UNIVERSIDADE CATÓLICA PORTUGUESA

Faculdade de Direito da Universidade Católica Portuguesa

Escola de Lisboa

Is the Anti-Tax Avoidance Directive's (ATAD's) General Anti-Abuse Rule (GAAR) in line with the ECJ case law?

Master in Tax Law

Isabella Coelho Paes Barreto

Written under the supervision of

Professor **Bruno Aniceto da Silva**

CATÓLICA tax

Lisbon, 10 September 2018

Table of Contents

Acknowledgements:

To those who paved the way before me, and upon whose shoulders I stand.
To my parents, for opening the world to me, for valuing my education and for loving me always. To my twin sister, my other half, my traveling companion and my best friend.
To Mara, for always pushing me forward. And to Niña for the incomparable amounts of love.
Thank you all for getting me here.

This is also dedicated to the many friends who walked alongside me on this journey.
Unable to come up with a full list of all the people who have helped, I will but name a few.
To Inês Santana Metello, the very best person I know. I'm lucky to have you in my life.
To Miguel Verissimo, Inês de Castro, Polyana Yazaki, Carolina Ribeiro, and all the others who helped me along the way. I wouldn't have managed without your support.

To the extraordinary teachers who taught me that we should never stop learning. A special mention to João Taborda Gama, who made me not only understand, but also utterly enjoy Tax Law.

Last but not least, I would also like to express my deepest gratitude to my supervisor Bruno da Silva, for his unwavering support and patience throughout this endeavor. Thank you, truly.

"I blame all of you. Writing this book has been an exercise in sustained suffering. The casual reader may, perhaps, exempt himself from excessive guilt, but for those of you who have played the larger role in prolonging my agonies with your encouragement and support, well…you know who you are, and you owe me." - BRENDAN PIETSCH

Abstract

A new general anti-abuse rule (GAAR) has been adopted as part of the Anti-Tax Avoidance Directive of 12 July 2016 (ATAD), and will likely have worldwide implications regarding the way companies operate and structure their businesses.

This dissertation intends to expose and develop the relationship between this new GAARs' treatment of abuse and the one forged by the European Court of Justice throughout the years. Throughout this endeavor several questions are raised about abuse, its prevention, the methods used and their efficiency. Thus, first this study sets out to highlight the difficulties of interpreting the concept of abuse of (tax) law, as well as the doctrine that was built around it throughout the years. Subsequently it exposes the role of abuse (and measures taken to prevent it) within the European Union legal order, as well as those based on the jurisprudence of the European Court of Justice – further detailing the onus regarding the burden of proof. Finally, part III establishes a recent trend towards mandatory GAAR codification by exposing the traditional approach taken up until this point, as well as a critical analysis of the scope, requirements and legal consequences related to the ATAD's GAAR.

Abbreviations

ATAD	Anti-Tax-Avoidance Directive
GAAR	General Anti-Abuse Rule
SAAR	Special Anti-Abuse Rule
ECJ	European Court of Justice
n.º	Number
§	Paragraph
§§	Paragraphs
BEPS	Base Erosion Profit Shifting
OECD	Organization for Economic Co-operation and Development
p.	Page
pp.	Pages
EU	European Union
EC	European Commission
CIRC	Código do Imposto sobre as Pessoas Coletivas
CFC	Controlled Foreign Companies
Co.	Company
PSD	Parent Subsidiary Directive
IRD	Interest and Royalties' Directive
MD	Merger Directive
Art.	Article
vol.	Volume
C-	Case

et seq	And following
v.	Versus
Dr.	Doctor
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
VAT	Value added tax
AG	Advocate General
i.e.	For example
FATCA	Foreign Account Tax Compliance Act
CRS	Common Reporting Standard
CbcR	Country-by-country Reporting
MLI	Multilateral Instrument, also known as Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Introduction

A State's power to tax comes from the notion that, as one can imagine, governmental authority is inconceivable without the existence of public funds. Thus, this power is not an end in itself, but a means to ensure the sovereignty of the State - both domestically and internationally - by asserting the means to protect its people and itself.

This limitation of the Member State's national power of taxation was imposed by the fundamental freedoms and non-discrimination clauses determined in the Treaty that established the European Community[1] and, albeit it was not without grievances, an understanding over limits to this restriction is slowly being created through several rulings.

In line with the *Schumacker*[2] ruling, the ECJ established - in rulings such as *Verder LabTec*[3] - that:

> *"(...) it should be borne in mind, first, that the preservation of the balanced allocation of powers of taxation between Member States is a legitimate objective recognized by the Court, and that, in the absence of any unifying or harmonizing measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation".*

In the *Brisal*[4] ruling the Court also expanded on the fact that in some cases, the restriction to fundamental freedoms may be justified for reasons of public interest, such as that of effective tax collection – as long as the aim pursued does not go beyond what is necessary for that purpose.

Other traditionally accepted justifications include the prevention of tax fraud and evasion, ensuring the effectiveness of fiscal supervision[5], as well as maintaining the

---

[1] Treaty 2002/C 325/01.
[2] ECJ, *Schumacker*, C-279/93, 14 February 1995, §§ 21 and 24.
[3] ECJ, *Verder LabTec,* C-657/13, 21 May 2015 §32.
[4] ECJ, *Brisal*, Case C-18/15, 13 July 2016, §39. See also ECJ, *FKP Scorpio Konzertproduktionen*, C-290/04, 3 October 2006, §§ 35 – 36.
[5] *i.e*. ECJ *Baxter and Others*, C-254/97.

coherence of the fiscal system[6]. In fact, this remains an important topic given that direct taxation is still an essential pillar of Member States' power of purse.

In any case, seeing as companies are rational economic agents, they will perform their actions with the optimal expected outcome in mind. Thus, they choose structures that limit their exposure to taxes – which, seen from an accounting perspective, represents a cost like any other.

In this globalized world, faced with a non-harmonized system and with imperfect laws[7], it is nearly impossible to avoid that companies try to mitigate their tax burden through tax planning. The problem, however, emerges when the line is crossed into tax evasion, and abuse.

Though the prevention of these practices has been frequently encouraged and recognized as an objective, both by Article 13 (B) of the Sixth Directive and by the ECJ, the phenomenon of tax-evasion is familiar to all tax systems. In fact, legal definitions of these terms – where they exist – are so different from State to State, that it is necessary to discover the structural and functional elements of tax abuse and to individualize the principles common to the various legal traditions in order to define this abuse and prevent it

Considering the above, and the alterations the ATAD may bring, this dissertation seeks to answer the question of whether the Anti-Tax Avoidance Directive's General Anti-Abuse Rule is in line with the ECJ case law.

In order to properly develop this topic and its underlying questions, this dissertation will be composed of three main parts:

The first part will develop the issue regarding the different concepts of abuse, which include the problems linked to the interpretation of International / European provisions in general, as well as the doctrine of abuse that was slowly forged throughout the years.

---

[6] *i.e.* ECJ, *Bachmann*, C-204/90; ECJ, *Commission v. Belgium*, C-300/90.

[7] Which is partly due to the fact that big businesses became global enterprises whereas tax authorities continued to operate through national frameworks, never grasping the global picture. It was only after the banking crisis in the United States of America that some of these operations were exposed as fundamentally unfair.

The second part specifically focuses on the abuse of tax law within the European Union, diving into the different measures taken to prevent tax evasion both from the European institutions (within the legal system) and by the ECJ, focusing also on the issue regarding the burden of proof.

Lastly, in our third part, we will analyze the general anti-abuse rules in their traditional approaches (up until now) and the novelty of the ATAD's GAAR, diving further into the legal consequences of non-compliance.

I - Different Concepts of Abuse

1. Problems of interpretation

Since the ECJ operates in a multi-language contest, the rules have to be translated in over 20 different national idioms[8]. This linguistic issue represents a complex problem, which should be analyzed from different points of view[9].

Though the definitions are not harmonized, - varying from country to country[10], and even from author to author[11] - the starting point is necessarily the recognition that there are several ways to reduce someone's (or somethings') tax liability. Among these acts, some are *intra-legem*, some are *extra-legem*, and some live in limbo.

---

[8] Here we use the term "Idioms" instead of "languages", because though some Member States share the same official language, the discrepancy in expressions is enormous.

[9] As was articulated by ANDREJ GLEZL in his article *Lost in Translation: EU Law and the Official languages – Problem of the Authentic Text,* Centre for European Legal Studies, University of Cambridge, 2007, pp. 1-11: "*In Anglo-Saxon countries tax avoidance is different from tax evasion. In France and in Belgium, tax avoidance is évasion, while tax evasion is fraude fiscal. However, Tax evasion is the Spanish evasión fiscal and the Portuguese evasão fiscal; while tax avoidance is respectively elusion fiscal and elisão fiscal"*.

[10] Which some authors recognize as political compromises in the use of vague terms, as seen BENES, Jan. *Translation of Terminology in EU Legislative Texts*, Bachelor's Diploma Thesis, Masaryk University, 2008, p. 1.

[11] As recognized early on by Portuguese professor SÁ GOMES, NUNO, *Lições de Direito Fiscal*, volume 2, Lisboa: FDUL, 1984, pp. 143 et seq.

Tax planning, the most known of these institutes, has several possible definitions. However, unable to explain (or expand on) all of them at the moment, in this dissertation we have sided with Portuguese Professor SALDANHA SANCHES'[12] doctrine regarding this particular act*:* [Free translation] "*tax planning consists on a tax reduction technique by which either the taxpayer avoids a certain behavior seeing as it is associated with an undesired tax liability, or he chooses, among several options provided by the legal order the one which, through intentional action or through the legislator's omission, offers the less tax burdens*". This is seen by the author as the exercise of an economic freedom (incumbent to all taxpayers) but subject to restrictions.

Tax avoidance, on the other hand, (also known as "aggressive tax planning") consists on bypassing the law without directly infringing it – *fraus legis.* It implies using the law to obtain a tax advantage that the government never intended (but merely did not foresee) so as to minimize the (taxpayers') tax burden[13]. Considering the economic globalization that has expanded in the last century, it is important to note that in cross-border situations, tax avoidance is made possible by the regulatory competition that exists among national tax systems. Given that the power to levy taxes remains with the Member States, the latter are allowed to "*organize, in compliance with Community law, its system of taxation of distributed profits and, in that context, (...) define the tax base, as well at the tax rates which apply to the company making the distribution and/or the shareholder to whom the dividends are paid, in so far as they are liable to tax in that State*", as stated in the ECJ's ruling Test Claimants in Class IV of the ACT Group Litigation[14].

As explained by Professor KOEN LAENARTS[15]:

---

[12] SANCHES, SALDANHA, *"Os limites do planeamento fiscal, Substância e forma no Direito fiscal português, comunitário e internacional*", Coimbra, Coimbra Editora, p. 21: "*O planeamento fiscal consiste numa técnica de redução da carga fiscal pela qual o sujeito passivo renuncia a um certo comportamento por este estar ligado a uma obrigação tributária ou escolhe, entre as várias soluções que lhe são proporcionadas pelo ordenamento jurídico, aquela que, por acção intencional ou omissão do legislador fiscal, está acompanhada de menos encargos fiscais*".

[13] It usually involves artificial arrangements that serve no other purpose than to reduce the tax liability of the Company – but is in compliance with the law.

[14] ECJ, *Test Claimants in Class IV of the ACT Group Litigation*, Case C-374/04, § 50. See also ECJ Test Claimants in the FII Group Litigation C-446/04, §47.

[15] In LENAERTS, KOEN. *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 (MJ), 2015, p. 330.

"As Member States apply different income and corporation taxes, a natural (or legal) person may decide to exercise an economic activity in a Member State other than his of her (or its) state of residence so as to profit from tax advantages".

