

The prohibition of abuse of rights in European Tax Law: sacrificing the internal market for the fight against base erosion and profit shifting?

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Abstract

The EU principle of prohibition of abuse of rights applied to taxation reflects the need to consider the financial interests of the Member States in an internal market where taxation remains largely unharmonized. Therefore, the circulation of taxpayers across tax systems may entail significant financial consequences for them, as for the Member States concerned. Although the origin of abuse is to be found in the case-law of the Court of justice, it is now codified in the legislative instruments, in particular in the EU Anti-tax avoidance directive of 2016. This directive, which entered into force in 2019, obliges Member States to adopt a general anti-abuse provision. This means a de facto harmonization of the concept of abuse for corporate taxation but which at the same time creates significant implementation difficulties for EU institutions, Member States and taxpayers. The directive also harmonizes specific anti-avoidance mechanisms in order to prevent base erosion and profit shifting between Member States and towards third countries and to ensure that “profits are taxed [on the territory] where value is created”. The contribution aims at analyzing the evolution of the concept of abuse of rights as applied to taxation in the European Union, also in the light of the OECD BEPS strategy.

Keywords: EU tax Law; abuse of rights; BEPS; tax harmonization.

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1. Introduction

The EU principle of prohibition of abuse of rights aims at striking a balance between the taxpayers’ rights to free movement and the need to safeguard the effectiveness of the Member States’ tax systems in the context of an internal market where taxation remains largely unharmonized. The unrestricted circulation of taxpayers may indeed entail significant financial consequences for the Member States, whether due to cross-border tax evasion (illegal) or tax avoidance (legal). The (legal) cross-border shifting of income and income-generating assets represents an overall loss of tax revenues for EU Member States, which, although difficult to estimate with precision, amounted in 2015 to several dozens of billions of euros.¹ This profit shifting may be the result of displacement of genuine economic activities from one Member States to another (for example, moving a car manufacturing factory from Germany to Hungary or from France to Romania), but it mainly occurs through the setting-up of legal tax planning structures, which entail only –if any- minimal

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1. See for example European Commission, Study on structures of aggressive tax planning and indicators, Taxation Papers, Working Paper No. 61 – 2015; OECD, Measuring and monitoring BEPS, Action 11 - 2015 final report, 5 October 2015.

displacement of assets and people. Those structures exploit existing legal instruments such as tax treaties, EU directives and domestic legislation, while taking advantage from the lack of coordination between tax systems in order to minimize their overall tax burden.

Although the origin of abuse is to be found in the case-law of the Court of justice, it is now codified in the legislative instruments, in particular in the EU Anti-tax avoidance directive of 2016 (hereafter ATAD).² This directive, which entered into force in 2019, obliges Member States to adopt a general anti-abuse provision. This means a de facto harmonization of the concept of abuse for corporate taxation but which at the same time creates significant implementation difficulties for Member States, which translates in legal uncertainty for taxpayers. The directive also harmonizes specific anti-avoidance mechanisms in order to prevent base erosion and profit shifting between Member States and towards third countries and to ensure that “tax is paid where profits and value are generated.”³

This legislative evolution follows a parallel path to the OECD BEPS initiative. In 2013, the OECD, on request by the G20, adopted a 15-point Action Plan to tackle base erosion and profit shifting (BEPS). The BEPS project is a comprehensive package of measures aiming at better coordinating domestic tax systems, at promoting transparency and exchange of information and at modernizing international tax rules in order to ultimately realign taxation with economic substance and value creation. It targets harmful international tax arrangements taking advantage of the differences between several states legislation (two or more). The outcome of the BEPS action plan, contained in final reports published in October 2015, consists in measures taking the form of “minimum standards,” “best practices” or “recommendations.”⁴ Many of these measures have been incorporated into a multilateral instrument, which entered into force in 2018 and has been signed by almost 100 countries.⁵

Whilst BEPS is not an EU initiative, 21 of the 28 EU Member States are also OECD members. The EU and its Member States have since the beginning played a leading role in the BEPS initiative and it is crucial for the global effectiveness of the process that the EU continues to exercise this leadership as regards the most delicate step, i.e. the adoption of hard law rules.⁶ Nevertheless, considering that the implementation of BEPS has to be done consistently with the current EU legal framework, the EU and its Member States face a particular challenge in respect of the BEPS implementation. The objective of the EU being mostly to ensure mobility of undertakings and other factors of production within the Internal market, it could potentially clash with measures aimed at limiting tax avoidance opportunities by making certain cross-border operations more difficult.⁷

The present contribution aims at analyzing the evolution of the concept of abuse of rights as applied to taxation in the European Union, also in the light of the OECD BEPS strategy.

2. Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market OJ L 193, 19.7.2016, p. 1–14.

3. ATAD, 1st recital.

4. OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, p. 6. www.oecd.org/tax/beps-explanatory-statement-2015.pdf.

5. As of 28 February 2020. See <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>.

6. Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report, page 22.

7. In respect of the obligation of MS to abide by EU law, the CJEU in several cases made it clear that “*it should be recalled that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law.*” See Case C-80/94, *Wielockx v Inspecteur der directe belastingen* [1995] ECLI:EU:C:1995:271, para 16, Case C-264/96, *Imperial Chemical Industries v Colmer* [1998] ECLI:EU:C:1998:370, para. 19, C-268/03, *De Baeck* [2004] ECLI:EU:C:2004:342, para 19.

2. The prohibition of abuse in EU law : origin and constitutive elements

When applied in a cross-border context, the prohibition of abuse of rights allows indeed Member States to justify domestic measures aiming at restricting the freedom of movement in situations where there is a risk that the taxpayers would escape the tax burden normally payable. The overriding reason in the public interest based on the balanced allocation of taxing powers between Member States, developed by the Court of justice, can be seen as a bridge between those notions. It contains indeed elements which mix concerns relating to taxpayers choosing the place where they would be subject to tax, typical from abuse with distortions in the territorial allocation of taxing powers based on substantial economic activity.

