indeed, the ATAD does not address any of the four OECD BEPS 'minimum standards' and its provisions on exit taxation (Art. 5 ATAD) and the general anti-abuse rule (Art. 6 ATAD) were not part of the OECD BEPS project.

3 *See infra* Ch. V.

4 The obvious instances of ambiguous and unexplained drafting issues are numerous. For example, does Art. 5(1) ATAD, which requires that certain transactions shall 'be subject to tax at an amount' equal to the difference between market and book value, mean that an exit tax on that amount must be levied even if the taxpayer is in a loss position (and hence be 'stricter' than the usual base inclusion of a realized capital gain) or does it merely require inclusion of that amount in the tax base? Also, in the sphere of exit taxation, why does Art. 5(1)(c) ATAD on the transfer of residence not exclude at least also immovable property situated (and hence – just as permanent establishments – remaining as taxable) in the exit state from being subject to exit taxation or more generally – like Art. 5(1)(a), (b) and (d) ATAD – require loss of taxing rights? How are the various control criteria in Art. 7(1) ATAD to be aligned and how should multiple inclusions of the same CFC income on a multi-tier structure be prevented (*see* e.g., Annika Soom, *Double Taxation Resulting from the ATAD: Is There Relief?*, 48(3) Intertax 273–285 (2020) Are 'dividends and income from the disposal of shares' under Art. 7(2)(a) ATAD to be seen as harmful passive income even if they would be tax exempt had they been received directly by the parent entity (e.g., under a participation exemption regime mandated by the Parent-Subsidiary Directive)? And if so, why? For a fundamental analysis of conceptual issues of the ATAD *see* e.g., Martha Caziero & Ivan Lazarov, *The Substantive Scope of the Anti-tax-Avoidance Directive: The Remaining Leeway for National Tax Sovereignty*, 58(6) Com. Mkt. L. Rev. 1789–1818 (2021), doi: 10.54648/COLA2021112.

5 For detailed analysis of the ATAD's core provisions *see* e.g., *A Guide to the Anti-tax Avoidance Directive* (Werner Haslehner, Katerina Pantazatou, Georg Kofler & Alexander Rust eds, Edward Elgar: Cheltenham 2020).

6 Opinion of AG Kokott, 22 May 2025, C-524/23, *Commission v. Belgium*, EU:C:2025:381. For a detailed discussion of the Opinion *see* Pieter-Jan Wouters, *CFC Rules (Model B): No Compensation for Foreign Taxes Needed According to Advocate General Kokott*, 65(8) Eur. Tax'n 358–361 (2025), doi: 10.59403/jdv0sa.

7 CJEU, 26 Feb. 2026, C-524/23, *Commission v. Belgium*, EU:C:2026:111.

debated issues (and, as always, raised many follow-up questions).

The background of *Commission v. Belgium* is rather simple: Article 7 ATAD contains the controlled foreign company (CFC) rule and Article 8 ATAD deals with the computation of CFC income, including the prevention of double taxation. At issue in Commission *v.* Belgium was Belgium's alleged failure to eliminate double taxation arising from the application of its CFC rules, i.e., the non-implementation of ATAD's Article 8(7). That provision states that the 'Member State of the taxpayer shall allow a deduction of the tax paid by the entity or permanent establishment from the tax liability of the taxpayer in its state of tax residence or location' and that '[t]he deduction shall be calculated in accordance with national law'. Following the usual steps of an infringement proceeding,[8] the case ended up before the CJEU, which – unlike AG Kokott – sided with the Commission and found that Belgium had indeed failed to fulfil its obligation to implement Article 8(7) ATAD into domestic law. The divergence between the AG's Opinion and the CJEU's Judgment as well as the complexity of the arguments brought forward by the Commission and Belgium highlight some of the fundamental differences on interpretation of EU secondary law. (One might note in passing that Belgium has switched to the 'categorical approach' under Article 7(2)(a) ATAD as of 2024 and implemented the relief from double taxation under Article 8(7) ATAD,[9] hence legislatively alleviating the issue that lead to *Commission v. Belgium* in the first place.)