Furthermore, as stated several times in ECJ case law[16]: "*[An EU] national cannot be deprived of the right to rely on the provisions of the treaty on the grounds that he is profiting from tax advantages which as legally provided by the rules in force in a Member State other than his state of residence*".

However, it is also clear that an EU national must not attempt to undermine the effectiveness of a Member State's tax system by circumventing their national legislation to fraudulently benefit from EU laws. In fact, this notion was clearly stated in *Centros*[17], and reinforced in several others ever since[18].

It is important to highlight that this is different from what we call tax planning, since trying to pay minimal tax is not necessarily a sign of avoidance.

Furthermore, tax avoidance is different from tax evasion, as the latter is the criminal practice of using illegal methods to avoid paying taxes. In fact, tax evasion is usually considered a subset of tax fraud, which occurs when an individual (or business) wilfully and intentionally falsifies information in order to limit the amount of tax liability.

Tax fraud essentially entails cheating on a tax return in an attempt to avoid paying the entire tax obligation. Examples of tax fraud include claiming false deductions; claiming personal expenses as business expenses; and not reporting income.

---

[16] Among others, ECJ, *Barbier* C-364/01, §71.
[17] ECJ, *Centros*, C-212/97, 9 March 1999, § 24.
[18] See, in particular, regarding freedom to supply services, ECJ, *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid,* C-33/74, 1974, § 13, ECJ, *Veronica Omroep Organisatie* v *Commissariaat voor de Media,* C-148/91, 1993, § 12, and ECJ, *TV 10* v *Commissariaat voor de Media,* C-23/93, 1994, § 21; regarding freedom of establishment, ECJ, *Knoors,* C-115/78, 1979, § 25, and ECJ, *Bouchoucha,* C-61/89 1990, § 14; regarding the free movement of goods, ECJ, *Leclerc and Others* v *'Au Blé Vert' and Others,* C-229/83, 1985, § 27; regarding social security, ECJ, *Brennet* v *Paletta,* C-206/94, 1996; regarding freedom of movement for workers, ECJ, *Lair* v *Universität Hannover,* C-39/86, 1988, § 43; regarding the common agricultural policy, ECJ, *General Milk Products* v *Hauptzollamt Hamburg-Jonas,* C-8/92, 1993 § 21; and regarding company law, ECJ, *Kefalas and Others* v *Greece*, C-367/96, 1998, § 20.

Tax evasion, though related, is usually more complex than tax fraud and it was to define it that the ECJ developed the notion of "abuse of law"[19].

Abuse, for its part - even in its most colloquial use - refers to the improper use of something. Just as well, what is called tax abuse, is nothing but the improper use of tax law[20].

Furthermore, an important distinction must be made between:

Abuse of Law, which indicates abuse in Community law: the object of abuse is a *norma agenda* belonging to a national fiscal system, which the taxpayer circumvents through a mistreatment of Treaty dispositions[21]; and Abuse of Rights[22], which for its part, indicates abuse of Community law: the object of abuse is a *facultas agendi* provided by a Community Directive.

> *"In rough terms the abuse of law is characterized by the misuse of provisions or rules either of the domestic or international systems to achieve improper benefits i.e. the use of those provisions or rules in a way that is not fully adherent with the rationale behind them. In this sense, the progressive evolution of the concept of abuse is a reaction against the absolute character of the statutory rights (and in particular, of the rights of property) during the later Empire Roman era*[23]*".*

Albeit the above, abuse is still a fragmented term that carries different meanings for different authors. In fact, authors like KIEKEBELD have proposed a unique notion of "tax

---

[19] DE LA FERIA, R., VOGENAUER, S. *Prohibition of abuse of (community) law: a New General Principle of EU Law?*, Oxford, Hart publishing, 2011.

[20] Such as tax evasion.

[21] It is, for instance, when a person seeks to rely on a European legal right to circumvent or displace national law.

[22] The ECJ recognizes the full and proper construction of the European right upon which a person wishes to rely, but prevents to utilize in any event. An example of this is when a person seeks to take advantage of a right in European law, but in a manner running against its spirit.

[23] BIZIOLI, GIANLUIGI, *Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive take precedence over the single market?,* EC tax review, (2017-3) pp.170, where he also mentions in footnote 17 that: "in this sense, the progressive evolution of the concept of abuse of law is a reaction against absolute character of the statutory rights (and, in particular, of the right of property) during the later Empire Roman era. '(…) it is in the same interest of the owner not to refuse help in case a slave is maintained in a condition of starvation, famine or subject to disproportionate work'.".

avoidance"[24] (which we refer to in this dissertation as evasion), but not having been adopted, intermediate approaches have had more success, such as that argued by VANISTENDAEL[25], which, after having compared the *Halifax* and *Cadbury Schweppes* rulings, concludes that both decisions have an identical "reasoning" if only different perspectives. The author notes that one of the biggest differences between the two rulings is that in Halifax the Court leaves some leeway for the national tax authorities to establish whether the tax motive is "essential" or not, whereas in *Cadbury Schweppes* the ECJ categorically determines that when the cross-border economic reality of the transactions are established, there can be no tax avoidance [evasion] and the goal of achieving a tax advantage has no importance.

Some other authors, for their part, even believe that the prohibition of abuse is a full and true principle[26].

Now that we have exposed the main problems of interpretation, as well as defined the terms that will henceforth be used in this dissertation, we will now provide a brief account on the evolution of the doctrine of abuse.

2. The Doctrine of Abuse

The doctrine built around the abuse of rights, found in different measures in the Civil Law jurisdictions, refers to the malicious or antisocial exercise of otherwise legitimate rights, which in certain situations can give rise to civil liability[27].

[24] As seen in NOGUEIRA, JOÃO FÉLIX PINTO, *Abuso de Direito em Fiscalidade Directa – a emergência de um novo operador jurisprudencial comunitário*, Revista da Faculdade de Direito da Universidade do Porto, Coimbra Editora, Coimbra, 2009, p. 280.
[25] VANISTENDAEL, FRANS, *Halifax and Cadbury Schweppes; one single European theory of abuse in tax law?*, EC Tax Review, n.º 4, 2006, p.195.
[26] MARTÍN JIMENEZ, A. *Towards a homogeneous Theory of Abuse in (Direct) Tax Law*, IBDF, Bulletin for International Taxation, April/May 2012 pp. 270-292.
[27] REID, ELSPETH, *The doctrine of abuse of rights: Perspective from a Mixed Jurisdiction*, Electronic Journal of Comparative Law, volume 8 n.º 3, October 2004, p. 1.

The doctrine of abuse was not originally defined by the ECJ, but slowly came into existence in certain passages, such as in *Van Binsbergen*[28], *Kefalas*[29] and *Centros*[30].

Specifically, the ECJ established in *Van Binsbergen* that:

> *"a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article [56 TFEU] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state*[31] *"*.

The ECJ later made clear that this line of reasoning did not imply that Member States had a free pass to indiscriminately (and unjustifiably) apply their own national anti-abuse provisions.

However, as hinted above, what is considered abusive by some may not be acknowledged by others, which is why scholars have not yet been able to answer the question of whether we can speak of just one concept of abuse in tax law according to the ECJ's case law.[32]

In fact, what is considered evasion in one country may be considered legitimate tax planning in another (as certain behaviors may approach fraud in northern countries and yet be acceptable in southern countries without much of a fuss). As Professor JOÃO FELIX NOGUEIRA, Portuguese scholar, has noted[33], this poses serious threats to the internal market[34]. Albeit the fundamental freedoms are ensured, an individual that conducts business in several Member States may see his activity labeled as fraudulent in one of them if that State adopts a wider definition of abuse.

---

[28] ECJ, *Van Binsbergen*, C-33/74, 3 December 1974.
[29] ECJ, *Kefalas*, C-367/96, 12 May 1998, §21-22.
[30] ECJ, *Centros*, C-212/97, 9 March 1999, §27.
[31] ECJ, *Van Binsbergen*, C-33/74, 3 December 1974, §47.
[32] PIANTAVIGNA, PAOLO, *Tax Abuse in the European Union Law: a Theory,* EC Tax review, 2011-3, p. 145. See also AG Poiares Maduro's Opinion on the *Halifax* ruling §71.
[33] See NOGUEIRA, JOÃO FÉLIX PINTO, *Abuso de Direito em Fiscalidade Directa – a emergência de um novo operador jurisprudencial comunitário*, Revista da Faculdade de Direito da Universidade do Porto, Coimbra Editora, Coimbra, 2009.
[34] Seen as a borderless space in which free circulation of goods, services, and capital are ensured.

In an attempt to harmonize said practices, the ECJ has been gradually adopting a notion of "abuse" related to its own concrete case-law and, through the progressive generalization of its formulas, has forged a real general doctrine of abuse. Hence, through the ECJ's way of thinking and re-thinking its modus operandi, we can infer the existence of a guideline.

However, by using some of these expressions in an interchangeable way, the ECJ makes the concept of abuse far from being clear[35]. As stated by Professor Pasquale Pistone[36]:

> *"There is a long way to go to achieve a common understanding of abusive practices for the purposes of European tax law, as well as to ascertain what exactly should be regarded as artificial arrangements, what relations exists for European law between abuse and respectively avoidance and evasion, as well as to overcome linguistic discrepancies contained in the text of the communication and in most decisions of the European Court of Justice".*

Furthermore, as was so properly described in Point (2) of the ATAD's Preamble: *Only a common framework could prevent fragmentation of the market and put an end to the currently existing mismatches and distortions"* - which is why we should use hermeneutical canons more cautiously and fine-tune new modern techniques to finally precise the aforementioned concepts.

Moreover, the European Commission has issued recommendations on how to implement measures to avoid the abuse of tax treaties.

In fact, tax treaties play an important role in forging international relations and facilitating trade and its efficiency. These treaties, however, should not give way to non-taxation or to unjustified reduced taxation, which is why the European Commission has lend its full support into tackling tax treaty abuse. Thus, following the discussions and release of the BEPS report by the OECD (Organization for Economic Co-operation and Development) - in particular Action 6, which identifies tax treaty abuse (among others, focusing on treaty

---

[35] A good example of this is the ECJ, *Elisa* ruling, C-451/05, of 11 October 2007: in §§ 80 and 91, the expressions in the Italian, Portuguese, Spanish and Danish versions mean tax fraud, whereas in the English, French and German versions the expressions refer to tax evasion.

[36] PISTONE, PASQUALE *Ups and downs in the case law of the European court of justice and the swinging pendulum of direct taxation*, Intertax, volume 36 n.º 4, 2008, p. 152.

shopping) - the report recommends the inclusion of a general anti-abuse rule based on a principal purpose test (PPT) of transactions or arrangements.

It is also essential for the smooth functioning of the internal market that the Member States be able to efficiently operate tax systems and prevent the undue erosion of their tax bases due to inadvertent non-taxation and abuse. Additionally, they should implement solutions to protect their tax bases from creating undue mismatches and market distortions.

It was from these incentives that was born the new general anti-abuse rule in the current ATAD.

II - Abuse of Tax Law within the European Union

1. Measures taken within the Legal Order

The ECJ has consistently held that "*community law does not preclude a Member State from adopting, in the absence of harmonization, measures designed to prevent the opportunities created under the Treaty from being abused in a manner contrary to the legitimate interest of the State"*[37].

With taxation remaining predominantly within the sovereign responsibility of the Member States, only limited competence has been assigned to the EU. As such, only indirect taxes have been harmonized (in particular VAT and capital taxes) and the power to regulate direct taxation remains largely with the Member State – which severely hinders the ideal of someday having a true single market in the EU, seeing as the EU decisions on tax matters require unanimous agreement by all Member States[38].

