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Transposition of ATAD GAAR in Belgium

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Abstract

In Belgium, the general anti abuse rule in matters of corporate income tax included in the anti-tax abuse directive has not been specifically transposed. We can however admit that the existing domestic rule against abuse in matters of income tax, viz. art. 344 § 1 of the Code of Income taxes, constitutes an adequate transposition.

Keywords: taxation; Belgium; abuse; ATAD; transposition.

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1. Introduction

Taxable events are defined by the statute, which implies that the line between what is taxable and what is not is often a thin one. Clever or astute taxpayers can fashion the facts so as to land on the right side of that line. That is the doctrine of the lawful choice of the least taxed way.[1]

The classic view was that, since taxes are defined by the legislator, that legislator was to react if he perceived abuse.[2] By definition, he was always one move behind in that chess game, which entailed loss of revenue in the meantime, let alone perceived unfairness. That result was judged preferable to the legally uncertain situation where taxation would be left to the discretion or arbitrary of the tax administration, even under the slow and expensive control of the judge.

That view has been shaken in many countries and so-called general anti abuse rules have emerged, to the detriment of the principles of legality of taxes and of legal certainty, the latter concern being sometimes alleviated by a system of tax rulings.[3] The need for such rules must be assessed in each country against the case law status concerning tax abuse cases, taking into account traditions as to principles of legal interpretation;[4] the drafting of such rules must comply with national constitutional rules.

In its infinite wisdom and in the wake of the OECD/G20 BEPS project, the European lawmaker has determined that a harmonized general anti abuse rule was necessary for the well-being of the internal market and inscribed such a rule in article 6 of the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

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1. Inland Revenue Commissioners v. Duke of Westminster ([1936] A.C. 1; 19 TC 490; that leading case has been subsequently narrowed down.

2. See generally the dissertation of L. De Broe, *International Tax Planning and Prevention of Abuse*, IBFD, 2008.

3. Ph. Malherbe, « Les décisions anticipées fiscales en Belgique », *REIDF*, 2017/1, pp. 50–57.

4. C. Docclo, « L'ambition de l'Union européenne d'introduire des règles anti-abus dans les lois disparates de ses Etats-membres », *Mélanges Pascal Minne*, Bruylant, 2016, p. 227 = *Tijdschrift voor Fiscaal Recht*, 2017/2, p. 61–82.

Recital 3 states: *"It is necessary to lay down rules in order to strengthen the average level of protection against aggressive tax planning*[5] *in the internal market. As these rules would have to fit in 28 separate corporate tax systems, they should be limited to general provisions and leave the implementation to Member States as they are better placed to shape the specific elements of those rules in a way that fits best their corporate tax systems. This objective could be achieved by creating a minimum level of protection for national corporate tax systems against tax avoidance practices across the Union. It is therefore necessary to coordinate the responses of Member States in implementing the outputs of the 15 OECD Action Items against BEPS with the aim to improve the effectiveness of the internal market as a whole in tackling tax avoidance practices. It is therefore necessary to set a common minimum level of protection for the internal market in specific fields.*"

Recital 11 however reaffirms the principle of the free choice of the least taxed way: "*Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs.*"

That directive has solid political ground: fighting abusive practices of MNEs is *dans l'air du temps* and making foreign corporations pay more taxes is a welcome idea for taxpayers in each Member State. The required unanimity was gathered at the Council: who would dare be seen opposing the fight against abuse? The terrorist element inherent in the legal fight against tax abuse also applies to lawmakers.

Whether that directive has equally solid legal ground has been disputed, often convincingly.[6] The legal position of a domestic statute transposing an illegal directive will raise interesting issues of domestic constitutional law[7] as well as of EU primary law.

The directive was to be transposed by 31 December 2019. Belgium announced a new text[8] but eventually did nothing, implicitly considering that its existing legislation was adequate transposition.

2. The texts

2.1. ATAD

Article 6 of the ATAD directive[9] provides:

5. On that notion, *see* Ph. Malherbe, *Introduction to International Income Taxation*, Brussels, Bruylant, 2020, ¶ 226, p. 113.

