

# The Role of the ATAD in Restoring Fairness

## A Proper Step towards Ensuring Sustainability of the International Tax Framework?

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# Research question

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*Can the EU Anti-Tax Avoidance Directive (ATAD) be expected to promote tax fairness and thereby contribute to increased sustainability of the international tax regime?*

- Tax fairness (now) seems to be widely recognized as a precondition for sustainable international development
- But what is (tax) fairness?
  - Economical approach
  - Philosophical approach
  - Political approach
  - **Legal (juridical) approach, including the principles of:**

## **Legitimacy**

- Law is legitimate when socially accepted, i.e. when it receives its legitimacy from democratic procedures – Rule of law

## **Equality**

- Persons in equal circumstances should be treated equally (taxation → ability to pay)

## **Certainty**

- The law should be clear, easily accessible, comprehensible, prospective and stable...

# ATAD – Background

- Anti- Tax Avoidance Package
  - A call for MS to take a stronger and more coordinated stance against companies that seek to avoid paying their fair share
- ATAD
  - Adopted by MS in July 2016
  - 5 legally binding minimum rules (4 SAARs and 1 GAAR)
    - To some degree a coordinated implementation of BEPS
  - The preamble:
    - It is imperative to restore trust in the fairness of tax systems...
  - The staff working document:
    - Fair burden sharing
    - Fair competition between businesses
    - The need to ensure sufficient revenues
    - Public perception
- ATAD focuses on the EU/IM, BUT...

- MS has retained competence in direct tax matters, but directives can be issued for approximation of legal measures that affect the IM
- Principle of subsidiarity: The EU shall only act if the objectives cannot be sufficiently achieved by MS
  - Commission: The aims of tackling cross-border tax avoidance and to implement BEPS in a coordinated way → ATAD is necessary
- Principle of proportionality: The content/form shall not exceed what is necessary to achieve the objective
  - Commission: ATAD is a minimum directive → Does not go too far
- Criticism, e.g. the ATAD does not aim to reduce barriers within IM, but rather to ensure that MS can properly exercise their tax sovereignty
- However, historical experience with tackling avoidance + various uncoordinated BEPS-measures by MS → Legal basis probably OK

# SAARs – Certainty & Equality

- SAARs – Denies certain benefits under certain conditions (“sniper approach”), i.e. counter a specific type of abusive behaviour
  - ATAD SAARs: EBITDA, exit taxation, CFC taxation, hybrid mismatch rules
- The SAARs are rather technical and complex → Legal uncertainty
  - ATAD is a minimum directive → No “real” harmonization
  - But complexity probably even higher if no coordination at all
  - Risk of double taxation, but the EU has adopted the Directive on TDRM
- The ATAD SAARs expected to promote tax equality
  - All MS will now have these SAARs → Bolster the overall resilience of MS’ corporate tax systems → MNEs’ aggressive tax planning opportunities reduced → MNEs taxed more in line with their ability to pay → tax burden more fairly distributed between taxpayers and more level playing field for businesses

- The scope of the GAAR and the exact relationship with SAARs not particularly clear → Legal uncertainty
  - But not a great surprise as uncertainty inherent in a GAAR
  - Perhaps "legal certainty" is the wrong test if the GAAR is workable for the compliant majority – UK experience (modest GAAR "damage")
  - Court-developed anti-avoidance principles not necessarily more precise
  - The deterrent effect might reduce the need for courts to stretch statutory interpretation → Reduce uncertainty of the overall tax system due to less litigation
- The ATAD GAAR expected to promote tax equality
  - All MS will now have a GAAR → Bolster the overall resilience of MS' corporate tax systems → MNEs' aggressive tax planning opportunities reduced → MNEs taxed more in line with their ability to pay → tax burden more fairly distributed between taxpayers and more level playing field for businesses

- ATAD will have considerable impact on MS' corporate tax systems
- Too early to fully assess the merits of the ATAD
- Based on a legal (juridical) approach to fairness...
  - The ATAD does create legal uncertainty (in particular in the short run)
  - The use of both multiple SAARs and a GAAR could be questioned (risk of double taxation)
  - The ATAD is not a best solution and perhaps not even a second best solution, e.g. it does not provide full harmonization
  - However, the ATAD allegedly is a step forward
    - Some coordination better than no coordination
    - Expected to reduce aggressive tax planning opportunities for MNEs
    - MNEs will be taxed more in line with their ability to pay
    - Enhance equality among taxpayers and businesses
    - Improve public perception of the fairness of the international tax system and thereby contributing to sustainability