2 'Minimum harmonization' and 'minimum level of protection' under Article 3 ATAD

2. One obvious argument in Belgium's favour was the 'minimum harmonization' clause in Article 3 ATAD: Under the heading 'minimum level of protection', it provides that the ATAD 'shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases'. Belgium's reliance on Article 3 ATAD was supported by AG Kokott,[10] but ultimately rejected by the CJEU.[11]

a. One might ask if not giving a credit for the foreign corporate tax under Article 8(7) ATAD is exactly the 'safeguarding' of 'a higher level of protection for domestic corporate tax bases' that is permitted by Article 3 ATAD, i.e., an increased tax base protection for a Member State. The Preamble to the ATAD gives little guidance and merely notes that Member States 'could decrease this ratio or place time limits or restrict the amount of unrelieved borrowing costs that can be carried forward or back' in the context of the interest barrier under Article 4 ATAD[12] or 'reduce the control threshold' or 'employ a higher threshold' for the relevant tax-rate comparison in the context of CFC rules under Article 7 ATAD.[13] The Preamble is, however, entirely silent on Article 8 (7) ATAD. Likewise, the Commission Proposal[14] gave no further guidance for interpretation, as it did not even contain a credit rule similar to what is now Article 8(7) ATAD. (That paragraph was added later during the Council deliberations, as usual without any explanation given in the published materials. The Union legislature's precise thoughts will, again as usual, remain a mystery forever.)[15] Some guidance was provided in a 'Note on the Application of the "Minimum Level of Protection"' that was prepared by the Commission for the Council's Working Party on Tax Questions (Direct Taxation) in March 2016.[16] In hindsight, the Commission's position in that Note is nothing short of surprising: The Commission's Proposal

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[8] *See* for the letter of formal notice INF/20/1212 (2 Jul. 2020), for the reasoned opinion INF/21/6201 (2 Dec. 2021) and the decision to refer Belgium to the CJEU INF/23/1808 (19 Apr. 2023) and IP/23/2131 (19 Apr. 2023).

[9] *See* Moniteur belge du 29 Dec. 2023, at 123984.

[10] Opinion of AG Kokott, 22 May 2025, *supra* n. 6, paras 72–96.

[11] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, paras 83–86.

[12] Point 6 of the Preamble to Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193/1.

[13] Point 12 of the Preamble to Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193/1.

[14] Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016)26 (28 Jan. 2016).

[15] Indeed, the credit provision first appeared in the Presidency's compromise text in Doc. 8766/16 (17 May 2016) (as Art. 9(7)), while no discussion on that provision can be found in the preceding published Council documents (e.g., Doc. 8899/16 [17 May 2016]).

[16] *See* DG TAXUD Note on the Application of the 'Minimum Level of Protection', Room Document #4 for the Working Party on Tax Questions – Direct Taxation (18 Mar. 2016).

contained two measures to avoid double taxation in the CFC context, one for subsequent distributions by the CFC (now Article 8(5) ATAD, then Article 9(4) of the Proposal) and one for the subsequent disposition of the participation (now Article 8(6) ATAD, then Article 9(5) of the Proposal), both of which prescribe that previously included amounts 'shall be deducted' from the respective later tax base. The word 'shall' seems to imply a 'must', just as the Commission argued with regard to Article 8(7) in its case against Belgium. But the Commission's position in early 2016 was different:

> The directive proposes rules for avoiding double taxation where there is a distribution of profits or disposal of the taxpayer's participation in the CFC after income of the controlled subsidiary has already been taxed under CFC legislation. If a Member State did not cater for eliminating double taxation in its implementing measures, that State would be laying down stricter rules, which, as a matter of principle, should be acceptable under the minimum standard. However, in this particular context, Member States may also wish to consider whether their envisaged stricter approach would be in line with broader objectives of the internal market, i.e. the elimination of double taxation. […] Member States may legitimately limit the availability of double tax relief after a certain number of years have gone by between the tax charge on undistributed income under CFC legislation and the subsequent profit distribution or disposal of shares.[17]