---

[37] DE BROE & BECKERS, LUC AND DORIEN, *The General Anti-Abuse Rule of the Anti-tax avoidance Directive*, EC Tax Review, 2017-3; See also the following rulings: ECJ, *Knoors* C-115/78 §25; ECJ, *Bouchoucha*, C-61/89 §13 ; ECJ, *Kraus* C- 19/92; and ECJ, *Paletta*, C-206/94 which shows, in its §24 that "*the Court has consistently held that Community law cannot be relied on for the purposes of abuse or fraud*".

[38] TEIXEIRA, GLORIA, *Manual de Direito Fiscal*, 3ª edição, Almedina, Coimbra, 2015, p. 385.

Today it is undeniable that taxpayers should be allowed to, within the legal structure, manage their business and orient their decisions in the way they deem more favorable to their interests. In fact, *tax planning* is foreseen under EU case law both in the *Halifax & Others* ruling[39], in *Cadbury Schweppes*[40], and in several other renowned abuse-related rulings[41].

Thus, the concern is whether the operation was structured within the legal tax-frame, not only according to the legislative text, but also in line with its spirit – in line with the objective in which the law was approved.

LUC DE BROE and DORIEN BECKERS have stated[42] that the prevention of tax evasion appears under EU law in three forms: (1) as a justification ground potentially capable of justifying direct tax restrictions of the fundamental freedoms; (2) as an authorization in tax directives for the Member States to enact anti-abuse measures ; and (3) in the field of VAT (and other indirect taxes) as a purpose-oriented interpretation method in order to delineate the (non-abusive/proper) scope of the subjective right invoked by the tax payer. However, we believe that there is a fourth form in which the prevention of tax evasion may appear: through General Anti-Abuse Rules, which we will develop on further below.

Considering the above, it is now known that the EU has embarked in an ambitious tax reform agenda to ensure fair and effective corporate taxation in the Single Market. In order to go forward with this agenda, and given the global nature of aggressive tax planning and harmful tax competition, Member States have called for a harmonized approach to address external challenges to their tax bases.

---

[39] ECJ, *Halifax & Others,* §75: *"(…) As the Advocate General observed in point 85 of his Opinion, taxpayers may choose to structure their business so as to limit their tax liability."*
[40] ECJ, *Cadbury Schweppes* §37: *"As to freedom of establishment, the Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favorable legislation does not in itself suffice to constitute abuse of that freedom".*
[41] Such as ECJ, *Centros,* C- 212/ 97, 9 March 1999, *§* 27, and ECJ, *Inspire Art,* C-167/01, 30 September 2003, §96.
[42] In DE BROE, L. & BECKERS, D. *The General Anti-abuse Rule of the Anti-tax avoidance Directive,* EC Tax Review, volume 3, 2017.

In accordance to the Communication from the Commission to the European Parliament and the Council on an external strategy for effective taxation[43], currently, effective taxation regarding third countries is mainly tackled through national anti-evasion measures, which tend to vary considerably from country to country. Among the different national approaches are specific provisions for transactions that occur with low/no tax jurisdictions; black, grey and white lists; and even case-by-case anti-abuse provisions – however, even the basis used to decide which jurisdictions should be subject to these measures differs from one Member State to the next.

Nonetheless, as Member States try to coordinate their approaches and corporate tax policies within the Single Market, in order to ensure effective taxation and counter-act abusive tax practices, they still need to address their divergent approaches to tackling external BEPS threats. In fact, certain taxpayers / businesses exploit legal loopholes and mismatches between Member States' defensive measures to shift profits out of the Single Market, untaxed.

Additionally, seeing as the diversity in approaches sends mixed messages to international partners about the EU's tax governance expectations and creates doubts about when defensive mechanisms will be triggered, companies face legal uncertainty and unnecessary administrative burdens when addressing third countries' tax systems. A coordinated EU external strategy on tax good governance is therefore essential to boost Member States' collective success in ensuring an effective taxation, tackling tax-evasion, and creating a clear and sustainable environment for businesses to operate in the Single Market.

In light of the above, the official communication identifies a set of measure which are vital to promote good tax governance and tackle the erosion of the tax base due to profit shifting.

Among other measures, the European Commission proposes the re-examination of good governance criteria, such as increased tax transparency and fairer tax competition.

[43] European Commission, *Communication from the commission to the European parliament and the council on an External Strategy for Effective Taxation*, COM (2016) 24 final, Brussels, 28.01.2016.

In order to fulfill these criteria, the European Commission has taken strides to apply and enforce the new automatic exchange of information global standard, and the OECD's BEPS project.

Furthermore, another step in the right direction would be the enhancing of good tax governance cooperation through agreement with third countries.

Needless to say that this is essential to manage any positive stride towards the avoidance of tax abuse. In fact, even if all the Directives, recommendations and projects mentioned above were to be successfully applied, Third Countries could still offer companies enough room for abusive practices. Indeed, to establish no dialogue and maintain no treaties with countries outside the EU could give place to massive corporate delocalization, which would not only devastate the European economy but also create massive unemployment.

As mentioned above, in § 85 of AG POIARES MADUROS' Opinion regarding the *Halifax & Others* case law:

> *"(...) the Court has consistently held, in consonance with the position generally accepted by Member States in the tax domain, that taxpayers may choose to structure their business so as to limit their tax liability".*

Thus, if a Third Country were to offer better conditions to the companies at hand, they could chose to delocalize to that country, which would greatly impact Member States.

In the direct tax area, the EU has tried to establish some criteria to ensure the smooth operation of the Single Market – notably through the Parent Subsidiary Directive[44] (PSD), the Interest-Royalty Directive[45] (IRD), the Merger Directive[46] (MD), together known as the Corporate Tax Directives. However, up until the PSD was altered in 2015, these supposed GAAR's were but mere allowances for the Member States to utilize their national legislation.

[44] Council Directive 2011/96/EU.
[45] Council Directive 2003/49/EC.
[46] Council Directive 2009/133/EC.

In fact, the PSD's original general anti-abuse rules established but that *"This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse"*[47], which we may all agree is not a general anti-abuse rule.

With the implementation of Directive 2015/121/EU, Article 1 (2) of Directive 2011/96/EU was amended to include the following:

> *"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.*
>
> *4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse".*

This GAAR foresees many of the tests we will analyze later in this dissertation[48], among which (i) the principle purpose test; (ii) the conflict with object and purpose test; and (iii) the non-genuine / artificial reality test.

The 2015 Directive also added that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest by 31 December 2015.

In fact, the ECJ has, in many occasions stated that Member States have an obligation under Article 10 (currently Article 4 of the Treaty on the European Union) and Article 249 (now Article 288 of the Treaty for the functioning of the European Union) to adopt measures necessary to ensure that the objectives pursued by the Directive are deemed effective. In other

[47] Article 1 (2) of Council Directive 2011/96/EU of 30 November 2011.
[48] In Part III n.º 2.

words, Member States are under the obligation to prevent abuse of the EU law, and have the duty to apply and interpret it in the way most likely to give full effect to its objectives.

Moreover, seeing as EU law has a general priority over national law, the concepts of abuse under national law must comply with those established at the European level. Member States may establish overriding reasons in public interest, but in the end they will still have to demonstrate how the measure transposed will still be able to attain its objectives.

Considering the amount of companies who still try to benefit from legal loopholes and the complexities related to the steps required from the national tax authorities to identify abuse, the ECJ has become essential to the creation and (above all) clarification of the EU's understanding on the matter of abuse.

2. The ECJ's case law

For years, several rulings tried in vain to justify the importance of avoiding tax abuse as a matter worthy of temporarily infringing on fundamental freedoms[49]- but it was only with the *ICI*[50] ruling that the risk of tax abuse was considered by the Courts as a general interest motive. However, even then this justification was only allowed if the provision in question did not "*have the specific purpose of preventing wholly artificial arrangements, set up to circumvent (...) tax legislation, from attracting tax benefits*"[51].

However, it was only with the *Marks & Spencer*[52] ruling that tax evasion (in the sense considered in this dissertation, but referenced in the ruling as "avoidance") was accepted as a justification for tax measures to restrict fundamental freedoms, and only through the consideration justifications taken together.

Seeing as the ECJ clearly needed a method of analysis that could distinguish between the legitimate exercise of a fundamental freedom from those that give rise to abuse, it seized

[49] Such as ECJ, *Avoir Faire* C-270/83 §§ 23-25 and ECJ, *Biehl*, C-175/88 of 8 May 2001.
[50] ECJ, *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, C-264/96, 16 July 1998.
[51] ECJ, *ICI*, C-264/9, 16 July 1998 § 26.
[52] ECJ, *Marks & Spencer*, C-446/03, 13 December 2005, § 49.

the opportunity, in *Emsland Stärke*[53], to develop a test that would allow national courts to draw a distinction between the two situations.

To put the ruling into context, Emsland-Stärke GmbH was a German company who explored several consignments of potato-based products to Switzerland – for which it received an export refund for VAT purposes. However, the German authorities discovered that immediately after the goods were released at the Swiss customs for home use, the consignments in question were transported back to Germany (or to Italy), for which the authorities demanded that Emsland-Stärke pay back the refund. Legally, the company fulfilled the criteria for the export refund – in accordance with Commission Regulation (EEC) n.º 2730/79 on 29 November 1979[54] -reason why they challenged the decision. The issue facing the ECJ was whether, in the event of a purely formal exportation with the sole purpose of benefitting from the refund, the Commissions' regulation precluded the obligation to repay said refund. Thus, in §§ 51 to 53, the ECJ replied the following:

> *"The scope of [EU] regulations must in no case be extended to cover abuses on the part of a trader (Cremer, cited above, paragraph 21). The Court has also held that the fact that importation and re-exportation operations were not realized as bona fide commercial transactions but only in order wrongfully to benefit from the grant of monetary compensatory amounts, may preclude the application of positive monetary compensatory amounts {General Milk Products, cited above, paragraph 21).*
>
> *A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.*
>
> *It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established,*

[53] ECJ, *Emsland Stärke*, C-110/99, 14 December 2000.
[54] Which laid down common rules for the application of the system of export refunds on agricultural products.

inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country".

This was a ground-breaking ruling seeing as it was the first time a seminal judgment laid down the criteria for determining the existence of abuse in EU law. Notwithstanding the above, in this sentence the ECJ left open the question of whether this criteria would be extensible to the field of taxation. The answer to this only came in further rulings, such as *Halifax & Others*.

As a matter of fact, Halifax, a Banking company, wished to build new call centers in Northern Ireland. Following the tax planning scenario that was laid out by its advisors, the company was able to set up a series of transactions involving different companies from its Group, which allowed it to recover all the VAT paid in respect to the construction work for the aforementioned call centers. However, Halifax's VAT refund was denied by the British Tax Authorities on the grounds that the whole transaction was entered into solely to avoid VAT. Thus, the Court replied, that "*The fact nevertheless remains that the question whether a given transaction is carried out for the sole purpose of obtaining a tax advantage is entirely irrelevant in determining whether it constitutes a supply of goods or services and an economic activity"*[55]. The purpose does not matter as long as it fulfills the objective criteria on which the supply of goods and services and economic activity is based.

The Court concluded, in *Halifax & Others* the following position:

"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 (see, to that effect, Case 125/76 Cremer [1977] ECR 1593, paragraph 21; Case C-8/92 General Milk Products [1993] ECR I-779, paragraph 21; and Emsland-Stärke, paragraph 51)." And later "Preventing possible tax evasion, avoidance and abuse is an objective recognized and encouraged by the Sixth Directive" [56].

[55] ECJ, *Halifax*, C-255/02 § 59.
[56] ECJ, *Halifax*, C-255/02 §§ 69 and 71.

