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Editorial

The 'Decluttering' of EU Direct Tax Law

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Unleashing the economic power of the EU's Single Market and boosting Europe's competitiveness and innovation capacity requires a fresh look at the immense administrative and regulatory burdens that have been created over the past decades. This also has a tax dimension, and – as Wopke Hoekstra, *the Commissioner responsible for taxation – has recently put it: 'Decluttering is of the essence'. Indeed, in a post-Pillar Two tax environment, many existing tax measures may have lost their relevance or even be duplicative. Moreover, perhaps the time has come to consider broad common rules for European companies: While this would not be 'decluttering' of EU tax law itself, the creation of common regimes that replace the Member States' rules would ideally be a 'one in, twenty-seven out' approach.*

Keywords: Decluttering, Pillar Two, CFC Rules, DAC6, harmonization, corporate tax, regulatory burdens, SME, Draghi Report, Letta Report, Simplification

1 Time to unleash the EU's single market

Unleashing the creative and economic power of the EU's Single Market also requires a fresh look at the ever-increasing administrative and regulatory burdens that stifle innovation and competitiveness. As the 'Letta Report' has highlighted, businesses across various European countries face significant bureaucratic burdens, with much of this burden being 'due to the overlapping regulations and administrative complexities generated by the EU's complex multilevel governance system', and fragmentations, gold-plating, ring-fencing, and asymmetries 'increasing difficulties and multiplying obstacles to productive activity'.[1] It has long been recognized that '[r]educing the administrative burden of government regulations on citizens, businesses and the public sector should be a part of the government's strategy to improve economic performance and productivity'.[2] But it is not only about administrative burdens: Reducing 'other regulatory burdens is equally important as administrative costs represent only a relatively small percentage of the overall costs governments impose on entities subject to regulation'.[3] Indeed, an evaluation of existing regulations can identify whether they have created 'unnecessary costs or other unintended impacts', i.e., lack efficiency.[4]

2 Competitiveness of european business is crucial

In a world of geopolitical tensions and Europe's declining relative weight in the world economy, it is certainly time to get serious: Not only about the impact of regulation 'on cost and price competitiveness, international competitiveness and the capacity to innovate', but also on '[r]educing administrative burdens', which 'is crucial to maintaining the competitiveness of European business'.[5] As for the former, the 'Draghi Report' criticized the 'accumulation of or frequent changes to EU legislation over time, translating into overlap and inconsistencies' and recommended to 'streamline the acquis, while adopting a single, clear methodology to quantify the cost of the new regulatory "flow"'.[6] As for the latter, the Commission has already implemented a 'one in, one out'-approach, under which new legislative burdens on businesses and citizens shall be offset by reducing existing burdens in the same policy area.[7] In addition to not increasing administrative and regulatory burdens, the

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1 E. Letta, *Much More Than a Market – Speed, Security, Solidarity, Empowering the Single Market to Deliver a Sustainable Future and Prosperity for all EU Citizens* 9–10 (Apr. 2024).

2 OECD, *Recommendation of the Council on Regulatory Policy and Governance* 27 (2012).

3 *Ibid.*

4 *See* e.g., OECD, *Reviewing the Stock of Regulation, OECD Best Practice Principles for Regulatory Policy* 9 (2020).

5 Commission's Communication, *Long-Term Competitiveness of the EU: Looking Beyond 2030*, COM(2023)168 17–18 (16 Mar. 2023).

6 M. Draghi, *The Future of European Competitiveness – Part A | A Competitiveness Strategy for Europe* 65 (Sep. 2024).

7 *See The European Union's Action to Simplify Legislation – Annual Burden Survey 2022* 12–18 (2023).