The Court has often stated that «European Union law cannot be relied on for abusive or fraudulent ends» and «preventing possible tax evasion, avoidance and abuse in an objective recognized by EU law».⁸ According to the Court, the prohibition of abuse of law is a general principle applicable to all areas covered by EU law.⁹ Such a broad scope of application does not help understating the exact function of the abuse concept, since it is used in very different situations, with quite different consequences.

It was applied for the first time in tax matters in the *Halifax* and *University of Huddersfield* cases dealing with the improper application of VAT deduction, after having been applied in the area of custom duties in *Emsland-Stärke*.¹⁰ Since then, the Court has regularly applied it to a wide series of situations.¹¹

8. See for example the following cases: ECJ, 29 April 2004, joined Cases C-487/01 and C-7/02, *Gemeente Leusden and Holin Groep BV vs Staatssecretaris van Financiën*, para. 76; ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 71; ECJ, 21 June 2012, joined cases C-80/11 and C-142/11, *Mahagében and Dávid*, para. 41; ECJ, 6 December 2012, C-285/11, *Bonik*, paras. 35 and the case law quoted; ECJ, 31 January 2013, C-643/11, *LVK* 56, para. 58; ECJ, 19 December 2013, C-563/12, *BDV Hungary Trading Kft., in liquidation v Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága*, para. 33.

9. ECJ, 3 July 2007, C-321/05, *Hans Markus Kofoed v Skatteministeriet*, para. 38. The principle of non-application of EU law to abusive practices was applied for the first time in the area of VAT in the *Halifax* and *University of Huddersfield* cases (CJEU, Case C-255/02 *Halifax plc*, *Leeds Permanent Development Services Ltd*, *County Wide Property Investments Ltd v HMRC*, [2006] ECLI:EU:C:2006:121, and C-223/03 *University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise*, [2006] ECLI:EU:C:2006:124). Some authors trace the origin of this principle in the case ECJ, 3 December 1974, C-33/74, *Van Binsbergen*, para. 13. On the prohibition of abuse in EU direct tax law, see in particular ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*; ECJ, 13 March 2007, C-524/04, *Test Claimants in the Thin Cap Group Litigation* and ECJ, 17 September 2009, C-182/08, *Glaxo Wellcome*. On the principle of abuse of rights in EU tax law, see T. O'SHEA, "Tax Avoidance and Abuse of EU Law", 11 *EC Tax Journal*, 2011, p. 77; R. DE LA FERIA, "Prohibition of Abuse (Community) Law - The Creation of a New General Principle of EC Law Through Tax", *Common Market Law Review*, 45, 2008, pp. 395–441; L. DE BROE, *International Tax Planning and Prevention of Abuse: A Study under Domestic Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, IBFD, Amsterdam, 2008, pp. 755 *et seq.* For a critical comment, see A. ARNULL, "What are General Principles of EU Law?", in R. DE LA FERIA & S. VOGENAUER, *Prohibition of Abuse of Law – A New General Principle of EU Law*, Hart Publishing, Oxford, 2011, pp. 18–23, and K. E. SØRENSEN, "Abuse of rights in Community law: A principle of substance or merely rhetoric?", 43 *Common Market Law Review* 423 (2006). For a critical comment, see WEBER, Dennis, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and In-direct Tax Case Law of the ECJ*, *European Taxation* 2013 (Volume 53) No 6–7, Part 1, p. 251–264 and Part 2, pp. 313–328; LENAERTS Koen, "The concept of 'abuse of law' in the case law of the European Court of justice on direct taxation, in: *Maastricht Journal of European and Comparative Law*, 2015 (Volume 22), No3, pp. 329–351

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10. ECJ, 21 February 2006, C-255/02, *Halifax plc*, *Leeds Permanent Development Services Ltd*, *County Wide Property Investments Ltd v HMRC* and ECJ, 21 February 2006, C-223/03, *University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise*. ECJ, 14 December 2000, C-110/99, *Emsland-Stärke v Hauptzollamt Hamburg-Jonas*, paras. 52 to 54. As for customs duties, see also ECJ, 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33; 9 juillet 2015, *Cimmino and Others*, C-607/13, EU:C:2015:448, paragraph 65; 14 April 2016, *Cervati and Malvi*, C-131/14, EU:C:2016:255, paragraph 4.

11. See ECJ, 21 February 2008, C-425/06, *Part Service*, para. 42; ECJ, 22 May 2008, C162/07 *Ampliscientifica and Amplifin*, para. 28; ECJ, 22 December 2010, C277/09, *RBS Deutschland Holdings*, para. 49; ECJ, 22 December 2010, C-103/09,

As the Court said in *Halifax*, «the application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law».¹² The prohibition of abuse must be seen as a restriction to the generally admitted freedom of the taxpayers to limit their tax liability: «In that regard, furthermore, taxable persons are generally free to choose the organizational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens (...)».¹³ The prohibition of abuse of rights must however be applied by EU institutions and Member States in conformity with other EU law principles, such as legal certainty and proportionality.¹⁴

The Court also accepted the prevention of abuse as an overriding reason in the public interest in its direct taxation case-law on fundamental freedoms for the first time in *Cadbury Schweppes*¹⁵ and subsequently in several other cases.¹⁶ The Court has later expressly acknowledged in *Kofoed* that the prohibition of abuse of rights constituted a general principle of EU law.¹⁷ Consequently, its application was restricted to situations falling within the scope of EU law, therefore excluding non-harmonized areas of taxation (*3M Italia*)¹⁸.

On the legislative side, general anti-abuse measures have been adopted in EU directives, rewarding the European Commission's efforts since 2012.¹⁹ It seems however that the direct cause of such an evolution is to be found rather in the OECD BEPS Action Plan²⁰ than in the case-law of the European Court of Justice (which will undoubtedly have its say however about the interpretation of those legislative provisions).

In the Danish cases,²¹ which concerned the application of the Parent-Subsidiary and Interest-Royalty directives to conduit companies, the Court held that the prohibition of abuse, as general

Weald Leasing, para. 30; ECJ, 27 October 2011, C504/10, *Tanoarch*, para. 51; ECJ, 17 December 2015, C-419/14, *WebMindLicenses*, paras.20 and 43 to 45.

12. ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 69.

13. ECJ, 22 December 2010, C277/09, *RBS Deutschland Holdings*, para. 53.

14. On proportionality in EU law, see C. Barnard, *The substantive law of the EU*, Oxford University Press, 6ed., 2019, p. 510–514. As for applications of the proportionality principle in the tax case-law of the Court, ECJ, 22 November 2001, C-301/97, *Netherlands v Council*, para. 43; ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 72; ECJ, 27 September 2007, C146/05, *Collée*, para. 24; ECJ, 27 September 2007, C-184/05, *Twoh International*, para. 25; ECJ, 6 September 2011, C-273/11, *Meczek-Gabona*, para. 36; ECJ. On legal certainty, CJEU, Case C-318/10, *SIAT*, [2012] ECLI:EU:C:2012:415, para. 54 and Case C-282/12, *Itelcar*, [2013], ECLI:EU:C:2013:629, para 44.

15. ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 42.

16. ECJ, 13 March 2007, C-524/04, *Thin Cap GLO*, para. 77; ECJ, 10 November 2011, C-126/10, *Foggia*, para. 50 (Merger Directive); ECJ, 19 July 2012, C-33/11, *A Oy*, para. 62.

17. See ECJ, 5 July 2007, C-321/05, *Hans Markus Kofoed v Skatteministeriet*, para. 38.

18. ECJ, 29 March 2012, C- 417/10, *3M Italia*. A. ZALASIŃSKI, «The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case», *European Taxation*, Vol. 52, 2012, p. 453.

19. Communication from the Commission of 6 December 2012 – An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722, and the annexed Commission Recommendation on Aggressive Tax Planning, C (2012) 8806; Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271. For an analysis of the GAAR recommended by the Commission in 2012 and the relationship with BEPS, see A. P. Dourado, «Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6», 43 *Intertax*, Issue 1, 2015, para 3.3, pp. 42–57.

20. P. PIANTAVIGNA, «Tax abuse and aggressive tax planning in the BEPS era: how EU law and the OECD are establishing a unifying conceptual framework in international tax law, despite linguistic discrepancies», *World Tax Journal*, Vol. 9, no. 1, 2017, pp. 56–61, 85–90; M. LANG et al., *GAARs - A Key Element of Tax Systems in the Post-BEPS World*, IBFD, Amsterdam, 2016.

21. ECJ, 26 February 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS (C-299/16) v Skatteministeriet* and ECJ, 26 February 2019, Joined Cases C-116/16 and C-117/16, *Skatteministeriet Danmark (C-116/16), Y Denmark Aps (C-117/16)*.

principle of European Union Law, has to be applied by national tax authorities even in the absence of specific domestic anti-abuse legislation. To this end, the Court has held that economic relations inspired by the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it is one of the constituent elements of abuse of rights, despite the conditions for benefiting from that advantage are formally fulfilled.²² In order to support this statement, the Court relied on previous VAT case-law²³ and expanded it to the field of direct taxation, despite significant differences as to the level of EU harmonization between those two areas.

In 2014, the Parent-Subsidiary Directive was amended to include a “general” anti-avoidance rule,²⁴ stating that: « (...) 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. (...) 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. (...)»

In 2016, a GAAR has been adopted in the EU Anti-Tax avoidance Directive, under similar terms with one important difference: the “object and purpose” has to be found in domestic law.²⁵

The Court of justice has stated several times that two elements have to be present to conclude that the transactions constitute an abusive practice:

- notwithstanding formal application of the conditions laid down in the relevant provisions of EU law and in the national legislation transposing it, the transactions concerned must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions,
- it must also be apparent from a number of objective factors that the essential (or principal or exclusive) aim of the transactions concerned is to obtain a tax advantage.²⁶

First, the transactions at stake must result in a situation where a tax advantage is granted to a taxpayer in contradiction with the purpose of the applicable legislation. In VAT cases, the concept of abuse does not create particular issues of application, because the purpose of the legislation is contained in the EU legislation, as interpreted by the court. In most of the relevant ECJ case-law, the taxpayer had structured his activities so as to be able to limit (or spread over years, as in the *Weald Leasing* case²⁷) the proportion of input non-deductible VAT in comparison with the situation

22. According to the Court, it follows from the nature of the prohibition of abuse of law as a general principle that it may be relied on against a taxable person, where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules, even in the absence of domestic or agreement-based anti-abuse provisions. In fact, the absence does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends.

23. Judgments of 18 December 2014, Schoenimport 'Italmoda' Mariano Previti and Others, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, Cussens and Others, C-251/16, EU:C:2017:881, paragraph 33.

24. The GAAR test was included in the PSD with the EU Council adoption of Directive 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, OJ L 21, 28.1.2015, pp. 1–3. For a comment, D. WEBER, “The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect”, 44 *Intertax*, 2016, pp. 117–120.

25. ATAD directive, article 6. For a comparison with the wording of the PPT test in the OECD Action 6 Report, see E. TRAVERSA & CH. HERBAIN, “General Assessment of BEPS and EU law: Hybrids Mismatches, Interest Deductions, Abuse of Tax Treaties and CFC Rules” in R. DANON (ed.), *Base Erosion and Profit Shifting (BEPS). Impact for European and international tax policy*, Schulthess, Zurich, 2016, pp. 287–318.

26. ECJ, 21 February 2006, C-255/02, *Halifax and Others*, paras. 74 and 75 and ECJ, 21 February 2008, C-425/06, *Part Service*, para. 42.

27. *Weald leasing*, para. 29 and 30

where he would have directly and personally realized the main transaction at stake. However, excessive deduction is not the only area where the abusive practices may take place. This can also be the case of abusive application of exemptions, in order to favor the final consumer by lowering the total price of the contested transactions (*Part Service* and *Oy AA*²⁸). Besides those cases, the doctrine of abuse of rights could apply potentially to any situation covered by VAT legislation.