The Court did not, however, forbid tax planning, as it conceded that taxpayers can choose to structure their business so as to limit their tax liability[57] – such as was argued by AG POIARES MADURO in § 85 of his Opinion.

Thus, the ECJ laid down the following criteria:

> *"In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.*
>
> *Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, 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"*[58].

Here the *Emsland-Stärke* tests were somewhat modified as the objective test did not refer to a combination of objective circumstances and the subjective test did not refer to the artificial creation of circumstances[59].

If the subjective[60] and objective requirements above were met (being the transaction contrary to the purpose of the provision it is using to feign legality and essentially aimed at

---

[57] Which has been recognized in jurisdictions all around the world, including in the United Stated of America – the country championing judicial activism as the best method of countering tax avoidance. As referenced by VANISTENDAEL, Frans, *Is tax avoidance the same thing under the OECD Base Erosion and Profit Shifting Action Plan, National Tax Law and EU Law?*, Bulletin for international Taxation, volume 70 n.º3, 2016, pp.167: "in the famous case of *Gregory v. Helvering* (1934), Judge Learned Hand, the judge of the US Court of Appeals (USCA), emphasized that: *anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury, there is no patriotic duty to increase one's taxes*".

[58] ECJ, *Halifax*, C-255/02 §§ 74-75.

[59] PETROVITCH, Katrina *Abuse under the Merger Directive*, European Taxation, volume 50, nº 12, 2010, p.560; and DE BROE, Luc, *International Tax planning and prevention of abuse*, IBDF, 2008, p. 771-775.

[60] Though this subjective element if not explicitly referenced in the ruling due to severe criticism laid out to the Court before the issuing of its ruling. See AG Poiares Maduro's Opinion §§ 70 - 71. Indeed, for the

obtaining a tax advantage), the transaction would be considered an abuse practice and, in accordance to § 94, would have to be redefined in order to re-establish the situation that would have prevailed in the absence of the transactions constituting the abusive practice.

This was, naturally, a huge breakthrough in indirect taxation. The question remained, however, on whether the same rules applied to direct taxation (which, unlike VAT was not harmonized at the EU's level), until the ECJ's judgment on 12 September 2006 – commonly known as the *Cadbury Schweppes* ruling[61]. Dealing with controlled foreign companies ("CFC") rules – legislation which allowed the United Kingdom's Inland Revenue services to tax UK-resident parent companies who received profits from their foreign subsidiaries (provided certain criteria were fulfilled)[62] - the *Cadbury Schweppes* case offered the ECJ a chance to explain the expression "wholly artificial arrangements". The taxation of CFCs mentioned above came with a list of exceptions[63], amongst which the so-called "motive test", which required two cumulative criteria:

> *"First, where the transactions which gave rise to the profits of the CFC for the accounting period in question produce a reduction in United Kingdom tax compared to that which would have been paid in the absence of those transactions and where the amount of that reduction exceeds a certain threshold, the resident company must show that such a reduction was not the main purpose, or one of the main purposes, of those transactions.*
>
> *Secondly, the resident company must show that it was not the main reason, or one of the main reasons, for the SEC's existence in the accounting period concerned to achieve a reduction in United Kingdom tax by means of the diversion of profits. According to that legislation, there is a diversion of profits if it is reasonable to suppose that, had the SEC or any related company established outside the United*

AG, the intentions of the parties are only inferable from the artificial arrangements set up in light of objective circumstances. Arguably, the Halifax case law suggests that the objective factor may suffice to conclude on an abusive practice.

[61] ECJ, *Cadbury Schweppes*, C-196/04.

[62] *i.e.* in so long as the parent company owned over 50% shares of the subsidiary (CFC); the CFC be subject to a lower taxation rate in the Member State in which it was established (as explained in §§ 6 – 7); etc.

[63] ECJ, *Cadbury Schweppes*, C-196/04 § 8 to §11.

Kingdom not existed, the receipts would have been received by, and been taxable in the hands of, a United Kingdom resident".

Thus, the taxpayer had to effectively prove that the reduction of tax was not the main purpose, or one of the main purposes of the arrangement.

The Cadbury Schweppes case went on to set out very important guidelines (some of which were already in place for indirect taxation thanks to the Halifax case), such as the fact that setting up subsidiaries in other Member States in order to reduce the company's tax liability is not in itself considered abuse[64].

Furthermore, the ECJ acknowledged that the UK legislation on CFCs restricted the EU fundamental freedom of establishment seeing as it made it harder for companies with foreign subsidiaries than for companies with subsidiaries established in the UK. However, and as clearly stated in § 51:

> *"restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned* (…)[65]".

Hence, in order for such a restriction to be justified, the ECJ would have to examine the object of the freedom and conclude that its restriction would prevent the creation of a wholly artificial arrangement – which would distort the normal taxation of profits by not reflecting the entity's economic reality.

This measure shows, in many ways, the connection between the combat of tax evasion and the important task of safeguarding the balanced allocation of Member States' power of purse / power to tax.

Furthermore, another essential implication that can be grasped by Cadbury Schweppes is how much narrower its concept of abuse is, in relation to other ECJ rulings, such as *Halifax & Others*. It does, however, set at least some concrete criteria in its § 67:

---

[64] ECJ, *Cadbury Schweppes*, C-196/04 § 37-38.
[65] See also ECJ, *ICI,* C-264/96, § 26.

"[the finding of genuine economic activity] must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment".

Professor KOEN LENAERTS noted in his Article called *The concept of 'abuse of law' in the case law of the European Court of Justice on direct taxation* that[66]:

"(...) whilst in the former case [Cadbury Schweppes] the Court of Justice defined 'abusive practices' as 'wholly artificial arrangements', in the latter case [Halifax] it held that 'the essential aim of the transaction concerned is to obtain a tax advantage".

In later jurisprudence, such as in *Part Service*[67], the ECJ clarified the expression "essential aim of the transaction" in so far as it does not need the be "the sole aim":

"(...) the Sixth Directive must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue[68]*"* (our underlining).

By introducing the notion of principal purpose, instead of essential aim, some authors such as FRANS VANSTANDAEL[69] believe that at least for the interpretation of VAT rules the notion requires us to compare the motives as to their importance (in regards to the volume and importance of the tax advantage).

Hence, a national court may find there to be abuse even if valid economic reasons are also brought forth (i.e. marketing, organization, etc), as long as the principal aim was the evasion of tax.

---

66 LENAERTS, Koen, *The concept of 'abuse of law' in the case law of the European Court of justice on direct taxation*, MJ, 2015.
67 ECJ, *Part Service*, C-425/06, 10 March 2006.
68 ECJ, *Part-Service* C-425/06, 10 March 2006, §45.
69 VANISTENDAEL, FRANS. *Chapter 11: EU vs. BEPS: conflicting concepts of Tax avoidance*, EU LAW and the Building of Global supranational Tax Law: EU BEPS and State Aid, online book IBFD, 2017, p. 6.

Moreover, in recent direct tax rulings, such as *Societé de Gestion Industrielle S.A. (SGI) v. État Belge*[70], the objective test is not even mentioned – though arguably authors[71] accept that the aforementioned test is implied (seeing as the ruling explicitly refers to *Cadbury Schweppes*).

Furthermore, it is important to note how each Member State is free to choose the criteria used to determine the application of corporate law, be it related to the 'registered office', the 'central administration', or its 'principal place of business'. Similarly, in the absence of harmonization of direct taxation in the EU, Member States are free to determine the level of taxation it wishes to apply. Thus, unavoidably, a company may rely on its right to free movement in order to obtain a more favorable tax treatment in another Member State, in so far as the branch it registered in the latter carries out a genuine economic activity.

Finally, since the OY AA ruling[72] it seems that the ECJ has loosened the criteria for wholly artificial arrangements as, in accepting combined justifications[73], in OY AA the Court accepted a combination of 2 factors[74]: one concerning the safeguard of the balanced allocation of the power to tax, and two being the need to prevent tax avoidance [meant as evasion]. Then, it concluded that "*Conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory is such as to undermine the right of the Member States to exercise their tax jurisdiction in relation to those activities and jeopardise a balanced allocation between Member States of the power to impose taxes*" and further added that "*Even if the legislation at issue in the main proceedings is not specifically designed to exclude from the tax advantage it confers purely artificial arrangements, devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, such legislation*

[70] ECJ, *Societé de Gestion Industrielle S.A. (SGI) v. État Belge,* C-311/08, 21 January 2010.
[71] Such as PETROVICH, Katrina. *Abuse under the Merger Directive*, European Taxation, volume 50, nº 12, 2010, p. 560.
[72] ECJ, *OY AA*, C-231/05, 18 July 2007, concerning the Finnish group contribution system - where the ECJ held that by the "rule of reason principle", Finland had an overriding public interest in restricting the freedom of establishment.
[73] ECJ, *Marks & Spencer*, C-446/03, 13 December 2005.
[74] ECJ, *OY AA*, C-231/05, 18 July 2007 § 60.

may nevertheless be regarded as proportionate to the objectives pursued, taken as a whole."[75]

Thus, in the OY AA ruling there seems to be no need to prove the artificiality of the arrangement seeing as the arrangement touches the very core of the Member State's sovereign power[76].

This having been said, some Member States have exceeded the means necessary to combat abusive practices, as in the *Itelcar*[77] judgement – which is why the national measures implemented in Member States must be sufficiently calibrated to aim only at prohibiting truly abusive practices. General presumptions that certain transactions constitute purely abusive practices will not suffice to comply with the principle of proportionality.

Cadbury Schweppes, *Thin Cap*[78], and *Glaxo Wellcome*[79] are, among others, cases that provide useful guidance for national courts to determine whether the methods use to prohibit abuse are in compliance with the fundamental freedoms. In fact, the court must first understand what fundamental freedom applies. Then, examine whether the norm in question restricts that freedom. And, if it turns out to be the case, the ECJ must examine whether this is a justifiable restriction.

3. Burden of proof

The practical effects of the ECJ's case law regarding "wholly artificial arrangements" depend largely on the question of who has to bear the burden of proof – specifically on whether it is up to the tax authorities to establish that an arrangement is not genuine and wholly artificial o whether they can shift that burden onto the taxpayer.

---

[75] ECJ, *OY AA*, C-231/05, 18 July 2007 §§ 62-63.
[76] MATEI, EMANUELA. *Same Same but different. A misunderstanding of the EU tax jurisprudence with possible negative spill-over effects on the BEPS recommendations*, Kluwer International Tax Blog, October 15, 2015.
[77] ECJ, *Itelcar and Fazenda Pública*, C-282/12, 3 October 2013.
[78] ECJ, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, 13 March 2007.
[79] ECJ, *Glaxo Welcome*, C-182/08.

Here, it is important to mention the *Bent Vestergaard*[80] case law, which establishes in its § 26 the following:

> *"it should be remembered that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) can be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer himself to produce the proof which they consider necessary to assess whether or not the deduction requested should be allowed (see Bachmann and Commission v Belgium, cited above, at respectively paragraphs 18 and 20 and paragraphs 11 and 13)".*

Thus, if the first part of the paragraph implies that the tax authorities can obtain information more easily though the application of the mutual assistance directive, in its second part, it determines that there is nothing to prevent the tax authorities from requiring the taxpayer himself to produce the proof that they consider necessary to assess the merit of the question (deduction).

However, as explained by TOMAS CANTISTA TAVARES[81]: "*It is very hard to prove that there was a pre-conceived plan; that all the steps were taken with the desire to evade taxation; that in the initial/primordial moments there was already the intention to evade taxation*", making the tax authorities' attempts very difficult and usually requiring them to apply very broad accusations. However, both in harmonized and in non-harmonized tax matters, that presumptions of tax avoidance or tax evasion are considered disproportionate and it is settled case law that these should not be accepted. As explained in the *Foggia*[82] ruling, national tax authorities mustn't apply pre-determined general criteria, instead having to perform a case by case analysis and consider the circumstances as a whole.