b. That was a somewhat twisted argument by the Commission: Giving no relief with regard to previously included CFC income is fine under Article 3 ATAD 'as a matter of principle', but Member States should consider whether that 'would be in line with broader objectives of the internal market, i.e., the elimination of double taxation'. Did the Commission argue here that not giving relief would raise questions under primary EU law because then a Member State could not avail itself of the 'shielding effect' of the ATAD? (The CJEU has effectively reversed the argument by finding that Article 8(7) ATAD is not optional (under Article 3 ATAD),[18] because if it were the non-prevention of double taxation could raise problems not only with regard to proportionality under the TFEU's competence rules[19] and a justification of a restriction of the freedom of establishment,[20] but also with regard to the principle of equality if Member States were allowed to have different domestic rules on that question.[21]) In *Commission v. Belgium*, however, the Commission argued that Article 8(7) ATAD is not at a Member State's disposition by virtue of Article 3 ATAD, as a:

> proper transposition of the ATAD into national law also requires transposition of Article 8(7) thereof. Minimum harmonisation only allows the measures provided for in the Directive to be supplemented or tightened, for example by lowering thresholds for control […], but does not allow their complete non-transposition.[22]

This argument seems to be at odds with the earlier 'Note on the Application of the "Minimum Level of Protection"' and might even allow the question whether the Commission's action against Belgium was initiated in good faith.

c. AG Kokott gave a lengthy argument why the Commission's perspective was wrong (and why non-transposition of a lenient rule could indeed achieve further-reaching attainment of a Directive's objective),[23] but the CJEU sided with the Commission and essentially viewed Article 8(7) ATAD – as per its wording ('shall') and systemic position within the ATAD[24] – as an 'exhaustive' harmonization[25] of the question whether a credit has to be granted, so that no discretion – not even under Article 3 ATAD – is left to the Member States.[26] Whether one agrees with the Commission's seeming flip-flopping or the CJEU's reasoning, the debate is

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[17] *See ibid.*, at 4–5.

[18] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, paras 83–86.

[19] *See* with regard to Art. 5 TEU *ibid.*, paras 90–92.

[20] *Ibid.*, paras 93–96.

[21] *Ibid.*, paras 102–104 and, more clearly, para. 113.

[22] *See* the description of the Commission's argument in the Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 73.

[23] *Ibid.*, paras 72–96.

[24] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, referring to paras 71–73 (wording) and paras 75–82 (system).

[25] *See* CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, para. 85, referring to CJEU, 18 Jan. 2024, C-227/22, *Regionalna Direktsia 'Avtomobilna Administratsia' Pleven*, EU:C:2024:57, para. 38, CJEU, 22 May 2003, C-441/01, *Commission v. Netherlands*, EU:C:2003:308, para. 46, and CJEU, 17 Oct. 2018, C-503/17, *Commission v. UK*, EU:C:2018:831, para. 55.

[26] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, paras 83–86.

now certainly open which of ATAD's measures are pockets of 'exhaustive harmonization' similar to the credit provision of Article 8(7) ATAD (and hence not at the Member States' discretion) and which can be tightened under the 'minimum level of protection' standard of Article 3 ATAD.

3 The limits of reference to domestic law for the 'calculation' of the credit in Article 8(7) ATAD

3. Belgium also defended its non-implementation of Article 8(7) ATAD by arguing that the provision itself – even without recourse to Article 3 ATAD – 'gives Member States the possibility to refrain entirely from tax deduction' as the 'the second sentence of Article 8(7) of the ATAD' 'refers to national law for the calculation of the tax deduction provided for in the first sentence of Article 8(7) of the ATAD'.[27] It would hence be up to national law to grant or deny the credit in the first place. Neither AG Kokott nor the CJEU accepted that argument. The Court emphasized the mandatory character of the credit as evidenced by the indicative present tense used in Article 8(7) ATAD ('shall') and that this obligation is without exception.[28] When the second sentence of Article 8(7) ATAD provides that '[t]he deduction shall be calculated in accordance with national law', this merely refers to the modalities for the calculation of the credit and, conversely, strengthens the basic premise of the first sentence of Article 8(7) ATAD that the credit as such must be granted.[29] This fully aligns with AG Kokott's reading of the second sentence of Article 8(7) ATAD, which 'only authorises the Member States to lay down the calculation method for the tax deduction, but not to refrain from deducting taxes altogether', as it only 'addresses the question of "how (much)" the deduction should be, while already assuming an (affirmative) answer to the question of "whether" there should be a deduction'.[30] Of course, putting the calculation of the credit amount into the hands of domestic legislation opens Pandora's box regarding various follow-up problems, such as cost allocation in light of the fundamental freedoms[31] or the question whether Article 8(7) ATAD must be understood as requiring a credit carry-forward.[32]

