Accommodation at Any Cost

Why the Measures to Save the Global Minimum Tax Might Prove Unconstitutional

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21.01.2026 doi: 10.59704/f6facd47d6d4b0d2

The Organisation for Economic Co-operation and Development (OECD) opened 2026 with a new deal on the "way forward on [the] global minimum tax package". As one might already infer from the wording, "a way forward" essentially amounts to trying to save what is left of a project that aimed to introduce a minimum level of taxation on the largest multinational companies in the world. What has happened to the deal that was already struck in 2021? The Trump presidency withdrew from that agreement on its first day in office and subsequently introduced retaliatory taxes in its "One Big Beautiful Bill Act" (OBBBA) for those countries that would still implement and enforce parts of that deal. Although that specific section has been taken out of the tax bill, the bargaining for an exception for US multinationals continued. Now, the newly agreed 'side-by-side arrangement' legalises this exceptional position for US companies. The EU has implemented the initial global minimum tax through a Directive, and Member States have implemented the rules domestically. I believe that the amendments to that legislation through the side-by-side deal highlight democratic deficiencies by delegating the formulation of tax norms to international forums. Specifically, I think that national and EU fundamental legal principles, most notably the principle of legality of taxation and the prohibition of delegation of essential elements of tax law, do not allow for the transposition of this agreement into EU and, thereby, domestic law.

Constructing a new international tax order

Contrary to the modest language on the new deal mentioned above, the project for rebuilding the international tax order through a mix of multilateralism and coordinated bilateralism started with sweeping words in 2015. The project aimed "to restore the trust of ordinary people in the fairness of their tax systems, to level the playing field among businesses, and to provide governments with more efficient tools to ensure the effectiveness of their sovereign tax policies". Instead of solely working with the OECD members, the OECD opened its doors for interested non-members under the so-called "inclusive framework", where new measures were negotiated on the basis of consensus. The project, consisting of two steps and conducted under the banner of tackling 'Base Erosion and Profit-Shifting' (BEPS), firstly produced 15 action points (BEPS 1.0) with concrete recommendations to be implemented in bilateral tax treaties and national laws. A "multilateral instrument", signed by over 100 countries, would provide for a swift introduction of measures in bilateral treaties, by-passing the need to renegotiate the vast web of over 3000 bilateral tax treaties currently in place.

The second phase of BEPS (BEPS 2.0) was agreed upon in the autumn of 2021 and contained two 'Pillars'. Pillar One aims at redistributing the tax base of profits of the largest multinationals to the jurisdiction where sales are made, contrary to the current rules that mainly allocate jurisdiction based on source of income and residence, which can be manipulated and opens options for tax planning and erosion of the tax base. The main issue was to find an effective solution for taxing digital companies that usually do not have a sufficiently substantial presence in a jurisdiction for it to assume a taxing right. To remedy that situation, some countries had adopted domestic digital services taxes, which were put on hold under the promise that Pillar One would allocate new taxing rights to those countries. As it stands, Pillar One will not be adopted, as it effectively requires the US to ratify the international agreement, given its informal

veto power. The agreement requires a point threshold that can effectively only be met once the US ratifies it.

Pillar Two, however, caught most attention. The plan was simple: to make sure that large (in-scope) multinational companies would pay at least 15% of corporate income tax on their profits. This could be done by agreeing that, under domestic laws, countries would ensure that the effective tax rate would be 15%. However, to guarantee that all countries would be on board, measures were introduced that effectively allowed other countries to tax the profits of multinationals that were short of the 15% mark in other jurisdictions. The EU has introduced those rules in its minimum-tax Directive, and the EU Member States have adopted these rules in their national legislation. It is here that the pain point of the US administration lies.

In the OBBBA draft, the US introduced Section 899, which would have the US levy retaliatory taxes on countries that would levy these "discriminatory or extraterritorial" taxes. Section 899 was removed as a compromise was reached in the G7, presenting the prospect of a new deal that would essentially exempt US multinationals from the application of the rules by declaring the US tax regime as qualifying as a "safe harbour". These modifications are now incorporated in the new side-by-side arrangement, in which corporations with the ultimate parent entity in the US are no longer subjected to the European rules. This is because the OECD deal deems the US a qualifying regime, in which there is no "material risk" that a minimum of 15% of profits will not be taxed. Despite the OECD's statement that it "will preserve the gains achieved so far", it is highly questionable if the rules will reach their intended effect now that US multinationals are excluded.

How the EU intends to implement the new deal

As mentioned, the rules are laid down in an EU Directive, which allows, in its Article 32, for agreements on so-called "safe harbours". A safe harbour agreement constitutes an exception or simplification of the rules. These agreements are an "international set of rules and conditions that all Member States have consented to". It enables EU Member States to put the top-up taxes at 0% (those extra levies on multinationals taxed below 15%). This is precisely where the OECD's side-by-side arrangement becomes important: it allows multinationals headquartered in states with "eligible domestic and international tax systems" to not be subjected to the Pillar Two rules in other jurisdictions. It has also published a list of those states with eligible tax systems, containing just one candidate: the United States.