---

[80] ECJ, *Skatteministeriet v Bent Vestergaard*, C-55/98, 28 October 1999.
[81] CANTISTA TAVARES, Tomás, *IRC e Contabilidade – da realização ao justo valor,* Almedina, 2018, p. 397: "*É muito difícil apurar e provar que houve um plano pré-concebido; que todos os passos estão ligados por um desejo de fuga ao imposto; que no momento inicial já se sabia da evasiva intenção fiscal"*.
[82] ECJ, *Foggia*, C-126/10, 10 November 2011, § 37.

It was only in *Cadbury Schweppes* that the court emphasized that the resident company (taxpayer) also take action.

> *"The resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine*[83]*".*

Thus, and in accordance to the legal right of defense (commonly accepted in democratic countries), the tax authorities may not assess that an arrangement is artificial without confronting the taxpayer and its preliminary conclusions / justifications.

However, as shown in § 71 of the same case law, tax authorities may not completely shift the burden to the taxpayers not reject evidence by him provided.

The obligations from both parties must be balanced, as established in the *Test Claimants in the Thin Cap Group Litigation*[84] case law:

> *"national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement"*. (our underline).

Moreover, the ECJ accepted in the *SGI v. État Belge* ruling that:

> *"the burden of proof as to the existence of an 'unusual' or 'gratuitous' advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities. It states that when those authorities apply that legislation, the taxpayer is given an opportunity to provide evidence of any commercial justification that there may have been for the transaction in question. The taxpayer*

[83] ECJ, *Cadbury Schweppes,* C-196/04 § 70.
[84] ECJ, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, 13 March 2007 §82.

has a month, a period which may be extended, within which to establish that no unusual or gratuitous advantage is involved, having regard to the circumstances in which the transaction was effected. If, however, those authorities persist in their intention of issuing a revised assessment and do not accept the taxpayer's arguments, the latter can challenge the assessment to tax before the national courts[85] *".*

Which is why we can conclude that the burden of proof is to be shared between the tax authorities and the taxpayer – requiring a case-by-case analysis.

III – General Anti-Abuse Rules (GAARs)

1. Traditional approach in Direct Tax Directives

a) Aggressive Tax Planning

Twenty (and more) years ago, a number of countries already had experience with GAARs or other specific provisions that permitted the tax authorities to challenge a taxpayer's transactions as constituting tax evasion – including the Netherlands, Germany and France, among others.

The expression "*aggressive tax planning*" (which nowadays is an umbrella concept[86]) follows the sudden changes in the international economic and financial environment. In particular, the interaction amongst tax treatments provided for by the different jurisdictions gives rise not only to the undesired overlapping of taxation rights (double taxation), but also

[85] ECJ, *Societé de Gestion Industrielle S.A. (SGI) v. État Belge,* C-311/08, 21 January 2010 § 73.
[86] Seeing as "it includes both international tax planning and tax avoidance" [used in the meaning of evasion], as stated by DOURADO, Ana Paula, *The meaning of Aggressive Tax Planning and Avoidance in the European Union and the OECD: An example of Legal plurism in international tax law*, IBFD, 2016 p. 258.

to the unforeseen loopholes (producing situations of double non-taxation or negative taxation).

With Council Directive 2011/96/EU, of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (also known as the Parent company and subsidiary Directive), the first European anti-abuse restriction was established, as the Directive foresaw, in its Article 1 that

> *"This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse".*

In 2012, the European Commission published a recommendation on "aggressive tax planning" which contained a "general anti-abuse rule" that defined abuse as "an artificial arrangement or artificial series of arrangements" whose essential purpose is the avoidance of taxation or the benefit of a tax reduction[87].

However, in truth, companies engaged in "aggressive tax planning" [tax evasion] will continue to try and find ways of bypassing rules and find loopholes in tax laws. The ATAD GAAR's major novelty is that with its implementation EU countries will gain the power to actually tackle artificial arrangements even if other specific rules (SAARs) don't cover it.

b) Previous GAARs

For a very long time, the reference to abuse in EU Directives was basically non-existent, usually only referring to the institutions of fraud or tax evasion. In fact, in its first version, the PSD very briefly mentioned abuse, while the MD only spoke of fraud. It was only with the IRD that a "first GAAR draft" was brought forth in its Article 5 (2), which stated that: "*Member States may, in the case of transactions for which the principal motive*

[87] Commission recommendation of 6 December 2012 on aggressive tax planning. In point 4.5 they stated that *"the purpose of an arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit or purpose of the tax provisions that would otherwise apply"*.

or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive" [88].

Directive 2015/121/EC of 27 January 2015 adopts a GAAR to prevent abusive tax planning structures aimed at benefitting from the participation exemption regime foreseen in the Parent Subsidiary Directive.

The Directive foresees, in Article 1, 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.* (…)".

The mention to these "relevant facts and circumstances" emphasizes the case-by-case analysis.

It further clarifies that "*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*". However, the conditions or criteria that should be taken into consideration to assess the existence of "valid commercial reasons" or "economic reality" are not clarified and, for most countries, depend greatly on domestic legislation or criteria.

Despite the above, some countries such as Portugal, even if adopting the new GAAR[89] by altering Articles 14 and 51 of the Portuguese Corporate Income Tax, known as *Código do Imposto sobre as Pessoas Colectivas* ("CIRC"), did not provide any clarification on those terms. Portugal is one of the countries that already had a national anti-abuse rule, which in its case was provided under Article 38.º of their General Tax Law. However, like so many other Member States, Portugal lost a lot of revenue due to savy tax-evasion and the use of legal loopholes.

2. The ATAD GAAR

[88] Directive 2003/49/EC, of 3 June 2003.
[89] Through Law 5/2016 of 29 February 2016.

The speed in which the new EU Anti-Tax Avoidance Directive (ATAD) was approved – not only to fulfil the Base Erosion Profit Shifting timeframe – is symptomatic of the level of urgency felt across EU Member States to respond to the challenges raised by the globalization and digitalization of the economy. [90]

As a matter of fact, the ATAD is an exercise of coordination of Member States' corporate tax systems according to the BEPS Action Plans (proposed by the OECD in 2015), and with an eye to the Single Market. It tries to balance, on one side, the functioning of the Single Market (which means fair competition and European fundamental freedoms - pillars of the internal market); and on the other side, the protection of domestic tax systems, so that they obtain their fair share of public revenues. In truth, it seems clear that the existence of Modern States heavily depends on taxation[91].

The ATAD is nothing other than an attempt to balance supranational interests and domestic ones. The package ensures the creation of a better/fairer business environment because it ensures EU-law conformity of ATA rules. It ensures "that tax is paid where profits and value is generated" in order to "*restore trust in the fairness of the system and allow governments to effectively exercise their tax sovereignty*"[92]. This ATA Package aims at assuring that taxes are paid where economic activity takes place, and it tries to eliminate the profit shifting through different measures: (1) strengthening domestic rules; (2) addressing treaty issues; (3) enhancing transparency; (4) building a common approach towards third countries.

On January 28th 2016, the European Commission presented its Anti-Tax-Avoidance ("ATA") Package as part of its campaign for fair, efficient and growth-friendly taxation in the EU with new proposals to tackle corporate tax avoidance[93] (in line with anti BEPS

[90] DE LA FERIA, Rita, *Harmonizing Anti Tax Avoidance rules*, EC Tax Review, 2017.
[91] Even American Supreme Court Justice Oliver Wendell Holmes, Jr. has argued in this direction by stating that "*paying taxes buys us civilization*".
[92] ATAD, Point (1) of the Preamble.
[93] European Commission *Press release*, January 28th 2016, Brussels.

measures set forth in the previous year) applying to both domestic and cross-border situations[94].

The package is based around the three core pillars of the Commission's agenda for fairer taxation: ensuring effective taxation in the EU, increasing tax transparency, and securing a level playing field. It includes the a Chapeau Communication, the Anti-Tax Avoidance Directive, a Recommendation on Tax Treaties, a Revised Administrative Cooperation Directive, a Communication on External Strategy, a Staff working document and a study on aggressive tax planning, as shown below[95]:

Some of the key features of this new proposals include: an anti-tax avoidance directive that brings forth legally-binding measures to block the most common methods used to avoid paying tax; a recommendation on how Member States can prevent tax treaty abuse; a cooperation proposal for Member States to share tax-related information on multinationals operating in the EU; actions to promote tax good governance internationally; and finally a new EU process for listing third countries that refuse to play fair.

Collectively, the hope is for these measures to hamper aggressive tax planning, ensure fairer competition for all businesses, and boost transparency between Member States in the

[94] BÁEZ MORENO, Andrés, *A pan-european GAAR? Some (un)expected consequences of the proposed EU Tax avoidance Directive combined with the Dzodi line of cases*, British Tax Review, n.º 2, Sweet & Maxwell, 2016, p. 143.

[95] European Commission, *Anti-Tax Avoidance Package*, 2016, [online] available at: https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en

Single Market. This would also prevent uncoordinated and unilateral implementations of the anti-BEPS proposals (which could fragment the market and give leeway to even further legal loopholes for companies to explore).

The ATAD, which is the focus of this dissertation, establishes several legally binding measures against aggressive tax planning (tax evasion).

In particular, it aims to address situations in which business groups take advantage of disparities between national tax systems to reduce their overall tax obligations.

To this end, it provides legal provisions against aggressive tax planning with regard to: interest limitation; exit tax rules; rules on controlled foreign companies ("CFC"); general anti-abuse rule; and rules on hybrid asymmetries. In fact, there are two kinds of provisions: Article 6 of the ATAD which concerns the GAAR and other provisions (such as Articles 4, 5, 6, 8 and 9) directed towards preventing the erosion of the domestic corporate tax bases.

In this way, the new GAAR largely resembles BEPS' Action 6 (which brings forth the principle purpose test). In fact, some authors believe that "*inspiration or even interpretational guidance can be found in the BEPS report*"[96].

Thus, in order to understand this new Anti-Tax Avoidance Directive, it is important to focus on BEPS' Action 6 to prevent treaty abuse and on the proposal of introducing a principle purpose test ("PPT") – an anti-abuse rule for double taxation treaties.

Thus, the aforementioned Action 6 seeks to:

> *"Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. Work will also be done to clarify that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country. The work will be co-ordinated with the work on hybrids".* (our underlining).

[96] BUNDGAARD & Schmidt, Jakob and Peter, *Uncertainties Following the Final EU Anti-Tax Avoidance Directive*, Kluwer International Tax Blog, 2016, p. 3.

And the Principle Purpose Test is described as follows:

> *"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[97], having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes[98] 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[99] of this Convention"[100].*

We can thus observe that two tests must be passed to determine whether the benefit of the treaty should be granted in a specific case: the subjective and the objective tests. The first one questions whether obtaining the benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit; while the second one determines that the Treaty's benefit must only be granted if its use is in accordance with the object and purpose of the Treaty provisions.

However, at the EU level, the intention of obtaining a tax benefit and the importance of the aforementioned benefit is irrelevant if fundamental freedoms are in play[101]. If taxpayers only apply the principle purpose test, they may infringe European fundamental

---

[97] KOK, Reinout, *The principal purpose test in tax treaties under BEPS 6*, Intertax, Volume 44, Issue 5, Kluwer Law International BV, 2016, pp. 406-412 stated that *"[this expression is] used so that a tax payer cannot avoid application of the PPT by merely asserting that the arrangement or transaction was not undertaken or arranged to obtain the benefits of the convention"*.