In direct taxation, the Court ruled on the compatibility of domestic anti-avoidance rules with fundamental freedoms. Disputes involve measures on Controlled foreign corporations rules (*Cadbury Schweppes*²⁹), thin capitalization rules (*Thin Cap GLO*³⁰), rules on the deduction of losses resulting from the reduction in value of shares (*Glaxo Wellcome*³¹) as well as the Merger Directive (*Kofoed* and *Foggia*³²). The case-law appears more prone to critique, since defining the scope of Treaty freedoms in relation to domestic anti-avoidance measures may turn out in a trickier operation.

The Court also applied the abuse of rights doctrine in the framework of the Capital duty directive,³³ like the *Commission v. Greece*.³⁴

Second, the essential (or main or sole³⁵) aim of the contested transaction must be to obtain a tax advantage, *i.e.* an advantage consisting in a reduction of the amount of the tax normally applicable as determined by the relevant applicable law.³⁶ According to the Court, «the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages». This does not exclude «the possible existence, in addition, of economic objectives». ³⁷ Moreover, it is up to the tax administration and the domestic courts to find out “objective factors” which allow establishing this intention in the hands of the taxpayer. To this end, they «may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden». ³⁸

The relevance of this subjective element has been criticized by several authors and even Advocate Generals.³⁹ For example, Weber considers that the essential aim of the transactions and the in-

28. ECJ, 21 February 2008, C-425/06, *Part Service*; ECJ, 19 July 2012, C-33/11, *A Oy*, as regards the exemption for the supply of aircraft used by airlines operating for reward chiefly on international routes.

29. ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes*; ECJ, 13 March 2007, C-524/04, *Test Claimants in the Thin Cap Group Litigation*.

30. ECJ, 13 March 2007, C-524/04, *Test Claimants in the Thin Cap Group Litigation*.

31. ECJ, 17 September 2009, C-182/08, *Glaxo Wellcome*. For a comment, K. LENAERTS, “The Concept of ‘Abuse of Law’ in the Case Law of the European Court of Justice on Direct Taxation”, *Maastricht Journal of European and Comparative Law* 329, 2015.

32. ECJ, 3 July 2007, C-321/05, *Hans Markus Kofoed v Skatteministeriet*; ECJ, 10 November 2011, C-126/10, *Foggia*. See also 20 May 2010, C-352/08, *Modehuis A. Zwijnenburg BV v. Staatssecretaris van Financiën*.

33. Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (former Council Directive 69/335/EEC).

34. ECJ, 7 June 2007, C-178/05, *Commission v. Greece*, para. 32.

35. The distinction between main purpose and essential purpose or even sole purpose is also to be found in the VAT case of the CJEU on abuse of rights (see ECJ, 20 June 2013, Case C-653/11, *Newey*, para. 46 and the case-law quoted). On the (non)relevance of the distinction between essential exclusive or principal, see ECJ, 21 February 2008, C-425/06, *Part Service*, paras. 45 to 50 and R. LYAL, “Cadbury Schweppes and Abuse: Comments” in R. DE LA FERIA & S. VOGENAUER, *supra*, pp. 429–430.

36. That should exclude situations where the advantage concern another tax than the tax covered by the relevant legislation. See ECJ, 20 May 2010, C-352/08, *Zwijnenburg*.

37. ECJ, 21 February 2008, C-425/06, *Part Service*, para. 62.

38. ECJ, 21 February 2006, C-255/02, *Halifax and Others*, para. 81.

39. Against the presence of a subjective element in the abuse test, see Opinion of Advocate General Geelhoed, 27 February 2003, C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, para. 173; Opinion of Advocate General Lenz, 16 June 1994, C-23/93, *TV10 SA v. Commissariaat voor de Media*; R. LYAL, “Cadbury Schweppes and Abuse: Comments”, in R. DE LA FERIA & S. VOGENAUER, *supra*, pp. 430–431; M. LANG, “Rechtsmissbrauch und Gemeinschaftsrecht im Lichte von Halifax und Cadbury Schweppes”, *Steuer und Wirtschaft International*, 2006, pp. 273–278.

tention of the persons who carry out such activities which should be “*objectified*” (i.e. it should be deducted from the objective circumstances), emphasizing the artificiality requirement set by the ECJ in its case law. Moreover, he remarks that, under the treaty freedoms, the objective and the subjective tests overlap (as shown in the *Cadbury Schweppes* case) and that such overlap does not easily occur under the secondary EU law.

In more recent cases, the Court does not seem to always consistently apply the abuse test by distinguishing between those two elements. Although it sometimes focuses only on the objective element (i.e. analyzing the object and purpose of the EU VAT provisions at stake),⁴⁰ it tends to give a determining weight to the artificial character of the transactions at stake (sometimes not even referring to the notion of abuse anymore⁴¹) and the fact that it does not reflect economic reality or on the tax advantage that the taxpayers realized in comparison with (supposedly) more sound transactions.

In so doing, the Court tends to equiparate, especially in its case-law on fundamental freedoms, the prohibition of abuse with the prohibition of «wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage».⁴² However, “wholly artificial arrangements” and “arrangements that do not reflect economic reality” are notions that should be distinguished.⁴³

In the *Cadbury Schweppes* case, the Court seemed to consider that the prohibition of abuse of rights could only apply in situations deprived of any economic substance, such as letterbox companies.⁴⁴ However, it appears from later cases that even situations involving companies with more economic substance could constitute abuse.⁴⁵ The requirement of artificiality does not indeed refer to the taxpayers involved but to the arrangements put into place, the analysis of which should reveal a reasonable proportion between the volume of economic activity and the importance of the profits that are taxable.

3. Functions of abuse in EU tax law

Based on the case-law of the Court, we could distinguish four different functions of the prohibition of abuse in EU tax law. First, it serves as a justification ground aiming at declaring compatible with fundamental freedoms domestic tax measures restricting cross-border movement adopted by Member States in non-harmonized areas.

40. See ECJ, *Weald Leasing* and *RBS Deutschland*, supra. Interestingly enough in those two cases, the Court did not consider that the transaction at stake amounted to abusive practices (although they clearly presented an artificial character – see J. Swinkels, *Abuse of EU VAT Law*, *International VAT Monitor*, 2011, p. 224–225).