4 Teleological reduction of the credit obligation for 'non-genuine arrangements'?

4. The most pronounced conceptual difference in argumentation between AG Kokott and the Court concerned the relationship between the so-called 'transactional approach' under Article 7(2)(b) ATAD, the general anti-abuse rule of Article 6 ATAD and the credit provision of Article 8(7) ATAD.

a. In brief, the ATAD gives Member States two different options on how to structure their CFC rules: Very simplified, the so-called 'categorical approach' provides for the inclusion of specifically defined passive income (e.g., interest, royalties) of the CFC in the parent's tax base (Article 7(2)(a) ATAD), whereas the so-called 'transactional approach' provides for the inclusion of a CFC's income 'arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage' (Article 7(2)(b) ATAD). Belgium has chosen the second approach and hence essentially argued that the CFC rules apply only in cases of abuse (where the diverted income would be truly Belgium's); as it would be 'inappropriate to allow a deduction of foreign taxes', Article 8(7) ATAD cannot apply to Member States that have implemented Article 7(2)(b) ATAD.[33]

b. AG Kokott broadly sided with Belgium[34]: She acknowledged that Article 8(7) ATAD's wording does not distinguish between the two CFC approaches under Article 7(2)(a) or (b) ATAD (unlike Article 8(1) and (2) ATAD), but that systematically and teleologically there can be no relevant double taxation of non-genuine arrangements, rendering Article 8(7) ATAD meaningless for Belgium. Kokott's argument (at least

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[27] *See* the description of Belgium's argument in the Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 38.

[28] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, para. 72.

[29] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, para. 73.

[30] Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 41.

[31] *See* e.g., EFTA-Court, 7 May 2008, Case E-7/07, *Seabrokers AS*, [2008] EFTA Court Report 172.

[32] This question is currently pending before the Court with regard to the indirect credit under Art. 4 of the Parent-Subsidiary Directive in Case C-546/25, *Beteiligungsgesellschaft* (referred by the German BFH, 26 Mar. 2025, I R 6/22).

[33] *See* for that description Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 14.

[34] *Ibid.*, paras 42–71.

for intra-EU situations[35] and despite – acceptable and even welcome – factual risks of double taxation[36]) is quite simple: She argued that the 'transactional approach' under Article 7(2)(b) ATAD is essentially a specific case of application of the general anti-abuse rule under Article 6 ATAD.[37] As the legal consequence of a non-genuine arrangement is its negation, '[t]he situation that would have prevailed in the absence of the transactions constituting the abusive practice must be re-established'.[38] That means that Belgium as the parent's state may tax the diverted income (as if had never been diverted, 'since it would have arisen in Belgium in the absence of non-genuine arrangements'[39]) and the CFC's state has to forego taxation of such income,[40] so that double taxation would not arise and would not need to be prevented by a credit under Article 8(7) ATAD. AG Kokott hence concluded that 'the application of Article 8(7) of the ATAD is thus limited to the inclusion of controlled foreign corporation rules in accordance with Article 7(2)(a) thereof', but does not extend to the 'transactional approach' under Article 7(2)(b) ATAD chosen by Belgium.[41] In finding so, AG Kokott also discloses her view on the relationship between the ATAD's special anti-abuse rules (such as Article 7(2)(b)) and the general anti-abuse rule (Article 6 ATAD):