6. I. Lazarov, S. Govind, *Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law*, 47 *Intertax*, 2019, vol. 10, p. 859–868: "This article examines the compatibility of the Anti-Tax Avoidance Directive (ATAD) with primary EU law on four grounds. First, it argues that the Directive is incompatible with the general principle of anti-abuse developed by the CJEU. Second, it considers the Directive to not comply with the requirements of Article 115 TFEU as it does not contribute to the 'establishment and functioning of the internal market' per accepted case law of the CJEU. Third, the Directive is at odds with the principle of subsidiarity, as the Commission put forward no convincing evidence regarding the need for such a directive at an EU level. Finally, several provisions of the Directive go beyond what is necessary to combat artificial arrangements in a tailor-made fashion, thereby making it incompatible with the principle of proportionality.."

7. The French Constitutional Council had quashed a French statute widening the scope of repression of domestic *abus de droit* (29 December 2013, No. 2013–685 DC, §§ 112–119), but backed out and condoned when confronted with a nearly identical text transposing an EU directive (29 December 2015, No. 2015–726 DC). *See* A. Maitrot de la Motte, "L'application du droit de l'Union européenne en matière fiscale », *Les cahiers du Conseil constitutionnel*, N° 2 - avril 2019, https://www.conseil-constitutionnel.fr/publications/titre-vii/l-application-du-droit-de-l-union-europeenne-en-matiere-fiscale.

8. Draft bill, House of Repr. DOC 54 2052/001, p. 11. See bill proposal of members of the opposition, Messrs. Peter Vanvelthoven and Ahmed Laaouej, House of Repr. DOC 54 2961/001.

9. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market; see N. Pirotte « La mesure générale anti-abus en droit européen : de la réalité juridique à la réalité économique », *L'Europe au présent !, Liber amicorum Melchior Wathelet*, Bruylant, 2018, p. 853.

English	French	Dutch
General anti-abuse rule	Clause anti-abus générale	Algemene antimisbruikregel
1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.	1. Aux fins du calcul de la charge fiscale des sociétés, les États membres ne prennent pas en compte un montage ou une série de montages qui, ayant été mis en place pour obtenir, à titre d'objectif principal ou au titre d'un des objectifs principaux, un avantage fiscal allant à l'encontre de l'objet ou de la finalité du droit fiscal applicable, ne sont pas authentiques compte tenu de l'ensemble des faits et circonstances pertinents. Un montage peut comprendre plusieurs étapes ou parties.	1. Voor de berekening van de verschuldigde vennootschapsbelasting laten de lidstaten een constructie of een reeks van constructies buiten beschouwing die is opgezet met als hoofddoel of een van de hoofddoelen een belastingvoordeel te verkrijgen dat het doel of de toepassing van het toepasselijke belastingrecht ondermijnt, en die, alle relevante feiten en omstandigheden in aanmerking genomen, kunstmatig is. Een constructie kan uit verscheidene stappen of onderdelen bestaan.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.	2. Aux fins du paragraphe 1, un montage ou une série de montages est considéré comme non authentique dans la mesure où ce montage ou cette série de montages n'est pas mis en place pour des motifs commerciaux valables qui reflètent la réalité économique.	2. Voor de toepassing van lid 1 wordt een constructie of een reeks van constructies als kunstmatig beschouwd voor zover zij niet is opgezet op grond van geldige zakelijke redenen die de economische realiteit weerspiegelen.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.	3. Lorsqu'un montage ou une série de montages n'est pas pris en compte conformément au paragraphe 1, la charge fiscale est calculée conformément au droit national.	3. Wanneer een constructie of een reeks van constructies overeenkomstig lid 1 buiten beschouwing wordt gelaten, wordt de belastingschuld berekend op grond van het nationale recht.

Fig. 1 Multilingual version

2.2. Belgian GAAR

Since 2012[10] the Belgian GAAR in the Code of Income Taxes provides[11]:

Art. 344	Art. 344.
§1er. N'est pas opposable à l'administration, l'acte juridique ni l'ensemble d'actes juridiques réalisant une même opération lorsque l'administration démontre par présomptions ou par d'autres moyens de preuve visés à l'article 340 et à la lumière de circonstances objectives, qu'il y a abus fiscal.	§1. Aan de administratie kan niet worden tegengeworpen, de rechtshandeling noch het geheel van rechtshandelingen dat een zelfde verrichting tot stand brengt, wanneer de administratie door vermoedens of andere in artikel 340 bedoelde bewijsmiddelen en aan de hand van objectieve omstandigheden aantoont dat er sprake is van fiscaal misbruik.
Il y a abus fiscal lorsque le contribuable réalise, par l'acte juridique ou l'ensemble d'actes juridiques qu'il a posé, l'une des opérations suivantes : 1°une opération par laquelle il se place en violation des objectifs d'une disposition du présent Code ou des arrêtés pris en exécution de celui-ci, en-dehors du champ d'application de cette disposition ; ou 2°une opération par laquelle il prétend à un avantage fiscal prévu par une disposition du présent Code ou des arrêtés pris en exécution de celui-ci, dont l'octroi serait contraire aux objectifs de cette disposition et dont le but essentiel est l'obtention de cet avantage.	Er is sprake van fiscaal misbruik wanneer de belastingplichtige middels de door hem gestelde rechtshandeling of het geheel van rechtshandelingen één van de volgende verrichtingen tot stand brengt: 1°een verrichting waarbij hij zichzelf in strijd met de doelstellingen van een bepaling van dit Wetboek of de ter uitvoering daarvan genomen besluiten buiten het toepassingsgebied van die bepaling plaatst; of 2°een verrichting waarbij aanspraak wordt gemaakt op een belastingvoordeel voorzien door een bepaling van dit Wetboek of de ter uitvoering daarvan genomen besluiten en de toekenning van dit voordeel in strijd zou zijn met de doelstellingen van die bepaling en die in wezen het verkrijgen van dit voordeel tot doel heeft.
Il appartient au contribuable de prouver que le choix de cet acte juridique ou de cet ensemble d'actes juridiques se justifie par d'autres motifs que la volonté d'éviter les impôts sur les revenus. Lorsque le contribuable ne fournit pas la preuve contraire, la base imposable et le calcul de l'impôt sont rétablis en manière telle que l'opération est soumise à un prélèvement conforme à l'objectif de la loi, comme si l'abus n'avait pas eu lieu.	Het komt aan de belastingplichtige toe te bewijzen dat de keuze voor zijn rechtshandeling of het geheel van rechtshandelingen door andere motieven verantwoord is dan het ontwijken van inkomstenbelastingen. Indien de belastingplichtige het tegenbewijs niet levert, dan wordt de belastbare grondslag en de belastingberekening zodanig hersteld dat de verrichting aan een belastingheffing overeenkomstig het doel van de wet wordt onderworpen alsof het misbruik niet heeft plaatsgevonden.

Fig. 2 Belgian GAAR

Which can be unofficially translated as follows:

> *§ 1. The legal act or set of legal acts performing the same transaction may not be opposed to the administration when the administration demonstrates by presumptions or by other means of proof referred to in Article 340 and in the light of objective circumstances, that there is tax abuse.*
>
> *Tax abuse shall exist where the taxpayer carries out, by means of the legal act or set of legal acts that he has performed, one of the following transactions:*
>
> *(1) a transaction by which the taxpayer places himself, in violation of the objectives of a provision of this Code or of the decrees issued in execution thereof, outside the scope of that provision; or*

10. Program-Statute (I) of 29 March 2012 (combating tax evasion), Belgian Official Gazette, 6 April 2012, 3rd edition; replacing the text introduce by the Statute of 22 July 1993 introducing tax and financial provisions (Belgian Official Gazette, 6 April 2012).

11. See: A. Nollet, *De l' "abus fiscal" ou Quand des actes juridiques du contribuable sont inopposables au fisc pour l'établissement de l'impôt,* Larcier, 2019, xvii + 732 p. ; Th. Afschrift, *L'abus fiscal*, Larcier, 2013, 273 p.