Commission has committed itself to reducing burdens associated with reporting requirements by 25%[8] and the 'Draghi Report' has pushed further that '[t]he EU should fully implement the announced cut by 25% of reporting obligations and commit to achieving a further reduction for SMEs up to 50%, upholding proportionality for SMEs in EU law and extending it to small mid-caps'.[9] The perceived seriousness of the economic impact of administrative burdens is further evidenced by the policies of the new Commission, with one member of the College, Valdis Dombrovskis, explicitly tasked with issues of 'implementation and simplification'. Part of his mission is to ensure that the goal of European rules and policies to support business and protect people is put 'into practice by focusing on less administrative and reporting burden, simpler implementation and better enforcement'.[10] As Commission President Ursula von der Leyen put it in her recent speech to the European Parliament Plenary on the new College of Commissioners and its programme:

> For Europe to catch up, we will also need to make things easier for our companies. They are telling us that the regulatory burden weighs heavily on them. Too much reporting. Too many overlaps. And too complex and costly to comply with. We need to streamline our rules to reduce the burden on businesses. And we need to give legal certainty about what we expect from them. And this is why I have asked one of our most experienced Commissioners, Valdis Dombrovskis, to take the lead on simplification and implementation. He will also be responsible for boosting Europe's economy and productivity. I can announce that one of our first steps in the new mandate will be a new omnibus legislation. We will look at different sectors and assess the European legislation. Our Single Market has always been the greatest engine for growth. This was the message delivered by Enrico Letta in his report. And the greatest strength of the Single Market is that it replaces the myriad national standards and customs, with a single set of rules. So we need to get back to what the Single Market does best. And make business easy across Europe.[11]

3 The urgency of simplification and reduction of regulatory burdens

In principle, this call has been well received by the Member States as well: The Council's 'Budapest Declaration' of 8 November 2024 highlights the urgency of simplification and the reduction of regulatory burdens:

> Launching a simplification revolution, ensuring a clear, simple and smart regulatory framework for businesses and drastically reducing administrative, regulatory and reporting burdens, in particular for SMEs. We must adopt an enabling mindset based on trust, allowing business to flourish without excessive regulation. Key objectives to be implemented by the Commission without delay include making concrete proposals on reducing reporting requirements by at least 25% in the first half of 2025, and including redtape and competitiveness impact assessments in its proposals.[12]

Without adopting a formal resolution, the Council subsequently emphasized:

> that joint efforts at EU and Member States' level towards reducing regulatory, administrative and reporting burdens, simplifying regulation, achieving coherence and predictability, and better implementing in a uniform manner and enforcing existing rules are crucial factors to improve the business environment in the EU

It also stressed that for SMEs 'it is necessary to go beyond the announced commitment of achieving 25% reduction of reporting requirements without compromising the policy objectives of existing rules'.[13] Hence, Member States have welcomed 'the Commission's proposals to reduce reporting burden by 25%, with a target of 35% for SMEs', with some even endorsing the Draghi Report's 50% target for SMEs, and called for 'a single methodology to calculate administrative burden, including the cumulative burden of different legislations'.[14] Moreover, the upcoming Polish presidency of the Council has made it a priority to 'promote the reduction of bureaucratic burdens', where 'it will be important that major European policies make their approach more flexible, move away from penalties and obligations and focus on rewards and incentives'.[15]

8 *See* e.g., the Commission's Communication, *supra* n. 5, and the Commission's Communication 'SME Relief Package', COM(2023) 535 (12 Sep. 2023).

9 Draghi, *supra* n. 6.

10 Mission Letter by Ursula von der Leyen to Valdis Dombrovskis, Commissioner-designate for Economy and Productivity and Commissioner-designate for Implementation and Simplification 6 (17 Sep. 2024). This mission includes leading the work of the College to 'stress-test the EU acquis with a view to eliminate overlaps and contradictions, while maintaining high standards. On this basis, you will coordinate the work with all relevant Members of College, to make proposals to simplify, consolidate and codify legislation where it is needed'.

11 *See* the Speech by President von der Leyen at the European Parliament Plenary on the new College of Commissioners and its programme (27 Nov. 2024).

12 Council of the EU, Budapest Declaration on the New European Competitiveness Deal, Press Release 838/24 (8 Nov. 2024).

13 Presidency conclusions on the future of European competitiveness, Doc. 16294/24 (28 Nov. 2024).

14 *See* the summary of the main results of the *Competitiveness Council (Internal Market and Industry)* (28 Nov. 2024), https://www.consilium.europa.eu/en/meetings/compet/2024/11/28/ (accessed 11 Dec. 2024).