> At a factual level, Article 7(2)(b) of the ATAD, as a *lex specialis*, may take precedence over the general abuse avoidance provision of Article 6 of the ATAD (*see* recital 11). At the level of legal consequences, however, Article 8(7) of the ATAD cannot be applied indiscriminately to Article 7(2)(b) of the ATAD. Otherwise, the result would be a finding contradictory to the legal consequence, provided for in Article 6, of completely ignoring a non-genuine arrangement.[42]

c. While AG Kokott took a holistic, harmonizing approach to the interpretation of the ATAD's provisions, the Court took a multi-step approach in reaching the opposite conclusion: First, the clear wording of Article 8(7) ATAD does not distinguish between the two different CFC approaches under Article 7(2)(a) or (b) ATAD.[43] Second, Article 7(2)(b) ATAD contains a 'special mechanism' for the inclusion of a CFC's income 'arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage', and that mechanism is different from the general anti-abuse rule under Article 6 ATAD.[44] As it is Article 6 ATAD's function – as expressed in the Preamble[45] – 'to fill in gaps' and not to 'affect the applicability of specific anti-abuse rules',[46] the special mechanism in Article 7(2)(b) ATAD must be seen as *lex specialis* in relation to Article 6 ATAD and takes precedence, without being influenced by the legal ramifications of the latter. Hence, Member States are not at liberty to either apply the special rule of Article 7(2)(b) ATAD (and the credit under Article 8(7) ATAD) or the general rule under Article 6 ATAD (without the credit under Article 8(7) ATAD), but are rather under an obligation to apply the special rule.[47] Of course, the Court did not indicate if the general rule under Article 6 ATAD might be applied if, for whatever reason, a taxpayer escapes the application of the ATAD's CFC rules. Third, and implicitly replying to AG Kokott's approach, the Court did not see any obligation for the CFC's state – whether or not an EU Member State[48] – to not tax the CFC's income; such obligation to refrain from taxation can neither be derived from Article 8(2) ATAD nor any other ATAD provision. That, however, means that taxation in the CFC state can indeed persist and that relief in the parent

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[35] *Ibid.*, paras 55–59.

[36] *Ibid.*, paras 67–69.

[37] *Ibid.*, paras 52–53.

[38] *Ibid.*, para. 49.

[39] *Ibid.*, para. 56.

[40] In case of divergence between Member States, AG Kokott refers to a resolution 'pursuant to the principle of sincere cooperation (first subparagraph of Art. 4(3) TEU) by means of the principles laid down in the Dispute Resolution Mechanism'; with regard to third states, AG Kokott mentions provisions on relevant methods for reaching agreement (*see* e.g., Art. 25 of the OECD Model Tax Convention on Income and Capital). *See* Opinion of AG Kokott, 22 May 2025, *supra* n. 6, paras 57–58.

[41] *Ibid.*, paras 70–71.

[42] *Ibid.*, para. 54.

[43] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, para. 79.

[44] CJEU, 26 Feb. 2026, C-524/23, *supra* n. 7, paras 80–81.

[45] Point 11 of the Preamble to Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193/1.

[46] *See* CJEU, 26 Feb. 2026, *supra* n. 7, para. 81.

[47] *Ibid.*, para. 82.

[48] *Ibid.*, para. 115.

state under Article 8(7) ATAD is not superfluous. Indeed, the Court put quite some importance on the dual and balancing objectives of the ATAD generally (and Article 8(7) ATAD specifically): Combating tax avoidance while preventing new barriers to the Internal Market, such as double taxation.[49] The credit under Article 8(7) ATAD specifically serves the objective of preventing double taxation and its denial would be an unwarranted and disproportional measure to address base erosion and profit shifting.[50] As AG Kokott's opinion pointed out, however, it is quite a remarkable outcome that a Member State that uses the 'transactional approach' under Article 7(2)(b) ATAD and only taxes profits which – by definition – have been artificially diverted still has to grant a credit, whereas it would be able to tax all profits absent such artificial arrangement.