41. See ECJ, 12 July 2012, *J.J. Komen en Zonen Beheer Heerhugowaard*, Case C326/11, paragraph 35.

42. See also Case C162/07 *Amplisientifica and Amplifin* [2008] ECR I4019, paragraph 28; Case C504/10 *Tanoarch* [2011], paragraph 51. Interestingly enough, when the Court refers to wholly artificial arrangement it consistently uses the term “sole aim,” while it tends to prefer the expression “essential aim” when describing the subjective element of the notion of abuse. This definition is almost identical to the one used in the direct tax case-law (see Case C196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I7995, paragraph 55). See M. Lang, *The General Anti-Abuse Rule of Article 80 of the Draft Proposal for a Council Directive on a Common Consolidated Corporate Tax Base*, 51 *Eur. Taxn* 223, 225 (2011).

43. The notion of wholly artificial arrangement would appear to be stricter in the sense that it would seem to follow from this that where a taxpayer also has another intention for a certain arrangement (for example, a business intention) there is no question of a wholly artificial arrangement; whereas under the main purpose test, having another reason still places a taxpayer under the common anti-abuse rule. Even though, as Weber itself noticed, according with the ECJ decisions, there can also be a matter of abuse under the wholly artificial arrangement test when in addition there are also non-fiscal reasons (for another part of the transaction). D. Weber (2016) p. 108 et seq.

44. N. Vinther & E. Werlauff, “Tax Motives Are Legal Motives – The Borderline between the Use and Abuse of the Freedom of Establishment with Reference to the *Cadbury Schweppes* Case”, 46 *Eur. Taxn* 383 (2006).

45. See case-law quoted. See also ECJ, 26 February 2019 (Grand Chamber), *N Luxembourg and Others v Skatteministeriet*, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 and *Skatteministeriet v T Danmark and Y Danmark Aps*, Joined Cases C-116/16 and C-117/16.

In that case, taxpayers engaging in abusive practices are deemed to fall outside the scope of the applicable freedom and as a consequence are stripped from EU protection against anti-avoidance measures that Member States could potentially adopt. Fight against abuse of (domestic) law is seen by the Court of justice as a legitimate objective to be pursued by Member States, who remain free to consider that those potentially abusive situations do not require legislative or administrative action. Nonetheless, this statement must be tempered by the States duty to implement article 6 of the ATAD directive. According to the directive, as from 2019, Member States shall ignore, relying on the preferred legal solutions and within the discretion left by the directive, an arrangement or a series of arrangements that they consider formally licit but that, having regard of the relevant facts and circumstances, is put into place for the main purpose of obtaining a tax advantage that defeats the object or purpose of the applicable tax law.

Second, the prohibition of abuse may also be implemented in specific provisions in EU tax directives targeting cross-border situations. Depending of the wording, it may either take the form of an authorization or an obligation for the Member States to enact anti-abuse measures which would result in denying the application of the benefits normally granted by the directives to the taxpayers in certain situations. Both types of provisions may coexist within the same legislative act, as the Parent Subsidiary Directive shows. Besides the general anti-abuse clause inserted in 2015, which has to be implemented by Member States on a compulsory basis, article 1 also provides that “this Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.” Third, it may also work as a general principle of purposive interpretation of EU (secondary) law, aiming at avoiding situations where the “mechanical” application of certain favorable EU law provisions would not be in line with their spirit or objective. In other words, its aim would be to deny the benefit of a more favorable tax treatment to “underserving” taxpayers, i.e. those who in spite of having *prima facie* complied with the formal requirement imposed by the relevant EU legislation, could be considered in a factual situation identical to taxpayers who are excluded from the scope of those favorable provisions. This conception of abuse can be found in the field of VAT, and as the 2019 Danish ECJ cases also made clear, to the harmonized areas of corporate taxation.

In harmonized areas, this principle has to be mandatorily applied by Member States. This feature clearly departs from the function played by this principle in non-harmonized area of EU law., where the concept has been developed primarily to curtail the room for maneuver of Member States in establishing anti-abuse measures targeting cross-border situations.⁴⁶

Moreover, as to VAT, the concept of abuse also applies to domestic situations, which is a natural consequence of the far-reaching harmonization of turnover taxes in Europe. It has to be mandatorily implemented by Member States as an integral part of the VAT common system. Member States are thus not simply required to apply the conditions laid down by the Court of Justice by defining the concept of abuse whenever they want to adopt domestic anti-abuse provisions; they are also under the duty to actively re-characterize transactions carried out by taxpayers which meet the criteria of abusive practices, regardless of domestic implementing measures.⁴⁷ As the Court said in *Cussens*, this obligation also applies to transactions carried out before the *Halifax* decision : *The principle that abusive practices are prohibited must be interpreted as being capable, regardless of a national measure giving effect to it in the domestic legal order, of being applied directly in order to refuse to exempt from value added tax sales of immovable goods, such as the sales at issue in the main proceedings, carried out before the judgment of 21 February 2006, Halifax and Others (C-255/02, EU:C:2006:121), was delivered, and the principles of legal certainty and of the protection*

46. See ECJ, *Cadbury Schweppes*, supra. For a comment, see D. Weber, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 1*, 53 Eur. Taxn 251 (2013).

47. The Court however denied that such an obligation existed as regards non- harmonized area of taxation. See ECJ, 29 March 2012, Case C-417/10, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. 3M Italia SpA*, supra and the comment by A. Zalasinski, *The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia case*, 52 Eur. Taxn 446, 453 (2012).

*of legitimate expectations do not preclude this.*⁴⁸

In VAT, the fight against abusive practices is therefore not an option but a prerequisite of the effectiveness of the EU common system.⁴⁹ This has significant implications for Member States legislatures and tax administrations, for which a precise understanding of the abuse criteria play an important part of their everyday practice.