15 *See* Priorities of the *Polish Presidency of the Council of the European Union*, https://polish-presidency.consilium.europa.eu/en/programme/priorities (accessed 11 Dec. 2024).

4 Business taxation: 'Decluttering is of the Essence'

Words must be followed by deeds, especially in the area of business taxation, where recent EU legislation has added to existing complexity and compliance costs are already staggering.[16] As *Wopke Hoekstra*, the member of the Commission responsible for taxation, put it: 'Decluttering is of the essence'.[17] Indeed, the past fifteen years have witnessed a broad reversal of the EU's direct tax policy from advancing taxpayer's economic freedoms in the Internal Market and supporting industrial policy[18] to a focus on fighting perceived aggressive tax planning and the creation of a plethora of reporting obligations underpinning the exchange of information between tax authorities. These EU policies add additional layers to the 'normal' complexity of the Member States' tax systems and create an increasingly rigid framework for tax policy, since amending or repealing a directive requires unanimity in the Council, just as its adoption does (Article 115 TFEU).[19] Such unanimity is certainly a high hurdle for significant decluttering. Conversely, EU direct tax initiatives that develop the Internal Market to support business are rare, although, e.g., the Dispute Resolution Directive (TDRD),[20] the recently agreed FASTER Directive[21] and the proposed 'Head Office Taxation' ('HOT')[22] (as part of the 'SME Relief Package'[23]) and 'Business in Europe: Framework for Income Taxation framework' ('BEFIT')[24] regimes arguably move into the right direction.

[16] The costs are enormous: A study for the European Parliament has estimated that tax compliance costs faced by private enterprises in the European Single Market are found to be sizable, most commonly ranging between 1% and 2% of turnover or, put in a different perspective, 1,3% of the respective state's GDP. *See* D. D'Andria & M. Heinemann, *Overview on the Tax Compliance Costs Faced by European Enterprises – With a Focus on SMEs*, PE 642.353 (2023), 24 (cost-to-revenue) and 32 (cost-to-GDP).

[17] Report of the Hearing of Wopke Hoekstra, Commissioner-Designate (*Climate, Net-Zero and Clean Growth*) 21 (7 Nov. 2024), https://elections.europa.eu/european-commission/en/hoekstra/ (accessed 11 Dec. 2024).

[18] For example, in the Parent-Subsidiary-Directive (Directive 2011/96/EU, [2011] OJ L 345/8, as amended), the Merger Directive (Directive 2009/133/EC, [2009] OJ L 310/34), and the Interest-Royalties-Directive (Directive 2003/49/EC, [2003] OJ L 157/49).

[19] *See* for that point W. Schön, *International Tax Rules for Unruly Times*, Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2023-08 (2023), 17 (also noting that 'hat EU legislation entails near-petrifaction of the respective normative framework').

[20] Directive (EU) 2017/1852, [2017] OJ L 265/1.

[21] *See* the Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, COM(2023)324 (19 Jun. 2023), the agreement in Council in Doc. 9925/24 FISC 115 (14 May 2024), and the (second) legislative resolution of the Parliament in P10_TA (2024)0033 (14 Nov. 2024).

[22] Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises, and amending Directive 2011/16/EU, COM(2023)528, with Annexes in COM (2023)528 (12 Sep. 2023).

[23] *See* the Commission's Communication 'SME Relief Package', COM (2023)535 (12 Sep. 2023).

5 Policy evaluation in light of pillar two's minimum corporate taxation

In addition, the adoption of the Minimum Taxation Directive ('GloBE Directive' or 'Pillar Two Directive')[25] provides ample reason to look back on the flurry of initiatives sailing under the OECD's 'Base Erosion and Profit Shifting' project and to determine whether – in the words of von der Leyen – there is '[t]oo much reporting' and there are '[t]oo many overlaps'. Not surprisingly, therefore, the Commission is also focusing on these factors in its current evaluation of the Anti-Tax Avoidance Directive (ATAD)[26] and the Directive on Administrative Cooperation ('DAC'),[27] where it highlights not only the usual criteria (such as effectiveness and efficiency), but also questions the continued relevance of the ATAD in light of the Minimum Taxation Directive, and possible proposals to reduce the reporting burden for the stakeholders, especially those involved under DAC6. Indeed, *Wopke Hoekstra* stressed that he 'will work towards EU tax initiatives playing a crucial role in supporting Europe's competitiveness, prosperity, and social fairness while continuing the fight against tax fraud, tax evasion and tax avoidance', and underlined the link between Europe's sustainable prosperity and competitiveness on the one hand and the reduction of administrative burdens and enhancing simplification on the other.[28] Part of this agenda will consist of:

> stress-testing the current EU tax acquis to identify and address inconsistencies, for instance overlaps, contradictions or out-of-date rules, by e.g., carrying out evaluations of the existing legislation, to test the effectiveness, efficiency, relevance, coherence and added value of the current direct tax directives.[29]

He also reiterated the commitment to reduce reporting obligations by at least 25% and by 35% for EU SMEs.[30]

6 The potential redundancy of existing measures

'Decluttering' in the area of direct taxation is thus caught between, on the one hand, the recognition that the

[24] Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), COM(2023)532 (12 Sep. 2023).

[25] Council Directive (EU) 2022/2523 of 14 Dec. 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, [2022] OJ L 328/1, based on the Commission's Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021)823 (22 Dec. 2021).

[26] Call for evidence for an evaluation regarding the Anti-tax Avoidance Directive (ATAD), Ares(2024)5539672.

[27] Call for evidence for an evaluation of the Directive on Administrative Cooperation ('DAC'), Ares(2024)3338658.

[28] *See* the written questions to and answers by Wopke Hoekstra, *Climate, Net-Zero and Clean Growth*,https://elections.europa.eu/european-commission/en/hoekstra (accessed 11 Dec. 2024).

[29] *Ibid.*

[30] *Ibid.*

elimination of overlaps and excessive reporting is necessary to unleash the Internal Market and, on the other hand, the intention to continue – in the words of Wopke Hoekstra – 'the fight against tax fraud, tax evasion and tax avoidance'. The latter perspective certainly has some institutional tailwind, for example through the recent report of the European Court of Auditors on 'Combatting harmful tax regimes and corporate tax avoidance',[31] which analysed three directives (the ATAD, DAC 6 and TDRD) and considered them (only) as a 'first line of defense' while identifying 'shortcomings in the way measures are implemented and monitored'. The lack of a broader policy perspective in this report, especially in light of the Minimum Tax Directive, is surprising (as are the insights into the regulatory masochism of some Member States[32]). Indeed, such a focus on the mere technical operation of rules seems misplaced in the larger framework of a necessary 'decluttering' that requires a close look at the layers of rules that have been added in recent years, a deep breath, and an informed judgment as to whether they all make sense in the current (tax) environment. An OECD report from 2022 points the way: While the global minimum corporate tax ('GloBE' or 'Pillar Two') is not itself an anti-abuse mechanism, it is likely to have an impact not only on tax competition between states, but also on taxpayer behaviour. Therefore, a global minimum tax system may render certain existing anti-abuse measures redundant: As 'the Pillar Two rules reduce the incentive to shift profits across jurisdictions by providing a floor to tax competition', 'countries may wish to review existing anti-abuse measures with this in mind'; the OECD therefore calls on states to 'assess the possibility to eliminate or adapt the duplicative rules or filing requirements'.[33] This could include a fresh look at possibilities for simplification or abolition of hybrid mismatch rules, CFC rules, limitations to the deductibility of interest, and approaches to aggressive tax planning or harmful tax practices.[34] In 2024, the OECD provided a more detailed follow-up, identifying three broad categories where such analysis might be particularly fruitful[35]: First, the global minimum taxation might have made certain anti-BEPS measures redundant (the OECD mentions anti-hybrid rules,[36] but this is also obvious, e.g., for the denial of deductions with regard to payments to low-tax recipients). Second, the categorization of preferential tax regimes could require a fresh look, as tax regimes may no longer be effective in producing below-minimum tax outcomes for the jurisdiction as a whole. Third, certain reporting requirements might have become unnecessary (e.g., with regard to low-tax-related hallmarks).