d. As mentioned before, the Court also links these dual and balancing objectives (and the prevention of double taxation) to the required proportionality under the TFEU's competence rules,[51] the proportionality of measures that restrict the freedom of establishment,[52] and – surprisingly – even the (general) principle of equality.[53] As for the latter, the Court noted that if Member States were allowed not to implement Article 8(7) ATAD, taxpayers could face a difference in treatment depending on whether or not the national legislation applicable to them includes mechanisms to prevent double taxation of CFC income. In light of the comparability of situations this would infringe upon the general principle of equality and could not be justified based on the ATAD's objectives.[54] Put differently, under that view, the principle of equality would be infringed if Member States were allowed to have different domestic rules on the question of preventing double taxation (while the Court seemed otherwise unconcerned about diverging rules under Article 3 ATAD in the first place). This argument, however, opens the door to future challenges against the ATAD: For example, is it in line with the requirement of proportionality that the ATAD indeed creates multiple instances of double taxation, e.g., by denying interest deductions under Article 4 ATAD for the payor while allowing full taxation of the income interest income payee or by allowing the inclusion of one and the same CFC income under Article 7 and 8 ATAD at multiple tiers of a corporate group?[55]

e. Finally, one might find it odd that the Court found that Belgium infringed upon its EU obligations under the ATAD by not granting relief from double taxation (under Article 8(7) ATAD), while the Court's own established jurisprudence since *Kerckhaert and Morres*[56] consistently holds that (juridical) double taxation is not a problem under the fundamental freedoms. So why could Belgium not argue that the double taxation potentially resulting from its non-implementation of Article 8(7) ATAD was merely the result of a parallel exercise of taxing powers by different Member States? While AG Kokott seemed to have some sympathy for that argument,[57] the Court simply answered that *Kerckhaert and Morres* is only applicable if there are no harmonization measures in place, whereas such measures exist in the form of Articles 7 and 8 ATAD and that these expressly limit Member States' discretion in this area.[58]

5 The elephant in the room: Was the Union even competent to legislate the ATAD?

5. The case of *Commission v. Belgium* has drawn quite some attention because AG Kokott's Opinion has

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[49] *See ibid.*, para. 91, referring to Point 5 of the Preamble to Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193/1, which reads: 'It is necessary to lay down rules against the erosion of tax bases in the internal market and the shifting of profits out of the internal market. Rules in the following areas are necessary in order to contribute to achieving that objective: limitations to the deductibility of interest, exit taxation, a general anti-abuse rule, controlled foreign company rules and rules to tackle hybrid mismatches. Where the application of those rules gives rise to double taxation, taxpayers should receive relief through a deduction for the tax paid in another Member State or third country, as the case may be. Thus, the rules should not only aim to counter tax avoidance practices but also avoid creating other obstacles to the market, such as double taxation'.

[50] *See* CJEU, 26 Feb. 2026, *supra* n. 7, para. 111.

[51] *See* with regard to Art. 5 TEU *ibid.*, paras 90–92.

[52] *Ibid.*, paras 93–96.

[53] *Ibid.*, paras 102–104 and, more clearly, para. 113.

[54] *See* again *ibid.*, paras 102–104 and, more clearly, para. 113.

[55] For such instances of double taxation *see* e.g., Soom, *supra* n. 4, at 273–285.

[56] CJEU, 14 Nov. 2006, C-513/04, *Mark Kerckhaert and Bernadette Morres*, EU:C:2006:713. *See also* e.g., CJEU, 12 Feb. 2009, C-67/08, *Margarete Block*, EU:C:2009:92; CJEU, 16 Jul. 2009, C-128/08, *Jacques Damseaux*, EU:C:2009:471; CJEU, 20 May 2008, C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, para. 42; CJEU, 10 Feb. 2011, C-436/08 and C-437/08, *Haribo and Salinen*, EU:C:2011:61, para. 170; CJEU, 19 Sep. 2012, C-540/11, *Daniel Levy and Carine Sebbag*, EU:C:2012:581; CJEU, 4 Feb. 2016, C-194/15, *Baudinet and Others*, EU:C:2016:81; CJEU, 25 Feb. 2021, C-403/19, *Société Générale*, EU:C:2021:136, para. 29.

[57] *See* in the context of Art. 3 ATAD the Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 93.