The article 6 of the ATAD directive adds a fourth dimension of abuse to the existing three (which can be seen as variant of the second), namely a EU law obligation to apply the prohibition of abuse of purely *domestic* provisions in both domestic and cross-border situations.⁵⁰ This may add to the already existing uncertainty, since corporate taxation remains largely a matter of national sovereignty. Member states are free to adopt rules, to define their scope of application and their objectives as well as introducing exceptions or specific anti-avoidance mechanism. This is a fundamental difference with the application of the prohibition of abuse within the framework of VAT directive, whose interpretation (including the definition of the objective of each provision) ultimately lies with the European Court of justice. This makes it very difficult for any EU institution - whether the Commission or the Court of justice to control the correct implementation of article 6 of the ATAD directive. Assessing a potential breach of the directive would indeed almost necessarily imply to determine the objectives of the supposedly abused domestic rule. This could be done in two different ways. It could either be done in reference of exclusively domestic sources (parliamentary works, domestic case-law, domestic literature), which would certainly be more respectful of the existing division of powers in the area of corporate taxation between, the EU and the member States. However, that would have as a consequence that a fundamental element of assessment of the correct implementation of an EU directive would be made exclusively on the basis of domestic law of the Member States. This could seriously jeopardize the effectiveness and uniform application of EU law. Or EU institutions could interpret themselves domestic legislation in order to find its objective and on the basis of the objective that they would have found, assess whether domestic tax authorities have properly applied the prohibition of abuse. This way of doing could however impair the division of competences, since EU institutions may not the power to interpret provisions that fall within the exclusive purview of the Member States.

Another disturbing feature is the fact that there seems to be a difference in wording between the notion of abuse as defined by the Court of justice in its case law and article 6 of the ATAD directive, as well as article 2 of the Parent-subsidiary directive, namely the reference to artificial arrangements. Reference to absence of substance in the directive could lead to think that the scope of article 6 lacks clarity and predictability and leaves too much discretion to national tax administrations, which may contradict the EU general principle of legal certainty.⁵¹ The CJEU in the cases SIAT and Itelcar⁵² held that rules of law, especially where they may have unfavourable consequences for taxpayers, must be clear, precise and predictable. Moreover, according to the CJEU case-law, the tax authority should be not “*required to provide even prima facie evidence of tax evasion or avoidance*,”⁵³ which does not clearly appear from the text.

Despite those four different conception of abuse, with different legal consequences, the Court treats the prohibition of abuse as a single general principle which supplies in the same manner to har-

48. ECJ, 22 November 2017, *Cussens*, C-251/16, ECLI:EU:C:2017:881.

49. According to the Court, allowing abusive practices could undermine the effectiveness of EU law. See for example, ECJ, *Halifax*, paragraph 76; *Emsland-Stärke*, paragraph 54 and the case law quoted.

50. L. De Broe & D. Beckers, “The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: an analysis against the wider perspective of the European Court of Justice’s case law on abuse of EU law”, *EC tax review*, Vol. 26 (2017), no. 3, p. 136.

51. See Case C-175/88, *Klaus Biehl v Administration des contributions du grand-duché de Luxembourg*, [1990], ECLI:EU:C:1990:186, para 18.

52. CJEU, Case C-318/10, *SIAT*, [2012] ECLI:EU:C:2012:415, para. 54 and Case C-282/12, *Itelcar*, [2013], ECLI:EU:C:2013:629, para 44.

53. CJEU, Case C-318/10, *SIAT*, [2012] ECLI:EU:C:2012:415, para. 55.

monized and non-harmonized area of taxation, which contributes to create uncertainty. Such a confusion has been criticized by various scholars.⁵⁴ Uncertainty also results from the fact that although the prohibition of abuse is a “general” principle, it requires “a case-by-case examination, taking into account the particular features of each case, based on objective elements, in order to assess the abusive or fraudulent conduct of the persons concerned.”⁵⁵ Even if this procedural clarification is intended to protect taxpayers’ rights, it makes it very difficult for taxpayers but also for tax authorities to foresee with a relative degree of certainty if a transaction falls within the scope of abuse.⁵⁶

4. Compatibility of BEPS-inspired general anti-avoidance rule in tax treaties, BEPS with EU law

The adoption of the anti-tax avoidance directive – including of a general anti-abuse rule at article 6 - has been justified by the European Commission by the need to ensure a uniform implementation of the OECD BEPS Action Plan in the European Union.⁵⁷ However, it may appear therefore useful to confront the newly adopted EU law provisions on abuse with the recommendations contained in the OECD BEPS Reports. This analysis could be useful for example when examining anti-abuse clauses contained in tax treaties concluded by Member States with third countries, which remain unaffected by the Directive.

In its final Report on Action 6 of the BEPS project, the OECD recommends changes to the OECD model tax convention in order to attribute double tax treaties (DTT) benefits only in “appropriate circumstances.” It proposes measures to combat treaty shopping, in particular the inclusion of targeted anti-avoidance provisions in DTT, called limitation-on benefits rules (LOB) and of a general anti-abuse provision based on the principal purposes of transactions or arrangements (PPT).⁵⁸ The OECD also suggests a clarification of the objectives of DTT, by making more explicit reference in the title and preamble, as well as in the Introduction to the OECD Model Tax Convention that “tax treaties are not intended to be used to generate double non-taxation.”⁵⁹ Such an objective would be relevant for the interpretation of all the provisions of the double taxation convention.⁶⁰ It would also serve –among others, and in particular the prevention of double taxation- as a guiding

54. B. Kieckhefer, *Anti-Abuse in the Field of Taxation: Is There One Overall Concept?*, 18 EC Tax Rev., 2009, pp. 144–145; F.A. Vanistendael, *Halifax and Cadbury Schweppes: One Single European Theory of Abuse in Tax Law?*, EC Tax Rev., 2006, vol. 15, p. 195; A. Martin Jimenez, *Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law*, Bull. International Taxation 270, 2012, vol. 66, IBFD; A. Cordewener, *Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards Under Treaty Freedoms and EU Directives?*, 26 EC Tax Rev. 60 (2017).

55. Case C-182/08 *Glaxo Wellcome*, para. 99.

56. Member States may not establish irrebutable presumptions of abuse. See Opinion of Advocate General Bot in Case C-182/08 *Glaxo Wellcome*, EU:C:2009:438, para. 175 et seq.