> *(2) a transaction by which he claims a tax advantage provided by a disposition of this Code or of the decrees issued in execution thereof, the granting of which would be contrary to the objectives of this provision and the essential purpose of which is to obtain this advantage.*
>
> *It is incumbent on the taxpayer to prove that the choice of this legal act or set of legal acts is justified on grounds other than the desire to avoid income tax.*
>
> *Where the taxpayer does not provide proof to the contrary, the tax base and the calculation of the tax shall be re-established in such a way that the transaction is subject to a levy in accordance with the purpose of the law, as if the abuse had not taken place.*

In a nutshell, the statute provides that there is fiscal abuse when the administration shows by means of evidence and by objective circumstances that, by a legal action or a set of legal actions, the taxpayer effects a transaction in order to avoid falling within the scope of a provision of the Code contrary to the objectives of that provision (first form[12]). The taxpayer may however prove that the actions were warranted by other motives than to avoid income tax. Otherwise, the tax base and calculation are re-established so that the transaction is liable to a levy in conformity to the purpose of the law, as if the abuse had not taken place.

3. Analysis

Let us break down the ATAD text and check whether the Belgian rule constitutes adequate transposition:

4. Discussion

We have seen that a few items warranted discussion.

4.1. One of the main purposes

A typical test of GAARs is the tax benefit as *sole* purpose or *essential* purpose. The directive chose to apply to arrangements having a tax benefit as their *main* purpose or *one of their main* purposes. Here we are in the realm of the purpose of the taxpayer.

If that phrase's objective is to address the situation where the main purpose is to obtain the tax benefit and the taxpayer invokes another goal as main purpose, and where national interpretation traditions prevent the judge from dismissing that alternative goal as negligible, so be it. Let us note that that objective should already be attained with the downgrading of the test from *essential* to *main*.

But if the objective of that phrase is to target the situation where the taxpayer can achieve a goal though two ways and chooses the least taxed way, and to characterize that choice as a second *main purpose,* the directive would clearly infringe on (notably) Belgian domestic constitutional principles. Our constitutional court had only upheld the new Belgian GAAR because it did not discard from the principle of the least tax way,[13] itself derived from the principle of legality of taxes:[14]

12. Or, second form, enters the scope of a provision granting a tax benefit contrary to the objectives of that provision, by a transaction of which the essential purpose is to obtain that benefit.

13. Cass., 6 June 1961, *Pasicrisie*, 1961, I, 1082, 'Brepols' ; Cass., 22 mars 1990, *Pasicrisie*, 1990, I, 849, 'Au Vieux Saint Martin'.

14. Under article 170 § 1 of the Belgian constitution, "No tax for the benefit of the state can be established except by a statute", *viz*. an act of Parliament sanctioned by the King. Thus not by a royal decree, and least of all "custom made" by the administration itself for a given taxpayer situation.

ATAD GAAR Text	Belgian GAAR Text Analysis	Check
1. For the purposes of calculating the corporate tax liability,	The rule applies to income taxes, including corporate tax.	Adequate
A Member State shall ignore	The rule provides that the abusive transaction may not be opposed to the tax administration.	Adequate
an arrangement or a series of arrangements which,	The rule addresses legal acts (*actes juridiques, rechtshandelingen*) or series thereof; there may be a nuance between legal acts and arrangements (*montages, constructies*), but nothing that conforming interpretation cannot bridge.	Adequate
having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage	The definition of the first form includes the avoidance of the scope of a tax provision but does not expressly require a tax avoidance purpose; the definition of the second form includes the essential tax goal. But both forms are present unless the transaction is justified on grounds other than the desire to avoid income tax.	See discussion below
that defeats the object or purpose of the applicable tax law,	The definition of the first form includes the violation of the objectives of the applicable provision; the definition of the second form includes the contrariety to the objectives of that provision.	See discussion below
are not genuine (non authentique, kunstmatig)	The text of the rule omits that notion, but authors and case law admit that artificiality is required.	See discussion below
having regard to all relevant facts and circumstances.	The rule requires that the tax administration invoke objective circumstances.	Adequate
An arrangement may comprise more than one step or part.	The rule applies to legal acts or series thereof; one of more acts will constitute an arrangement; more acts will constitute a series of arrangements.	Adequate
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place	The rule requires the taxpayer to show that non tax motives justify the choice of the legal acts or set thereof.	Adequate
for valid commercial reasons which reflect economic reality.	The text does not refer to those concepts.	See discussion below
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.	The text provides for a correlative taxation as if the abuse had not taken place.	Adequate

Fig. 3

> "B.19. Not only do the impugned provisions **in no way detract from the principle that the taxpayer can opt for the less taxed way**, despite the limitations placed on it 5…) without substantially undermining this principle (…), but furthermore the application of these provisions is subject to several strict conditions."[15]

Demanding that the foreseeable tax regime – thus the possible tax benefit – would not be a main purpose of the transaction is an insult to the intelligence of the CFO and to the professionalism of the CEO of the taxpayer: minimizing expenses, including tax expenses is their job and their duty.[16]

Under the Belgian rule, abuse is present if a tax benefit is present and the arrangement is not "**justified** on grounds other than the desire to avoid income tax." The word *justifié* (in Dutch *verantwoord*) satisfies the test that the tax benefit is not a main motive, since the other grounds are a sufficient motive.