7 'Decluttering', partial overlaps, and the need for bold moves

Much of the current 'decluttering' discussion is, of course, based on the assumption that Pillar Two will not crumble, despite its lackluster adoption and continuing criticism. That said, the GloBE rules are intended to address 'remaining BEPS challenges' (as 'BEPS 2.0').[37] They do not automatically override concerns addressed by more targeted measures under 'BEPS 1.0' but rather encourage an assessment of the level of complexity still required after the introduction of the minimum taxation rules, especially in the EU, where the minimum tax regime has been adopted via a Directive[38] that binds all Member States. Such assessment is necessary for EU-mandated rules (such as those of the ATAD or DAC6) as well as exiting uniquely domestic regimes. Indeed, a global minimum corporate minimum tax certainly changes the environment in which existing rules operate, and which concerns may ultimately remain. Put differently: Would we have needed the BEPS project in the first place if we had Pillar Two before? And if so, what BEPS rules would have been needed if we had Pillar Two first? Of course, 'decluttering' requires a broader perspective and political will. Indeed, as always, there are many 'good reasons' why 'decluttering' would not work in a particular area. Take, for example, the current discussion of CFC regimes,[39] given their obvious similarity to GloBE's income inclusion rule (IIR).[40] While calls for

31 European Court of Auditors, *Combatting Harmful Tax Regimes and Corporate Tax Avoidance*, Special Report 2024/27 (Nov. 2024).

32 *See* European Court of Auditors, *Combatting Harmful Tax Regimes and Corporate Tax Avoidance*, Special Report 2024/27 (Nov. 2024), 26, noting that 49,3% of cross-border arrangements in the period 2020–2023 have been reported by Germany.

33 OECD, *Tax Co-operation for the 21st Century: OECD Report for the G7 Finance Ministers and Central Bank Governors* (2022), para. 57.

34 For a concise overview of the interaction between GloBE and the ATAD *see* J. Englisch & J. Becker, *Implementing an International Effective Minimum Tax in the EU*, 224 Materialien zu Wirtschaft und Gesellschaft 67–75 (Jul. 2021).

35 OECD, *2024 Progress Report on Tax Co-operation for the 21st Century, OECD Report for the G7 Finance Ministers and Central Bank Governors* (May 2024), paras 23–28.

36 *See* for the latter specifically the analysis by J. Hey, *Time for Rethinking: The ATAD Experiment and the Conceptional Flaws of Its Hybrid Mismatch Rules*, 52 Intertax 668, at 668–672 (2024), doi: 10.54648/TAXI2024073.

37 OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (2020), para. 8.

38 Council Directive (EU), *supra* n. 25.

39 See e.g., S. Soong, Time to Declutter Tax Systems Amid Pillar 2 Adoption, Pross Says, 110 Tax Notes Int'l 1660 1660–1661 (19 Jun. 2023); S. Soong, *Germany to Start Legislating For OECD Global Minimum Tax*, OECD Official Says, 72 (73) Tax Notes Int'l 111 (3 Jul. 2023); E. Lamer, Time to Declutter the Corporate Tax System, OECD Official Says, 111 Tax Notes Int'l 204 204–205 (10 Jul. 2023); T. Masuda, *Should Countries Declutter Their CFC Legislation Once They Adopt the Global Minimum Tax?*, (Kluwer International Tax Blog 28 Jul. 2023).

40 *See* for that discussion, e.g., B. J. Arnold, *The Evolution of Controlled Foreign Corporation Rules and Beyond*, 73 Bull. Int'l Tax'n , 631 631–648 (2019), doi: 10.59403/1qh2n7n; J. Hey, *The 2020 Pillar Two Blueprint: What Can the GloBE Income Inclusion Rule Do That CFC Legislation Can't Do?*, 49 Intertax 7, at7–13 (2021), doi: 10.54648/TAXI2021002. Indeed, Germany has recently amended the definition of foreign 'low taxation' as one of the triggers for the