[98] KOK, Reinout, *The principal purpose test in tax treaties under BEPS 6*, Intertax, Volume 44, Issue 5, Kluwer Law International BV, 2016, pp. 406-412 further explained that "*The fact that has been chosen for 'one of the principal purposes' instead of e.g., for the 'sole purpose', the 'essential purpose' or 'predominant purpose', makes it relatively easy for the tax authorities to establish that the subjective test is me*t".

[99] KOK, Reinout, further stated that "*There is no explicit reference to the 'object and purpose' of the treaty in general. In the author's view, however, the 'object and purpose' of a treaty provision has to be interpreted in light of the 'object and purpose' of the treaty in general*". But where can we find the aforementioned 'object and purpose'? ENGELEN, Frank, *Interpretation of Tax Treaties under International Law*, IBDF, 2004, pp. 175 of course explains that "The primary source for the 'object and purpose' of a treaty has to be found in the text of the treaty itself".

[100] Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse.

[101] VANISTENDAEL, Francs, *Is tax avoidance the same thing under the OECD Base Erosion and Profit Shifting Action Plan, National Tax Law and EU Law?*, Bulletin for international Taxation, volume 70 n.º 3, 2016, pp.167.

freedoms, which is why the new ATAD was careful to introduce its new GAAR (as Article 6) in the following terms:

> *"1- Non-genuine arrangements or a series thereof carried out for the essential purpose[102] of obtaining a tax advantage[103] that defeats the object or purpose[104] of the otherwise applicable tax provisions shall be ignored for the purposes of calculating the corporate tax liability. An arrangement may comprise more than one step or part[105].*
>
> *2. For the purposes of paragraph 1, an arrangement[106] or a series thereof shall be regarded as non-genuine[107] to the extent that they are not put into place for valid commercial reasons[108] which reflect economic reality.*

[102] This is considered the first test. Here we note that the insertion of the 'principle purpose test' in the ATAD's GAAR differentiates between primary/principle and secondary purposes, thus establishing that it does not suffice for it to be one of the purposes of the arrangement, it must be an essential reason for the taxpayer to have moved forward with the arrangement. However, some authors disagree with the existence/application of the principle purpose test (such as DE BROE and LUTS as they believe the main purpose test is unacceptable because the taxpayer will no longer be able to rely on obtaining a tax benefit when making business decisions. These authors, among others, believe that the test should be the *sole* or *predominant* purpose test. (DE BROE & LUTS, Luc et Joris, *BEPS Action 6: Tax Treaty Abuse,* Intertax, volume 43 n.º2, Kluwer Law International BV, 2015), whereas some authors wonder if in practice there is any difference between the two tests, as their conclusions will often be the same (WEBER, Dennis, *The New Common Minimum Anti-Abuse Rule in the EU Parent Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, Intertax, volume 44 n.º2, Kluwer Law International BV, 2016, p.110).

[103] Requires the manifestation of an advantage in comparison to another situation (though the OECD does not provide any clarifications as to what the conditions for a tax advantage are).

[104] Considered as the second test. For the arrangement to be considered wholly artificial, the means used to obtain the tax advantage must have been contrary to the object or purpose of the Directive.

[105] Thus the GAAR may only attack the part of the arrangement that is wholly artificial so as to not exceed its goal and infringe the proportionality principle.

[106] Which should be considered, in accordance with the European Commission, *Recommendation of 6 December 2012 on aggressive tax planning* (2012/772/EU), OJEU 2012, § 4.3 as "any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event".

[107] This is considered the third test. This is also known to some as the substance test, requiring there to be valid commercial reasons lest the arrangement be artificial/non-genuine. This expression "valid commercial reasons" was explained in *Leur Bloem* §47 and later confirmed in *Foggia* (C-126/10) §34 as follows: "*With regard to 'valid commercial reasons' within the meaning of that Article 11(1)(a), the Court has already had occasion to state that it is clear from the wording and aims of Article 11, as it is from those of Directive 90/434 in general, that the concept involves more than the attainment of a purely fiscal advantage. A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that provision*".

[108] Though no clarification is brought as to the valid commercial reasons must belong to the business itself or if the shareholders interests in the company will suffice.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated by reference to economic substance in accordance with national law".

From this it is obvious that the ATAD's GAAR has a *de minimis* approach: as it only contains a general provision[109], it mandates that Member States ensure at least the minimum level of protection described in the Directive, allowing them to apply stricter/more restrictive rules if they so desire.

Thus, in its current condition, this GAAR represents a shield for Member State's revenue and corporate tax systems – though it is also important to note that the loss of tax revenue is not in itself a legitimate interest that justifies a restriction to fundamental freedoms[110].

Furthermore, if some authors fear that the Directive will be transposed differently in each Member State, disrupting the possibility of attaining a level playing field[111] - others[112] believe that because most countries will transpose the new ATAD GAAR exactly as recommended, this could lead to the final loss of interpretative control by Member States over their domestic GAARs even outside the scope of the Directive – seeing as the ECJ will probably assume increasing jurisdiction over domestic GAARs.

Though this is a real concern for most Member States, other implications must also be considered, such as the modification of hundreds of double tax treaties – without the need for further bilateral negotiations. In fact, in June 2017 another important step was taken to

---

[109] As shown in the European Commission's, *Council Directive Communication laying down rules against tax avoidance practices that directly affect the functioning of the internal market*. Com (2016) 26 final, Brussels 29 January 2016, p. 5 (Proportionality).

[110] As seen in ECJ, *Skandia and Ramstedt*, C-422/01, 26 June 2003, § 53. Unlike, for instance, the State's need to ensure the effective collection of tax and the prevention of tax fraud and evasion.

[111] Such as Gianluigi Bizioli in *Taking the EU Fundamental Freedoms Seriously: Does the Anti-tax Avoidance Directive Take precedence over the single market?*, EC Tax Review, volume 3, 2017 p.171, stating that the possibility of implementing the Directive with a higher level of protection and with other options allowed, could deeply thwart the creation of a level playing field –"This approach gives Member States the opportunity to jeopardize the implementation of the Directive and frustrate the achievement of its objectives". Furthermore, he adds that this concern is also raised by A. P. Dourado in *The EU Anti Tax Avoidance Package: Moving ahead of BEPS*? 44 (6-7), Intertax, 2016.

[112] Such as BÁEZ MORENO, Andrés, *A pan-european GAAR? Some (un)expected consequences of the proposed EU Tax avoidance Directive combined with the Dzodi line of cases*, British Tax Review, n.º 2, Sweet & Maxwell, 2016, p. 151.

prevent abusive behaviours: 72 jurisdictions signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as "MLI"). Both these instruments (ATAD and MLI) will significantly affect cross-border operations and trigger unprecedented changes in European taxation. Thus, besides preparing for these changes, the taxpayers with presence in traditional holdings and financing jurisdictions could prepare by confirming that their operations are supported by appropriate documentation as well as compliant with transfer pricing rules. Moreover, companies should confirm that they have made the necessary self-certifications under FATCA, CRS and CbcR, and other internal reporting processes – lest penalties be applied for delay and non-compliance.

This having been considered, there are actions that the taxpayers may take in order to improve their positions in light of these alterations, such as align their structure with their business, tax and treasury objectives[113].

3. Legal Consequences of non-compliance

Despite all that we have said, the legal consequences of ignoring a transaction for tax purposes is not clear.

Article 6 (1) of the ATAD determines that Member States "shall ignore" arrangements that fulfill the requirements of the GAAR. Thus, once the conditions for the GAAR's application are met, the targeted set up must be ignored.

Turns out that Member States do not have any discretionary power whatsoever regarding the legal consequence of the norm's application. This, however, raises the question of what "ignorance of legal transaction" really means. Must the "transaction involved in an abusive practice […]" be re-defined in order to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice? It is commonly agreed that the term "ignore" must be interpreted as "disregard or refuse to recognize". The

[113] By, for instance, concentrating holding and financing companies in the same region (or at least have their investment policy under the same umbrella in a given jurisdiction); consolidating in the holding's jurisdiction the asset management entities and fund vehicles.

abusive series of arrangements must simply be left out. Thus, based on the wording of Article 6 (1) of the ATAD, national tax authorities would not be allowed to reclassify the abusive practice and replace it with another (taxable?) transaction. However Article 6 (3) provides that "*Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated by reference to economic substance in accordance with national law*", which leaves it up to national tax authorities to re-calculate the tax liability in accordance with national law[114].

However, let us imagine the following scenario: between Member State Portugal and the United States a 'letterbox company' with no substance is constituted in Belgium in order to avoid the Portuguese withholding tax on dividend paid to a US Co. Now, let's assume that this letterbox Co. is considered artificial and constitutes an arrangement whose principle purpose is that of obtaining a tax advantage which is contrary to the objects and purpose of the EU Directives. The only way to undo this abusive situation is to somehow re-establish Portugal's possibility of withholding tax on a dividend paid to the US Co. This can be achieved by "ignoring" the letterbox company in Belgium and considering as if the dividends paid from the Portuguese Co. went directly to the US Co. (as if the artificial arrangement had not been set). This will still allow for the use of lower rates established in bilateral tax treaties to avoid double taxation, avoiding only the (probably lower) rates that would have been applicable between Portugal and Belgium instead.

This approach has been adopted by jurisprudence since the *Weald Leasing*[115] case-law in so far as the ECJ decided:

> *"it would (...) be for that court to redefine those transactions so as to re-establish the situation that would have prevailed in the absence of the elements constituting that abusive practice*", further adding that "*the redefinition by that court must go no further than is necessary for the correct charging of the VAT and the prevention of tax evasion (see, to that effect, Halifax and Others, paragraph 92)"*.

[114] Though it is important to note that when this clause extends to financial and other dematerialized activities, it is difficult to picture staff, equipment and the ownership of assets at the same level as 'traditional' economic activities. Thus, for the 'economic substance' requirement to be compliant with ECJ case-law, its implementation and interpretation must be broad enough to encompass these cases.
[115] ECJ, *Weald Leasing*, C-103/09, 22 December 2010, §50 and §52.

This brings us to a vital point regarding legal consequences. In fact, the consequence of abuse must be proportional and therefore must not go farther than is necessary in order to ensure the correct levy of corporate income taxation. Thus, the criteria to combat such structures should be attuned to the alleged abuse (directive shopping) and the provisions that are circumvented[116].

Conclusion

In view of the recent movements against base erosion profit shifting, a general anti-tax abuse rule has been adopted as part of the Anti Tax Avoidance Directive and will enter into force starting January 1st 2019.

International tax neutrality, one of the main focuses of the EU's ATA Package[117], requires that taxation affect taxpayers business choice as little as possible, including the election of the place of income production[118]. The real issue, stemming from the relationship between taxation and the fundamental freedoms, at least until the harmonization of corporate income tax, should not be understood in terms of obstacles, but in terms of fiscal neutrality.

In fact, time and time again have the European institutions made clear that EU law does not protect taxpayers who seek to pay less tax by creating situations that artificially fall into the scope of application of the fundamental freedoms – however, the phenomenon of tax evasion persists. Thus, the ATAD GAAR's purpose it to cover loopholes left by the

[116] WEBER, Dennis, *The New Common Minimum Anti-Abuse Rule in the EU Parent Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, Intertax, volume 44 n.º2, Kluwer Law International BV, 2016, p.129.
[117] Stressing, however, that the EU's neutrality concerns began far before, gaining (political) dignity with the European Commission's, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Promoting Good Governance in Tax Matters*, 28 April 2009, COM(2009) 201 final.
[118] See SMITH, Stephen, *Subsidiarity and Neutrality in European Tax Policy: Economic considerations, in Neutrality and Subsidiarity in Taxation*, Kluwer Law International, EFS, n.º 3, 1996.