Therefore, the new OECD agreement has a considerable impact on the EU Directive, as US multinationals will now fall under the safe harbour exemption. The European Commission has stated that it intends to implement the side-by-side agreement under Article 32 of the Directive. The legality of these measures under EU law has already been a subject of debate. Despite the existence of other views, I am inclined to agree with Dennis Weber that this arrangement, first of all, stands at unease with the Court of Justice's Meroni doctrine that, in simple terms, limits the delegation of powers to technical matters and excludes the delegation of political powers. This is due to the fact that, as everyone knew but did not dare to say out loud, the effects of this legislation were mostly going to be felt by US multinationals that did not meet the 15% effective tax rate. The non-application of the rules to those companies in the Netherlands is rumoured to amount to a tax loss of EUR 120 million, while the expected revenue of the measures has been estimated at around EUR 450 million. The safe harbour exception would thus be highly substantial and deprive the legislation of its intended effect. Furthermore, the 'side-by-side agreement' directly contradicts the preamble of the Directive, which states that it "is necessary to implement the OECD Model Rules agreed by the Member States in a way that remains as close as possible to the global agreement". Therefore, this could reasonably be seen as a change of the law through an international agreement unforeseeable when the Directive was adopted.

I would like to add to that reasoning that tax measures have a special character, reflected in their exclusion from Article 114 TFEU and being subjected to the unanimity rule of Article 115 TFEU. This is rein-

forced by tax law's special relationship with the principle of legality of taxation, a general principle of EU law. The principle requires that all essential elements are to be laid down by law, safeguarding the parliamentary prerogative over tax laws. Further, it contains a prohibition on the delegation of powers to determine the essential elements of a tax. This special status of tax lawmaking is already present in the Treaties. Substantively changing the effect of an EU-wide tax measure through an international agreement thus stands at odds with the Court's proclamation that "the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, [requires] that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law".

National sensitivities and the legality of the measure

It makes sense to zoom in on one EU Member State in particular, and that is Belgium, for two reasons. First, the Belgian Council of State has already been vocal in formulating its objections to the constitutionality of the inclusion of hybrid measures that change tax laws after their adoption within the sphere of OECD norms. Importantly, it raised these objections under the principle of legality. Second, in Belgian courts, the American Free Enterprise Chamber of Commerce has brought proceedings to declare the initial Directive contrary to EU law on the grounds of breaching property rights, the freedom to conduct business, the principle of legal certainty, discriminatory treatment, and the principles of legality and territoriality. Due to the explicit link with EU law, the Belgian Constitutional Court has referred the case to the CJEU.

It highlights the contentiousness of the matter, as two lines of dispute are now open within the very same domestic setting. First of all, under Belgian constitutional law "all powers emanate from the nation" (Article 33 Belgian Constitution), meaning that all tax laws must find their source in a law and any exemption from taxes must be approved by parliament (Articles 170 & 172 Belgian Constitution). This casts serious doubt on the route travelled through the side-by-side agreement, that is automatically incorporated into national law by the Directive through Article 32, and stands at unease with the delegation of taxing powers to the European level in the Belgian national context.

For what concerns the case before the CJEU, the question becomes if the new side-by-side agreement would not effectively render the proceedings unnecessary, as the agreement takes away the effect of the rules against which the American Free Enterprise Chamber of Commerce brought its proceedings in the first place. If the Court would entertain those concerns on the grounds of that side-by-side agreement being in effect, it could logically reach the conclusion that the tax rules do not breach EU law (if it does not do so on other grounds). However, if it does use the side-by-side agreement as a justification, it might face a new challenge if the side-by-side agreement is challenged before it. As Korving points out, there could be room for Member States to challenge the validity of the Commission's notice that announces the side-by-side arrangement under article 32 of the Directive, with the Court potentially annulling that arrangement. Another option would be a judgment in a national court ruling the arrangement incompatible with its national constitution, which probably is a route best avoided.

Conclusion

The newly agreed international tax deal, which has to accommodate an exceptional status for US multinationals, is testing national and EU provisions on tax lawmaking to the fullest extent, especially the principle of legality and its prohibition on delegation of lawmaking capacities to non-parliamentarian actors. The twists and turns made to accommodate the US position are, however, made within a legal straitjacket: the OECD deal seems at odds with both EU and national constitutional law, whereas the rules themselves are also already under scrutiny. As shown above, EU and national laws do not allow for the accommodation of US tax exceptionalism. This does put the EU legislature in an awkward position, as it will be faced with the dilemma of upholding its laws in line with fundamental principles or calling bluff on the threat of

retaliatory taxation levied on its companies and individuals in the US. As with many other dossiers currently up in the air, it all seems to boil down to how much the EU wants to stick to its principles and if the global tax deal is a battle worth risking a larger tax war over.

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SUGGESTED CITATION

van der Vlugt, Sam: Accommodation at Any Cost: Why the Measures to Save the Global Minimum Tax Might Prove Unconstitutional, Verfassungsblog, 21.01.2026, doi: 10.59704/f6facd47d6d4b0d2.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260121-172337-0.