[58] CJEU, 26 Feb. 2026, *supra* n. 7, paras 100–101.

addressed a lingering concern: Was the adoption of the ATAD even covered by the European Union's legislative competences? Serious doubts have been raised in the academic literature[59] and AG Kokott has joined those critical voices, finding it 'doubtful whether the ATAD can rely on the legal basis of Article 115 TFEU'.[60] While the Internal Market under Article 115 TFEU certainly has as least two sides – one that views it through the lens of freedoms of taxpayers and one that views it through the lens of practices of tax evasion and tax avoidance[61] –, AG Kokott is highly critical whether the ATAD indeed promotes the Internal Market:

> The EU legislature appears to see the effect of promoting the internal market primarily in combating tax-avoidance practices. By so doing, the ATAD does not remove restrictions of fundamental freedoms arising from existing national provisions, however. On the contrary, by placing Member States under an obligation to observe a uniform minimum protection of national corporate tax systems against tax avoidance practices, it limits the companies' possibilities for cross-border activities. It thereby hinders the exercise of fundamental freedoms instead of promoting it. […] To date, the Court has always seen measures against tax-avoidance practices as restrictions of fundamental freedoms, usually of freedom of establishment and freedom of capital, requiring justification. In particular, exit taxation, but also controlled foreign corporation rules have, in this respect, already been the subject of the Court's case-law. Since upholding the fundamental freedoms of economic operators in particular serves the functioning of the internal market, it seems contradictory to assume that a restriction of those very same fundamental freedoms could promote the same objective.[62]

Noting that '[h]armonisation is not an end in itself', AG Kokott was highly doubtful if the ATAD indeed meets the necessary threshold of having a 'direct effect on the functioning of the internal market'.[63] This criticism resonates with more recent concerns of Union overreach into the Member States competences (not only with regard to the ATAD, but also, e.g., with regard to the Pillar Two Directive[64]) and is a welcome voice in the ongoing discussion. AG Kokott, however, did not view *Commission v. Belgium* as the proper case for the Court to address the competence issue *ex officio*,[65] and indeed the Court did not enter into a discussion of Article 115 TFEU. (It seems, however, that the Court approved of the proportionality of the ATAD in light of Article 5 TEU.[66]) It is, however, high time for such a case on the limits of the Union's direct tax competence under Article 115 TFEU to reach the Court.[67]

Notes

[59] *See* e.g., Arnaud de Graaf & Klaas-Jan Visser, *ATAD Directive: Some Observations Regarding Formal Aspects*, 25(4) EC Tax Rev. 199 (204–206) (2016), doi: 10.54648/ECTA2016021; Florian Oppel, *BEPS in Europa: (Schein-) Harmonisierung der Missbrauchsabwehr durch neue Richtlinie 2016/1164 mit Nebenwirkungen*, 25 Internationales Steuerrecht 797 (798–799) (2016); Johanna Hey, *Harmonisierung der Missbrauchsabwehr durch die Anti-Tax-Avoidance-Directive (ATAD)*, 94 Steuer und Wirtschaft 248 (254, 262) (2017), doi: 10.9785/stuw-2017-940304; Claus Staringer, *Die Anti-Tax-Avoidance-Richtlinie: Gesamtwürdigung aus steuerpolitischer Sicht*, in *Die Anti-tax-avoidance-Richtlinie* 1 (11–12) (Michael Lang, Alexander Rust, Josef Schuch & Claus Staringer eds, Linde: Vienna 2017); Edoardo Traversa & Matthieu Possoz, *L'équilibre délicat entre la lutte contre l'évasion fiscale internationale et l'achèvement du marché intérieur: réflexion sur la mise en oeuvre du plan BEPS de l'OCDE au sein de l'Union européenne*, Revue des affaires européennes 611 (624–625) (2018); Werner Haslehner, *EU-US Relations in the Field of Direct Taxes from the EU Perspective: A BEPS-Induced Transformation?*, in *Implementation of anti-BEPS Rules in the EU: A Comprehensive Study* 37 (46–48) (Pasquale Pistone & Dennis Weber eds, IBFD; Amsterdam 2018); Cécile Brokelind, *The Anti-tax Avoidance Directive under Scrutiny: A Matter of Competence?*, in: *International Taxation in a Changing Landscape, Liber Amicorum in Honour of Bertil Wiman* 45 (48–49) (Jérôme Monsénégo & Jan Bjuvberg eds, Wolters Kluwer: Alphen aan den Rijn 2019); Sriram Govind & Ivan Lazarov, *Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD under EU Law*, 47(10) Intertax 852–868 (2019), doi: 10.54648/TAXI2019086; Werner Haslehner, *The General Scope of the ATAD and its Position in the EU Legal Order*, in *A Guide to the Anti-tax Avoidance Directive* 32 (38–39) (Werner Haslehner, Katerina Pantazatou, Georg Kofler & Alexander Rust eds, Edward Elgar: Cheltenham 2020); Georg Kofler, *EU Power to Tax: Competences in the Area of Direct Taxation*, in *Research Handbook on European Union Tax Law* 11 (24–26) (Christiana Panayi, Werner Haslehner & Edoardo Traversa eds, Edward Elgar: Cheltenham 2020). For arguments that Art. 115 TFEU is indeed a sufficient legal basis *see* e.g., Nadja Braun Binder, *Rechtsangleichung in der EU im Bereich der direkten Steuern* 92–94 (Mohr Siebek: Tübingen 2017).