Corporate Tax Directives and by national GAARs – thus, to take over where special anti-abuse rules fail[119].

This new GAAR also brought with it the opportunity to re-evaluate the conditions and requirements used to qualify abusive tax practices.

As mentioned above, one of the main issues that the GAAR faces is its interpretation not just regarding the expressions used but also concerning the need to translate the norms in several idioms – which means sometimes the norms' intentions are lost in translation.

However, throughout the years, scholars, judges and legislators have been able to forge a doctrine of what entails abuse (from its beginnings in the French *abus du droit* and German *bona fide* to the current regime with its tests and established jurisprudence).

Hence, attempts to diminish these abuses were undertaken world-wide[120], but that evasion continues to be an issue that greatly reduces States' revenue every year – be it by hybrid mismatches, transfer pricing violations, letter-box offices or any number of other arrangements. These attempts made conversations among Member States possible, which brought forth several anti-abuse rules, finally culminating in the ATAD's GAAR.

As mentioned above, the ATAD's GAAR contains three tests that must be satisfied in order to conclude that an arrangement is artificial: (i) the principle purpose test; (ii) the conflict with object and purpose test; and (iii) the non-genuine / artificial reality test.

Considering the principle purpose test – which is not unanimously accepted by doctrine - the ECJ has already determined, in non-tax-related cases, that European law benefits will be denied whenever the ***sole*** reason for a transaction was to benefit from this system[121]. Whereas in tax-related-cases, the ECJ has indiscriminately used this criteria[122][123]

---

[119] As shown in the European Commission, *Council Directive Communication laying down rules against tax avoidance practices that directly affect the functioning of the internal market*. Com (2016) 26 final, Brussels 29 January 2016. p. 9 (A general anti-abuse rule).

[120] Mostly through the lead of international institutions (more than national governments themselves).

[121] PETROVITCH, Katrina, *Abuse under the Merger Directive*, European Taxation, volume 50, nº 12, 2010, p. 561.

[122] Some Authors seem to believe that a *sole purpose test* would be more coherent and easier to prove. However, how does one weigh the objectives? Some say it is necessary to compare the importance of the tax objectives with other objectives at stake; other, for their part believe that one needs to examine whether the arrangement would have taken place in the absence of fiscal reasons.

[123] Distinguishing between principal aim and sole aim and then concluding that abuse is present when the principle purpose is tax avoidance [though they mean evasion] in ECJ *Part Service* C-425/06, 21 February

of principal / essential purpose[124]. However, in clear contrast to the MD's wording, the ECJ went so far as to interpret the Directive's principle purpose test as a predominant / sole purpose test:

> *"a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant in the context of the proposed transaction[125]".*

Knowing that this issue has been subject of discussion in all the GAARs so far (Corporate Tax Directives), we cannot help but conclude that it must have been a deliberate choice. Thus, it is not necessary that the tax evasion be the sole reason for the artificial arrangements, suffice it be one of the main reasons/purposes (which would be much more onerous for the taxpayer if the burden of proving the hierarchy of purposes and establishing which were the main ones was not so difficult).

Regarding the conflict between the object and purpose test, the GAAR requires the obtaining of a tax advantage which defeats the object or purpose of the otherwise applicable tax provisions. Thus, the reasons why the tax norms and directives were put in place must be very clear so as to, in contrast, be able to identify if the tax advantage received would defeat its purpose.

Finally, the non-genuine / artificiality test, also known as the substance test, establishes the need for 'valid commercial reasons' but does not provide us with further detail as to what these might be. In fact, no clarification is brought as to if the valid commercial reasons must belong to the business itself or if the shareholders interests in the company will suffice - nor

---

2008 §40 but then, a few months later, referring to sole aim test in ECJ *Ampliscientifica* C-162/07, 22 May 2008, §§27 and 28.

[124] ECJ, *Halifax* C-255/02, §§74 and 75: "(…) *it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, 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*".

[125] ECJ, *Foggia*, C-126/10, 10 November 2011, § 35.

do most countries provide a list of reasons that would be considered valid[126][127], making the term particularly fluid. Furthermore, and now regarding the onus of proof, it's impossible to prove, without a doubt, that there are no valid economic reasons whatsoever. This because economic or commercial motivations are not subjected to any scrutiny from external entities (except in some instances of mergers and acquisitions that are supervised by Competition Authorities). In any case, even if it is somehow proven that there were no valid economic reasons for the arrangement, this does not mean that it is wholly artificial. To this we must add the need of a case by case analysis, seeing as many variables may be in play in trying to discern the substance of an arrangement[128].

Thus, if ever confronted by the Tax Administration with the inexistence of valid economic reasons the taxpayer has two options[129]: (a) try to prove that there are indeed valid economic reasons that motivated the arrangement in question; (b) accepting the absence of valid economic reasons, try to prove that the operation in no way was made to avoid taxation, but was rather made by a number of other reasons (family affairs, conflicts between the partners, imposition of such a structure because of a regulatory entity, etc.).

As stated in AG POIARES MADURO'S Opinion of the Halifax case, in §89: "*The prohibition of abuse, as a principle of interpretation, is no longer relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would*

[126] Except the Netherlands, as they set out several examples in 2015 with the advent of the PSD GAAR of so called "minimum substance requirements" to be met. Among others they include that the management decisions be taken in the country of residence of the intermediary holding company; that the main bank account of the intermediary holding company be held in the country of residence of the aforementioned company; that the books be kept in the country of residence of the intermediary holding company; etc. For further details see LOYENS & LOEFF *Netherlands implementation of the amendments to the EU Parent Subsidiary Directive: PSD GAAR and Anti-Hybrid Rule*, Edition 106, December 2015.

[127] Some reasons that have been considered valid include empire building, entering a new market, optimizing efficiency, vertical integration, redirecting focus to the core business, etc.

[128] The use of the expression 'letter-box companies', for example, can be misleading, as illustrated in ECJ, *Eurofood IFSC*, C-341/04, 2 May 2006, seeing as from the ruling we can conclude that a 'letter-box company' is not a company lacking in office space or space, but instead a company that carries no business whatsoever in the territory in which its registered office is situated. Thus, a holding company for instance would not be considered a 'wholly artificial arrangement'.

[129] As stated in LOBO SILVA, Filipe, *As operações de reestruturação empresarial como instrumento de planeamento fiscal,* Almedina, 2016, p.164.

grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant. It would introduce a high degree of uncertainty regarding legitimate choices made by economic operators and would affect economic activities which clearly deserve protection, provided that they are, at least to some extent, accounted for by ordinary business aims".

Now, this all having been said, there seem to be obvious discrepancies between the GAARS laid forth in the various Directives[130] (primary EU law), in the anti-abuse criteria created by the ECJ case-law[131] (secondary EU Law), and even inconsistencies among the ECJ's own rulings.

In fact, as we can see from the amended PSD, as well as from the MD, their GAARs require that the arrangements be genuine – while in ECJ case-law these commercial reasons do not need to be the principal (or one of the principle) motives of the arrangement.

Furthermore, both the PSD and the IRD allow for the application of national GAARs (unlike the MD) which causes some inconsistencies when considered together. In fact, the purpose of national anti-abuse legislation is to protect the national tax base, whereas the objective of the directives is to facilitate cross-border transactions by eliminating double juridical and economical taxation (and/or non-taxation)[132]. Thus, both objectives are empirically opposed seeing as facilitating cross-border flows of income usually involves lowering taxation and therefore resulting in loss of income for the Member State.

The EU GAAR, on its part, cannot have as main objective that of avoiding the loss of revenue for its Member States. Its goal is (and must remain) that of preventing abuse in the European Union.

The national GAARS may be stricter, more efficient and impose more limitations on the erosion of the tax base, however, once they operate in cross-border transactions where

[130] Which require the tax to be the principal (or one of the principal) purposes for the transaction.
[131] Such as in *Cadbury Schweppes*, *Thin Cap Group Litigation* and *Glaxo Wellcome*, which hold that a genuine and not-negligible exercise of fundamental freedoms have priority over tax evasion.
[132] VANISTENDAEL, FRANS. *Chapter 29: Can EU Tax Law Accommodate a Uniform Anti-Avoidance Concept?*, Practical Problems in European International Tax Law: Essays in Honour of Manfred Mössner, online book IBFD, 2016.

fundamental freedoms are in play, the question metamorphoses from ‘is there abuse in accordance to national tax law’ to ‘ is there abuse of the fundamental freedoms’.

Hence, hopefully this dissertation has brought some clarity on the discrepancies, issues and requirements that need to be met concerning the soon to be in force ATAD GAAR and its relation to the ECJ case law. It will be essential for Member States to enforce the provisions both in intra-community transactions and in operations concerning third parties, as well as coordinate with other Member States’ tax authorities to look out for new forms of abuse that may emerge.

Bibliography, Jurisprudence and other sources

BENES, JAN. *Translation of Terminology in EU Legislative Texts*, Bachelor's Diploma Thesis, Masaryk University, 2008, pp. 1-48.

BIZIOLI, GIANLUIGI. *Taking EU Fundamental Freedoms seriously: Does the Anti-Tax Avoidance Directive take precedence over the single market?,* EC Tax Review, volume 3, 2017, pp. 167 - 175.

BÁEZ MORENO, ANDRÉS. *A pan-european GAAR? Some (un)expected consequences of the proposed EU Tax avoidance Directive combined with the Dzodi line of cases*, British Tax Review, volume 2, Sweet & Maxwell, 2016, pp. 143-151.

BUNDGAARD, J. & SCHMIDT, P. *Uncertainties Following the Final EU Anti-Tax Avoidance Directive*, Kluwer International Tax Blog, 2016.

CALDAS, MARTA. *O conceito de planeamento fiscal agressivo: novos limites ao planeamento fiscal?,* Cadernos IDEFF, n.º18, Maio de 2015, Almedina.

CANOTILHO, J.J GOMES. *Direito Constitucional e Teoria da Constituição*, 7ª Edição, Edições Almedina, Coimbra, 2013.

CANTISTA TAVARES, TOMÁS. *IRC e Contabilidade – da realização ao justo valor,* Almedina, 2018.

DE BROE, L. & BECKERS, D. *The General Anti-Abuse Rule of the Anti-tax avoidance Directive*, EC Tax review, 2017-3.

DE BROE, L. & LUTS, J. *BEPS Action 6: Tax Treaty Abuse,* Intertax, Volume 43 n.º 2, Kluwer Law International BV, 2015.

DE BROE, LUC. *International Tax planning and prevention of abuse*, IBDF, 2008, p. 771-775.

DE LA FERIA, RITA. *Harmonizing Anti Tax Avoidance Rules*, EC Tax Review, 2017.

DOURADO, ANA PAULA. *The meaning of Aggressive Tax Planning and Avoidance in the European Union and the OECD: An example of Legal plurism in international tax law*,

International Tax Law: New challenges to and from Constitutional and Legal Pluralism, IBFD, 2016 pp. 253-278.

DOURADO, A. & PALMA BORGES, R. *The Acte Clair in EC Direct Tax Law*, IBFD, 2008.

DURO TEIXEIRA, MANUELA. *Reestruturação de empresas e limites do planeamento fiscal – algumas notas*, Reestruturação de empresas e limites do planeamento fiscal, Coimbra Editora, 2009.

ENGELEN, FRANK. *Interpretation of Tax Treaties under International Law*, IBDF, 2004, pp. 175 et seq.

GLEZL, ANDREJ. *Lost in Translation: EU Law and the Official languages – Problem of the Authentic Text,* Centre for European Legal Studies, University of Cambridge, 2007, pp. 1-11.

KOK, REINOUT. *The principal purpose test in tax treaties under BEPS 6*, Intertax, Volume 44, Issue 5, Kluwer Law International BV, 2016, pp. 406-412.