57. ATA Directive, 2nd recital: “In addition, the conclusions supported an effective and swift coordinated implementation of the anti-BEPS measures at the EU level and considered that EU directives should be, where appropriate, the preferred vehicle for implementing OECD BEPS conclusions at the EU level. It is essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion. In a market of highly integrated economies, there is a need for common strategic approaches and coordinated action, to improve the functioning of the internal market and maximise the positive effects of the initiative against BEPS. Furthermore, only a common framework could prevent a fragmentation of the market and put an end to currently existing mismatches and market distortions. Finally, national implementing measures which follow a common line across the Union would provide taxpayers with legal certainty in that those measures would be compatible with Union law.”

58. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Final Report, OECD Publications, October 2015, pp. 20 seq.

59. Changes to the Commentary of Article 1 OECD MC were already made to that end in 1977 and 2003 (see : OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Final Report, OECD Publications, October 2015, p. 91 and the references quoted).

60. OECD Report on Action 6, p. 92.

principle of the international tax policy of OECD Member States that, in general, countries should consider before embarking on DTT negotiations with another country.⁶¹

From an EU law perspective, DTT are part of national law of the Member States and are consequently subject to the control of their compatibility with EU law. At the level of the principles, the goal of Action 6 to combat double non-taxation is similar to the one pursued by the European Commission in several Communications and Proposals aiming at fighting against aggressive tax planning and tax avoidance.⁶²

However, it should be recalled that in the eyes of the CJEU, the mere loss of tax revenue, whether caused by double non-taxation or not, cannot alone be used as an overriding reason in the public interest justifying domestic anti-avoidance measures that would specifically target cross-border payments or structures.⁶³

A measure recommended by the OECD in its Final report on Action 6 is the insertion of a general anti-avoidance clause based on the Principal purpose test. The PPT rule targets transactions whose one of the main principal purpose is the obtainment of treaty benefits. Unless the taxpayer establishes that the benefit of his transaction would be “in accordance with the object and purpose” of the relevant DTT provision, the PPT prevents the granting of the benefit and supersedes other more specific anti-avoidance rules. As long as the administration considers it reasonable to conclude that obtaining the DTT benefit was “one of the main purposes” of the transaction, the PPT would remain applicable even where the LOB requirements would be satisfied.

Since the BEPS Action Plan, the EU adopted two general anti-avoidance rule, one in the Parent-Subsidiary Directive and one in the Anti-Tax avoidance directive.⁶⁴ The “general” anti-avoidance rule,⁶⁵ in the Parent-Subsidiary directive states that: “*(...) 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.

(...) 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. (...)”

The GAAR contained in the Anti-tax avoidance Directive follows the same pattern in broader terms, with some differences: the “main” purpose is replaced by the “essential” purpose, as the Commission had proposed in its 2012 Communication,⁶⁶ and the “object and purpose” has to be found in domestic

61. OECD Report on Action 6, pp. 95–97.

62. See in particular Communication from the Commission of 6 December 2012 – An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722, and the annexed Commission Recommendation on Aggressive Tax Planning, C (2012) 8806 final ; Commission Communication of 28 January 2016 “Anti-avoidance Tax Package : Next steps towards delivering effective taxation and greater tax transparency in the EU,” COM/2016/023.

63. See *ao* CJEU, Case C-136/00, Danner, [2002], ECLI:EU:C:2002:558, paras. 55 and 56; Case C-422/01, Skandia and Ramstedt, [2003], ECLI:EU:C:2003:380, para. 51.

64. The European Commission had been pushing since 2012 for the adoption of General Anti-Abuse Rules (GAAR) in EU Directives, domestic tax systems and, in tax treaties. Communication from the Commission of 6 December 2012 – An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722, and the annexed Commission Recommendation on Aggressive Tax Planning, C (2012) 8806; Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271.

65. The GAAR test was included in the PSD with the EU Council adoption of Directive 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, OJ L 21, 28.1.2015, pp. 1–3.

66. Commission recommendation of 6.12.2012 on aggressive tax planning C(2012) 8806 final: “*An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored.*” The distinction between main purpose and essential purpose or even sole

law. At first sight, the wording of the PPT test in the OECD Action 6 Report appears similar to those two European GAARs, which are inspired by the CJEU Cadbury Schweppes case-law.⁶⁷ However, a more careful analysis shows that there are some fundamental differences due to the different legal contexts where those provisions arise, which could severely undermine the compatibility of the PPT clause under EU law.

A first issue concerns the “object and purpose” of the PPT clause itself, in the light of the nature of tax treaties. By adopting a PPT clause, contracting states send a very ambiguous message to taxpayers: the DTT benefits are accessible unless taxpayers intend to obtain the DTT benefits. In other words, there is a presumption that where the taxpayers acted so as to obtain the benefits, they are not in line with the object and purpose of the DTT provision at stake. It is the snake that bites its own tail, and this is caused by the fact that the “object and purpose” of the provisions of tax treaties, besides reducing the tax burden of cross-border activities, is not clearly defined.

Hence, the effectiveness of the clause depends on the definition given the aims of the convention, beside the traditional ones such as the fight against double taxation. Nevertheless, it is quite difficult to find in the DTT a different purpose to justify a disapplication of taxation on transnational incomes, as stated in the PTT clause. So, the application of a such open general anti-abuse clause, as the PPT is, may significantly depend from the interpretation of national judges and tax administrations. Moreover, the integration of the PTT clause in the treaty against double taxation may create uncertainty and reduce the efficacy of the DTT itself.

Indeed, in order for the proposal to be effective, it should be based on a broader definition of the objectives of the convention. However, if these do not correspond to the traditional ones, to eliminate double taxation, which are already corresponding to the DTT, it is difficult to imagine other purposes and principles of the agreement. Hence, the agreements that can determine, as required by the formulation of the PTT, a disapplication of the conventional rules for cross-border income. Therefore, the risk is that the application of a general anti-abuse clause with such a broad purpose, such as a PTT, could be left to the interpretation and application of national administrations to national judges, resulting in divergences in application. Hence, the risk that a fight so integrated into abuse, such as that proposed to integrate the PTT penalty in international agreements, will become a cause of recurrent uncertainty that risks jeopardizing the traditional effectiveness of the conventions themselves. (?)