[60] Opinion of AG Kokott, 22 May 2025, *supra* n. 6, paras 25–37, particularily para. 31.

[61] *See* for that categorization, e.g., – ranging from the traditional company tax directives to administrative cooperation – and for further details on the Unions competences and their exercise Kofler, *supra* n. 59, at 11–50.

[62] Opinion of AG Kokott, 22 May 2025, *supra* n. 6, paras 27–28.

[63] *Ibid.*, paras 29–31.

[64] For critical analysis *see* Arne Schnitger, *Vereinbarkeit der Vorschläge zur Einführung von GloBE-Regelungen mit den Grundfreiheiten des AEUV*, 31 Internationales Steuerrecht 741 (742–743) (2022); Rainer Prokisch, *Mindestbesteuerung in der EU und die Frage der Gesetzgebungskompetenz*, Global Taxes, TLE-003-2023 (2023); Jens Schönfeld & Thomas Sendke, *Globale Mindestbesteuerung und EU-Recht*, 33 Internationales Steuerrecht 633 (633 et seq.) (2024); and for anticritical positions Ranjana Andrea Achleitner & Valentin Bendlinger, *GloBE (Pillar Two) – Kompetenzrechtliche Erwägungen zur Umsetzung eines Mindestbesteuerungssystems innerhalb der Europäischen Union*, beck.digitax 2–13 (2021); Valentin Bendlinger, *The OECD's Global Minimum Tax and Its Implementation in the EU* 393 et seq. and 409 et seq. (Wolters Kluwer: Alphen aan den Rijn 2023). For a balancing analysis *see* Wissenschaftliche Dienste des deutschen Bundestages, *Globale Mindestbesteuerung – Europa- und verfassungsrechtliche Fragen*, EU 6 – 3000 – 064/23 / WD 4 – 3000 – 072/23 (2024) 14 et seq.; *see also* e.g., Luc De Broe & Mélanie Massant, *Are the OECD/G20 Pillar Two GloBE-Rules Compliant with the Fundamental Freedoms?*, 30(3) EC Tax Rev. 86 (98) (2021).

[65] Opinion of AG Kokott, 22 May 2025, *supra* n. 6, para. 37, noting that, '[d]espite reservations regarding the European Union's legislative competence for the ATAD, this question must remain open in the present action for failure to fulfil an obligation. At the present time, the issue of competence could probably be clarified only by means of preliminary ruling proceedings that call into question the validity of the ATAD'.

[66] *See* CJEU, 26 Feb. 2026, *supra* n. 7, paras 90–92.

[67] A challenge against the Pillar Two Directive, which was, inter alia, based on a competence argument, remained undecided for procedural reasons. *See* CJEU, 30 Oct. 2025, C-146/24 P, *Fugro*, EU:C:2025:841.