That being said, we can conclude that on that count the Belgian provision is a satisfactory transposition of the directive, since it applies if the arrangement violates or is only meant to circumvent the tax rule.

4.2. Object and purpose

Here we are in the realm of the purpose of the legislator.

That enigmatic phrase is taken over from the (in)famous principle purpose test laid down in new article 29.9 of the OECD Model Convention:

> *9. Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.*

It probably stems from the treaty interpretation principles enshrined in the Vienna Convention:

> *Art. 31.1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

The word *object* makes sense when applying to the interpretation of treaties in general: a treaty of fishery has not the same object as a treaty on the non-proliferation of nuclear weapons. It makes way less sense when applied to a tax treaty, of which the object is taxes, and even less when applied to a domestic statute, which is not a treaty. The phrase *object of a treaty* cannot in our view be bluntly transposed to the *object of a [statutory] provision*: the object of a provision is what it does, what it achieves.[17]

Let us conclude at this stage that the word object in that sentence is devoid of any meaning.[18]

15. Judgment No. 141/2013 of 30 October 2013; our translation.

16. W. Schön, *Tax and Corporate Governance: A Legal Approach*, in W. Schön, *Tax and corporate governance*, Berlin, Springer, 2008, p. 47.

17. Civil Code : Art. 1126 – Tout contrat a pour objet une chose qu'une partie s'oblige à donner, ou qu'une partie s'oblige à faire ou à ne pas faire. (*Every contract has as its object something which one party undertakes to give, or which one party undertakes to do or not to do.*)

18. The Dutch version betrays the embarrassment: it translates *object* by *toepassing*, which means application.

Remains the word *purpose*. In the civil law tradition, contract interpretation should be purposive.[19] Applying that principle to statutes is even more difficult, since the legislator is not a person, but typically one or two assemblies and a government,[20] with conflicting and hypocritical interests and purposes. And for tax conventions, about whose purposes are we talking? The one of the Committee on fiscal affairs of the OECD, of the negotiators of the actual bilateral treaty at stake or of the constitutionally competent bodies that first signed, then ratified the treaty?

If anything, the object and the purpose are opposites: the object is what the provisions does (*volonté déclarée*); the purpose is what the provision would try and do (*volonté réelle*).

Remains to be seen whether the interpreter will be able to in good faith find in a tax treaty provision a purpose which clearly overrides the object. We humbly submit that tax treaties are so technical that when the legislator ratifies them, he has no clearly identifiable purpose. Of course, that comment does not apply with the same strength to domestic tax statutes.

That being said, we can conclude that on that count the Belgian provision is a satisfactory transposition of the directive:

- The word *object* is missing, but was meaningless;
- The word *purpose* (*finalité, doel*) is transposed by the word *objectifs* (in French) or *doelstellingen*[21] (in Dutch).

4.3. Commercial and economic

The directive applies if the arrangement does not serve *valid commercial reasons* which reflect economic reality. The first part of that phrase is copied from the TAAR[22] in the parent subsidiary directive,[23] itself taken over from the tax merger directive:[24]

> Article 15.1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1: a. has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for **valid commercial reasons** such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;

The role of that test was different: in the merger directive, it authorized the Member States to use that test as a presumption; according to ATAD, it is no longer is a presumption and becomes a rule.

Commercial is not to be read narrowly; the Dutch word *zakelijk* refers to *business*.