an outright abolition of CFC rules persist,[41] some have taken the contrary position that no 'clean-up' is necessary at all, since the CFC regime and minimum taxation serve different purposes (the 'abuse' of foreign subsidiaries on the one hand, and the creation of a level playing field by setting a globally accepted limit on the race to the bottom on the other)[42] and have different scope and effects.[43] Similarly, the EU Commission has initially concluded that 'it is not necessary to amend the ATAD' in light of GloBE and that 'it is consistent with the OECD [GloBE] Model Rules to continue the application of the ATAD CFC rule in parallel to the GloBE Model Rules'.[44] Within the scope of the GloBE rules, the interaction between CFC regimes and minimum taxation is thus left to the rule order[45] and the 'CFC tax push down'.[46] Similarly, the potential impact of the GloBE on tax planning and the use of shell entities has not been a sufficient reason for the EU Commission to step back from its considerations for an 'Unshell' directive.[47] Even more, the Commission has attempted to define 'substance' in that proposal, even though one could have imagined that GloBE's internationally agreed, formulary substance-based income exclusion (SBIE) might have been an obvious starting point for a safe-harbour criterion.[48]

8 Quick solutions, hard solutions, and the final push for common direct tax rules?

Nevertheless, 'decluttering' direct taxation is clearly not an easy task and may require bold political decisions to have a real impact on the Internal Market and to support the Commission's strategy for the EU's long-term competitiveness. A quick(er) solution could be to work on safe harbours for companies and transactions that are less likely to pose a risk (e.g., because of their size, substance, business model or sector), an approach clearly envisaged in the GloBE framework and the ongoing work on permanent safe harbours. A hard(er) solution would be to overhaul and simplify the policy landscape by removing or adapting rules that may have lost some relevance in light of the GloBE framework, although – as the OECD notes – different scopes etc. 'may require further analysis to consider the extent of duplication and overlap in both policy and practice'.[49] This detailed discussion on the European and national levels has already begun[50] and will hopefully gain academic and policy momentum.[51] It may also be the right time to reconsider the general approach of the ATAD, which

application of its CFC regime from 'under 25%' to 'under 15%' to achieve consistency between CFC taxation and global effective minimum taxation with regard to the taxation of foreign activities (*see* §8(5) of the German Foreign Tax Act, as amended by the Gesetz zur Umsetzung der Richtlinie (EU) 2022/2523 des Rates zur Gewährleistung einer globalen Mindestbesteuerung und weiterer Begleitmaßnahmen, BGBl I 2023, Nr. 397, and BT-Drucksache 20/866, 239, 6 Oct. 2023). A consistent low tax threshold seems sensible from a policy perspective, but of course falls short of abandoning the CFC regime altogether.

[41] *See* for such call also with regard to MNEs outside the scope of GloBE the German Final Report of the Expert Commission „Vereinfachte Unternehmensteuer", *Besteuerung der Unternehmen: Einfacher und Effizienter* 131–145 (Jul. 2024). For the same conclusion at least for MNEs in scope of GloBE, *see* e.g., the AmChamEU consultation response on the Anti-Tax Avoidance Directive (11 Sep. 2024), at 3, and the ZEW comments on the call for an evaluation of the Anti-tax Avoidance Directive (10 Sep. 2024), at 5–7.

[42] *See* for Japan's position Masuda, *supra* n. 39.

[43] Of course, there are many possible arguments for states' reluctance. Just in the area of CFC regimes, and even disregarding potentially different low-tax thresholds, there are multiple differences, e.g., in scoping (e.g., the EUR 750m threshold for GloBE), the top-up effect (to the domestic rate versus to the minimum rate), the bases (domestic tax law versus accounting profit), the covered income (only low taxed versus low taxed and passive, even in light of the SBIE) and the scope of blending (entity versus jurisdiction). Moreover, states might point to two broader policy hurdles. First, the GloBE's (late) introduction of the QDMTT signals its indifference which state charges the minimum tax, whereas many existing anti-abuse measures (at least implicitly or in their effect) aim at 'protecting' the domestic tax base. Second, the GloBE rules only apply to MNEs with consolidated revenues of at least EUR 750m, while generally domestic anti-avoidance rules do not contain a similar threshold and hence have a broader scope of application; removing, e.g., CFC rules only for MNEs that in scope of Pillar Two (but not for smaller ones outside Pillar Two's scope) might be problematic from a policy and legal perspective. 'Decluttering' hence might depend on the willingness (and constitutional or EU law possibility) to either maintain certain rules only for smaller MNEs or to focus exclusively on the larger MNEs.