A second issue in the perspective of EU law is the subjectivity and lack of clarity of the PPT clause. It relies on the “reasonable” determination and ranking by the administration of the reasons behind a transaction that directly or indirectly resulted in the obtaining of a DTT benefit. This reliance on the discretionary appreciation of the administration creates too much insecurity to be suitable to the general principle of legal certainty of EU law.⁶⁸ The CJEU in the cases SIAT and Itelcar⁶⁹ held that rules of law, especially where they may have unfavourable consequences for taxpayers, must be clear, precise and predictable. In its current wording, it is unlikely that the OECD PPT clause would meet the EU requirement of legal certainty.⁷⁰ Moreover, according to the CJEU case-law, the burden of proof imposed on the taxpayer shoulders, i.e. establishing that the granting of a benefit would be in accordance with the object and purpose of the convention, seems disproportionate to the objective of combating abuse, since the tax authority is not “required to provide even prima

purpose in also to be found in the VAT case of the CJEU on abuse of rights (see CJEU Case C-653/11, Newey, [2013], ECLI:EU:C:2013:409, para 46 and the case-law quoted). For an analysis of the GAAR recommended by the Commission in 2012 and the relationship with BEPS, see DOURADO, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, para 3.3, *op. cit.*, pp. 42–57.

67. CJEU, Case C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas, [2006], ECLI:EU:C:2006:544, para. 62.

68. See also Case C-175/88, Klaus Biehl v Administration des contributions du grand-duché de Luxembourg, [1990], ECLI:EU:C:1990:186, para 18.

69. CJEU, Case C-318/10, SIAT, [2012] ECLI:EU:C:2012:415 and Case C-282/12, Itelcar, [2013], ECLI:EU:C:2013:629, para 44.

70. See PANAYI, *Advanced Issues in International and European Tax Law*, *op.cit.*, Kindle Location 230.

facie evidence of tax evasion or avoidance.”⁷¹ How could the taxpayer know better than the tax administration the object and purpose of the provisions he or she is in principle entitled to use? Moreover, it seems rather strange to speak of “benefits” of the convention, as if the application of mutually agreed general rules was a “favour” or a “privilege” granted to “virtuous” taxpayers. So as to enhance legal certainty and relieving taxpayers from such an *onus probandi*, the European Commission has recommended to Member States not to implement as such the OECD PPT clause, but to allow taxpayers to benefit from tax treaties whenever they would establish that they are acting in the course of a “genuine economic activity.”⁷² This addition is certainly welcome, but it would have been better in order to be more in line with the CJEU case-law to shift more clearly the burden of proof on the tax administrations, that should demonstrate in the light of objective factors that the taxpayers had engaged into (wholly) artificial arrangements.

5. Conclusion

The fight against tax avoidance and aggressive tax planning appears to be now the thriving force of EU tax policy, and the OECD BEPS Action Plan has certainly reinforced this trend. As a consequence, Internal market concerns, although still not completely out of the radar, seem to come in a second place. The best example is the CC(C)TB project, aiming at harmonizing the corporate tax base and possibly consolidating it on an EU-wide basis. After having been put on hold for years,⁷³ the Commission has announced that it would adopt a staged approach (first, common tax base with cross-border losses relief, then consolidation, with no clear timeline as regards the second phase).⁷⁴ But even before opening the public discussion on those common corporate tax rules, the Commission released the Anti-avoidance Tax package, which it presented as a necessary preliminary to a revised CCCTB proposal.⁷⁵ And –even if there are probably sound policy reasons to proceed like this–, one could question the relevance for the Internal market of adopting a directive which almost exclusively contain anti-avoidance measures to be implemented by Member States in order to protect their domestic tax base. Certainly, the author could agree with the Commission when it says that a EU-directive on Tax avoidance “will ensure a coherent EU approach to implementing the new international standards arising from the OECD BEPS project, providing consistency for businesses and preventing a fragmented approach in the Single Market.”⁷⁶ Nevertheless, doubt can be raised as to additional domestic anti-avoidance measures –even following a common structure agreed at the EU level– would not contribute to more fragmentation, hindering (genuine) cross-border activities. The attempt to harmonize anti-avoidance rules only, without coupling it with the harmonization of substantive rules, may also raise concerns as to the competence of the European Union to do so. Indeed, article 115 TFUE confers powers to the Council to “issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.” Moreover, such directives should comply with the subsidiarity and proportionality principles laid down at Article 5 TEU. It appears legitimate to raise the question whether all the measures proposed in the Anti-Tax Avoidance Directive would help to attain the objective of the achievement of the Internal market, and

71. CJEU, Case C-318/10, SIAT, [2012] ECLI:EU:C:2012:415, para. 55.

72. Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271.

73. The original CCCTB proposal was presented in 2011. European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2011/0121..

74. European Commission, Communication of 17 June 2015, “A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action,” COM (2015) 302, p. 8.

75. European Commission, Communication of 17 June 2015, “A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action,” COM (2015) 302, p. 9: “While the new proposal is being prepared, work must continue in the framework of the proposal currently on the table of the Council on some international aspects of the common base which are linked to the BEPS project (...). Consensus on these elements should be achieved in the Council within 12 months, and should be made legally binding before an agreement is reached on the revised CCCTB.”

76. Ibidem, p. 9.

whether their adoption at the EU level would meet the subsidiarity and proportionality criteria. Even if such an analysis should be distinct for each of the measures proposed, it is particularly relevant for the general anti-abuse rule of article 6, which also applies to domestic situations regulated by otherwise purely domestic provisions.

In conclusion, if the evolution of the content and interpretation given to the concept of abuse of rights may be welcomed as it embodies a truly EU and not merely national approach, one should beware of the fact that it could at the same time undermine the very reason of EU tax integration, i.e. the abolition of fiscal borders, in particular international double taxation.

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