The second part of the phrase, *which reflect economic reality,* is logically and syntactically incorrect: it is not the commercial motives that should reflect economic reality – how could they? Moreover,

19. Civil Code : Art. 1156. On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes. (*One should in conventions seek to identify which has been the common intention of the contracting parties, rather than stopping at the literal meaning of the terms.)*

20. B. Frydman, *Le sens des lois*, 3rd ed., 2011, p. 406.

21. Irregular plural of *doel*.

22. Targeted anti abuse rule.

23. New arts. 1.2 and 1.3 introduced by COUNCIL DIRECTIVE (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

24. Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

at least in our view, economic reality as such does not exist in law:[25] only exists legal reality, *viz*. everyday reality apprehended and characterized by law.[26] We can try and see two possible meanings:

- Either the alternative main purpose stated by the taxpayer does not reflect economic reality, is not credible;
- Or the arrangement does not reflect economic reality, is artificial or non-genuine.

That second part of the phrase thus appears fairly redundant.

The Belgian test requires a justification by "grounds other than the desire to avoid income tax"; that test encompasses both personal and corporate income tax. For corporations, non tax motives and valid economic reasons appear to be reasonably synonymous.

The other motives test of the Belgian provision accordingly constitutes an appropriate transposition.

4.4. Non genuine

The big novelty of the new parent-subsidiary TAAR test,[27] copied here, was the use of the word *not genuine* more than probably in an attempt to lower the ECJ threshold of *wholly artificial*.[28]

Leaving aside the issue whether it is a good idea to depart in secondary law from a primary law standard, that attempt rather failed, since various language versions – and here the Dutch *kunstmatig* – translate *non genuine* as *artificial*.[29]

The artificiality test implied in the Belgian provision is thus a satisfying transposition.

5. Conclusion

We can thus conclude that the existing Belgian provision constitutes a satisfactory transposition of the ATAD GAAR.[30]

One can debate whether it still should be replaced by a servile copy of the directive text. When a directive imposes harmonization but allows the Member States to carve-out abusive situations to a certain extent, it is better to thus copy. For the merger directive, Belgium's alternative text was found to unduly invert the burden of proof and had to be rewritten.[31] The working of the

25. Much like economic science views the law as an economic object: see Richard Posner's famous *Economic Analysis of Law*.

26. N. Pirotte « La mesure générale anti-abus en droit européen : de la réalité juridique à la réalité économique », *L'Europe au présent !, Liber amicorum Melchior Wathelet*, Bruylant, 2018, p. 853 ; J. Malherbe, L. De Broe, « Réalité juridique et réalité économique», *Journal de Droit Fiscal*, 1988, pp. 322–331 ; D. Garabedian, "Form and Substance in Tax Law, Belgian Report," *Cah. Dr. F. Int.,* Vol. LXXXVIIa, IFA 2002, p. 1.

27. "2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

"An arrangement may comprise more than one step or part.

"3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."

28. CJEU, 12 September 2006, C-196/04, @ 63 and 66.

29. Ph. Malherbe, « Quelques réflexions sur l'abus fiscal international », E. Traversa (dir.*), Fiscalité des Entreprises – Questions d'actualité*, Larcier, 2015, pp. 237.

30. Ph. Malherbe, « Quelques réflexions sur l'abus fiscal international », E. Traversa (dir.*), Fiscalité des Entreprises – Questions d'actualité*, Larcier, 2015, pp. 248–249 ; comp. A. Van de Vijver, « Een richtlijnconforme algemene antimisbruikbepaling ? », *Tijdschrift voor Fiscaal Recht* 2019, No. 556, p. 155.

31. Cass., 13 December 2007, F.06.0065.N; see art. 183*bis* Code of Income Taxes.

French agreement procedure was found not to comply with the directive, which probably allowed the taxpayer to get away with a scheme of tax avoidance in the case under scrutiny.[32]

But here, the legal position is different: the anti-abuse rule is not an exception to harmonization but is harmonization in its own right (or wrong). Unless the Belgian legislator determines that the ATAD rule is superior to the Belgian one – a debatable proposition, to be verified after years of empirical studies -, there is no reason for yet another change.

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32. CJEU, 8 March 2017, C-14/16, Euro Park Service v Ministre des Finances et des Comptes publics ; Ph. Malherbe, « De l'utilité de l'uniformité - Illicéité de l'agrément fiscal préalable des fusions internationales? », *Tijdschrift voor Rechtspersonen en Vennootschappen-Revue Pratique des Sociétés*, 2018, p. 543.