[44] Pt. 1 of the Explanatory Memorandum of the Commission's Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM(2021) 823 (22 Dec. 2021).

[45] *See* OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-base Erosion Model Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS (Feb. 2023), Art. 10 para. 118.30 (QDMTT before CFC).

[46] Articles 4.3.2.(c), 4.4.4. GloBE MR and Art. 24(3), (6) GloBE Directive.

[47] *See* Pt. 1 of the Explanatory Memorandum to the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021)565 (22 Dec. 2021), where the Commission argues that GloBE does invalidate the 'Unshell' prosposal: 'The legal framework on the minimum level of taxation exclusively pertains to the rate, i.e., level of taxation. It does not touch upon potentially harmful features of the tax base. Neither does it involve examining whether an entity possesses sufficient substance to carry out the activity that it is supposed to. It is true that the implementation of the rules on the minimum level of taxation may gradually discourage the creation of shell entities to some extent. Yet, this is yet an unknown outcome which cannot be guaranteed at this stage'.

[48] *See* generally for the discussion D. Fehling, *Der formulaic Substance Carve-out bei Säule 2: Prototyp eines neuen Substanzverständnisses?*, 32 Internationales Steuerrecht 185 185–189 2023.

[49] OECD, *supra* n. 35, para. 25.

[50] *See* particularly the German Final Report of the Expert Commission „Vereinfachte Unternehmensteuer", *Besteuerung der Unternehmen: Einfacher und Effizienter* 131–145 (Jul. 2024), for a detailed and nuanced discussion of the potential 'decluttering' German tax system.

[51] First steps light of the Pillar Two implementation are already underway: e.g., in late 2024 the German Ministry of Finance has tabled a (second) discussion draft on the 'Entwurf eines Gesetzes zur Anpassung des Mindeststeuergesetzes und zur Umsetzung weiterer Maßnahmen' (2 Dec. 2024), which foresees that certain anti-profit-shifting rules shall be 'reduced to the necessary level', e.g., by increasing the safe harbour amounts in the German CFC rules (§13 of the German Foreign Tax Act) or by abolishing the 'royalty barrier' (§4j of German Income Tax Act).

provides a '[m]inimum level of protection' for Member States (but not for taxpayers). This allows states to apply 'domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases' (Article 3 ATAD). This leeway for Member States increases complexity and uncertainty (and tax compliance costs), whereas 'EU policy should focus on introducing common rules that reduce to a minimum the ability for local jurisdictions to deviate from such common rules'.[52] It would therefore make sense that a 'decluttered' ATAD would provide either a 'common level of protection', putting an end to a web of diverging stricter rules in the Member States, or a 'maximum level of protection', allowing Member States to speed up further decluttering and reinstate flexibility for Member States in the new world where the minimum corporate tax has effectively removed many policy concerns. And perhaps the competitive pressure on Europe has become serious enough to finally seriously move forward with common rules inspired by the Commission's proposals on ('HOT'[53] for SMEs and 'BEFIT'[54] for larger MNEs, which could not only provide for a holistic approach to BEPS-concerns in relation to third countries (and allow for the re-integration of a 'decluttered' ATAD in a harmonized corporate tax regime[55]), but also eliminate transfer pricing issues and double taxation in the EU.[56] While this is not 'decluttering' of EU tax law itself, the creation of common regimes that replace the Member States' rules would ideally be a 'one in, twenty-seven out'-approach.

52 *See* D'Andria & Heinemann, *supra* n. 16, 8.

53 Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises, and amending Directive 2011/16/EU, COM(2023)528, with Annexes in COM (2023)528 (12 Sep. 2023).

54 Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), COM(2023)532 (12 Sep. 2023).

55 It should be remembered that the ATAD was a mere split-off of the Commission's work on the Common Consolidated Corporate Tax Base (CCCTB); *see* e.g., Doc. 14509/15 FISC 169 ECOFIN 916 (1 Dec. 2015), Doc. 14544/15 FISC 171 (2 Dec. 2015) and Doc. 14544/15 ADD 1 FISC 171 (2 Dec. 2015).

56 *See* for such 'holistic' perspective already the Commission's Communication *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015)302 (17 Jun. 2015).