LANG, M. & HEIDENBAUER, S. *Wholly Artificial Arrangements*, Kluwer Law International BV, 2008, pp. 597-615.

LEHNER, MORIS, *Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EX Treaty*, EC Tax review, volume 9 n.º1, 2000.

LENAERTS, KOEN. *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 (MJ), 2015, pp. 329-351.

LENAERTS, KOEN. *Tax mitigation v. Tax evasion in the case law of the European court of justice*, ISSN 132-1274 TEISË, 2013, pp. 219-237.

LINN, ALEXANDER. *The ATAD and its effect on German Tax law*, International Tax Review, 15 December 2016.

LOBO SILVA, FILIPE. *As operações de reestruturação empresarial como instrumento de planeamento fiscal,* Almedina Editora, 2016.

MARTÍN JIMENEZ, ADOLFO. *Towards a homogeneous Theory of Abuse in (Direct) Tax Law*, IBDF, Bulletin for International Taxation, April/May 2012 pp. 270-292.

MARQUES FREITAS, IARA RODRIGUES. *A Cláusula Geral Anti-Abuso como meio de combate ao planeamento fiscal ilegítimo: pressupostos e condições de aplicação da CGAA no Direito Fiscal Português*, tese de mestrado forense, Agosto 2012.

MATEI, EMANUELA. *Same Same but different. A misunderstanding of the EU tax jurisprudence with possible negative spill-over effects on the BEPS recommendations*, Kluwer International Tax Blog, October 15, 2015.

NABAIS, JOSÉ CASALTA. Introdução ao Direito Fiscal das Empresas, 2ª Edição, Almedina, Coimbra, 2015.

NOGUEIRA, JOÃO FÉLIX PINTO. *Abuso de Direito em Fiscalidade Directa – a emergência de um novo operador jurisprudencial comunitário*, Revista da Faculdade de Direito da Universidade do Porto, Coimbra Editora, Coimbra, 2009, pp. 233-299.

NOGUEIRA, JOÃO FÉLIX PINTO. *Direito Fiscal Europeu – O Paradigma da Proporcionalidade: A Proporcionalidade como critério Central da Compatibilidade de Normas Tributárias Internas com as Liberdades Fundamentais*, 1ª Edição, Coimbra, Editora, Coimbra, 2010.

PIANTAVIGNA, PAOLO. *Tax Abuse in the European Union Law: a Theory*, EC Tax review, 2011-3.

PIETSCH, B. M., *Dispensational Modernism*, Oxford University Press, 2015.

PINETZ, ERIK. *Final Report on Action 6 of the OECD/G20 Base Erosion Profit Shifting Initiative: Prevention of Treaty Abuse*, nº1/2 Bulletin for International Taxation, volume 70, 2016, pp. 113-120.

PASQUALE, PISTONE, *Ups and downs in the case law of the European court of justice and the swinging pendulum of direct taxation*, Intertax, volume 36 n.º 4, 2008, pp. 152 et seq.

PASQUALE, PISTONE, *The Impact of ECJ case law on national taxation*, IBFD, Bulletin for International Taxation, 2010, pp. 410 - 428.

PETROVICH, KATRINA. *Abuse under the Merger Directive*, European Taxation, volume 50, nº 12, 2010, pp. 558-567.

REID, ELSPETH. *The doctrine of abuse of rights: Perspective from a Mixed Jurisdiction*, Electronic Journal of Comparative Law, volume 8 n.º 3, October 2004.

RIGAUT, ALOYS. *Anti-Tax-Avoidance Directive (2016/1164): New EU Policy Horizons*, European Taxation, volume 56 n.º 11, 2016, pp. 497-505.

SÁ GOMES, NUNO, *Lições de Direito Fiscal*, volume 2, Lisboa: FDUL, 1984, pp. 143 et seq.

SANCHES, SALDANHA. *Manual de Direito Fiscal*, 3ª Edição, Coimbra Editora, Coimbra, 2007.

SANTOS, ANTÓNIO CARLOS. *Planeamento Fiscal, evasão fiscal, elisão fiscal: o fiscalista no seu labirinto*, Revista Fiscalidade, Edição Abril-Junho 2009, pp- 62-100.

SMITH, STEPHEN. *Subsidiarity and Neutrality in European Tax Policy: Economic considerations, in Neutrality and Subsidiarity in Taxation*, Kluwer Law International, EFS, n.º3, 1996, pp. 7-27.

TEIXEIRA, GLORIA. *Manual de Direito Fiscal*, 3ª edição, Almedina, Coimbra, 2015, pp. 385 et seq.

VANISTENDAEL, FRANS. *Chapter 11: EU vs. BEPS: conflicting concepts of Tax avoidance*, EU LAW and the Building of Global supranational Tax Law: EU BEPS and State Aid, online book IBFD, 2017.

VANISTENDAEL, FRANS. *Chapter 29: Can EU Tax Law Accommodate a Uniform Anti-Avoidance Concept?*, Practical Problems in European International Tax Law: Essays in Honour of Manfred Mössner, online book IBFD, 2016.

VANISTENDAEL, FRANS. *Halifax and Cadbury Schweppes; one single European theory of abuse in tax law?*, EC Tax Review, n.º 4, 2006, pp.195 et seq.

VANISTENDAEL, FRANS. *Is tax avoidance the same thing under the OECD Base Erosion and Profit Shifting Action Plan, National Tax Law and EU Law?*, Bulletin for international Taxation, volume 70 n.º3, 2016, pp.167 et seq.

WEBER, D. & DA SILVA, B. *From Marks & Spencer to X Holding: The Future of Cross-Border Group Taxation,* Kluwer Law International BV, 2011, pp. 1 – 24.

WEBER, DENNIS. *The New Common Minimum Anti-Abuse Rule in the EU Parent-subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, INTERTAX, Volume 44, Issue 2, 2016.

XAVIER, ALBERTO. *Direito Tributário Internacional*, 2ª Edição, Almedina, Coimbra, 2011.

Jurisprudence:

ECJ, (*Ampliscientifica*) *Ampliscientifica Srl and Amplifin SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate*, C-162/07, 22 May 2008.

ECJ, (*Avoir Faire) Commission v. France* C-270/83, 28 January 1986.

ECJ, *Bachmann v. Belgian State*, C-204/90, 28 January 1992.

ECJ, *Barbier*, C-364/01, 11 December 2003.

ECJ *Baxter and Others*, C-254/97, 8 July 1999.

ECJ, (*Bent Vestergaard) Skatteministeriet v Bent Vestergaard*, C-55/98, 28 October 1999.

ECJ, *Biehl*, C-175/88, 8 May 2001.

ECJ, *Bouchoucha,* C-61/89, 3 October 1990.

ECJ, *Brisal,* C-18/15, 13 July 2016.

ECJ, *Cadbury Schweppes,* C-196/04, 12 September 2006.

ECJ, *Cadbury Schweppes,* C-196/04, 12 September 2006, Opinion of Advocate-General Léger, 2 May 2006.

ECJ, (*Centros*) *Centros Ltd v Erhvervs- og Selskabsstyrelsen* C-212/97 of 9 March 1999.

ECJ, *Commission v. Belgium*, C-300/90, 28 January 1992.

ECJ, *Commission vs Germany,* C-591/13, 16 April 2015.

ECJ, (*Dzodzi*) *Massam Dzodzi v Belgian State*, joined cases C-297/88, C-197/89.

ECJ, *Elisa ruling* C-451/05 of 11 October 2007.

ECJ, *Emsland Stärke* C-110/99, 16 May 2000.

ECJ, *Eurofood IFSC*, C-341/04, 2 May 2006.

ECJ, *Euro Park service*, C-14/16, 8 March 2017.

ECJ, *(Eurowings) Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna*, C-294/97, 26 October 1999.

ECJ, *Foggia*, C-126/10, 10 November 2011.

ECJ, *Gemeente Leusden and Holin Groep*, joined cases C-487/01 and C-7/02.

ECJ, (*General Milk Products*) *General Milk Products* v *Hauptzollamt Hamburg-Jonas,* C-8/92, 3 March 1993.

ECJ, *Glaxo Welcome*, C-182/08, 17 September 2009.

ECJ, (*Halifax & Others*) *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, C-255/02, 21 February 2006.

ECJ, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, C-255/02, 21 February 2006, Opinion of Advocate-General Poiares Maduro, 7 April 2005.

ECJ, *(ICI) Imperial Chemical Industries plc v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, C-264/96, 16 July 1998.

ECJ, (*Itelcar*) *Itelcar and Fazenda Pública*, C-282/12, 3 October 2013.

ECJ, (*Inspire Art*) *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* C-167/01, 30 September 2003.

ECJ, (*Kefalas*) *Kefalas and Others* v *Greece*, C-367/96, 12 May 1998.

ECJ, (*Knoors) J. Knoors v Staatssecretaris van Economische Zaken,* C-115/78, 7 February 1979.

ECJ (*Kraus) Dieter Kraus v Land Baden-Württemberg,* C-19/92, 31 March 1993.

ECJ, *Lair* v *Universität Hannover,* C-39/86, 21 June 1988.

ECJ, *Leclerc and Others* v *'Au Blé Vert' and Others,* C-229/83, 10 January 1985.

ECJ, *Leur Bloem*, C-28/95, 17 July 1997.

ECJ, (*Marks & Spencer) Marks & Spencer plc v. David Hasley*, C-446/03, 13 December 2005.

ECJ, Oy AA, C-231/05, 18 July 2007.

ECJ, (*Paletta II*) *Brennet AG v Vittorio Paletta* C-206/94, 2 May 1996.

ECJ, *Part Service*, C-425/06, 10 March 2006.

ECJ, *(Schumacker) Finanzamt Köln-Altstadt v Roland Schumacker*, C-279/93, 14 February 1995.

ECJ, *Skandia and Ramstedt*, C-422/01, 26 June 2003.

ECJ, *(SGI) Societé de Gestion Industrielle S.A. v. État Belge,* C-311/08, 21 January 2010.

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

ECJ, (*Thin Cap Group Litigation*) *Test Claimants in the Thin Cap Group Litigation*, C-524/04, 13 March 2007, Opinion of Advocate-General Gellhoed's, of 29 June 2006.

ECJ, *TV 10* v *Commissariaat voor de Media,* C-23/93, 5 October 1994.

ECJ, (*Van Binsbergen*) *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid,* C-33/74, 3 December 1974.

ECJ, (*Verder LabTec) Verder LabTec GmbH & Co. KG v Finanzamt Hilden,* C-657/13, 21 May 2015.

ECJ, *Veronica Omroep Organisatie* v *Commissariaat voor de Media,* C-148/91, 3 February 1993.

ECJ, *Weald Leasing*, C-103/09, 22 December 2010.

ECJ, (*X & Y*) *X & Y v. Riksskatteverket*, C-436/00, 21 November 2002.

Other sources:

Directive 2003/49/EC, of 3 June 2003 – Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

Directive 2009/133/EC of 19 October 2009 – Council Directive 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.

Directive 2011/96/EU of 30 November 2011 – Council Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Directive 2015/121/EU of 27 January 2015 – Council Directive amending directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries on different Member states.

Directive 2016/1164/EU of 12 July 2016 – Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

Sixth Council Directive – Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – common system of value added tax: uniform basis of assessment.

Portuguese Law 5/2016 of 29 February that alters the national CIT Code.

European Commission, *Communication from the commission to the European parliament and the council on an External Strategy for Effective Taxation*, COM (2016) 24 final, Brussels, 28.01.2016

European Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse.

European Commission, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Promoting Good Governance in Tax Matters*, 28 April 2009, COM(2009) 201 final.

European Commission, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market*. Com (2016) 26 final, Brussels 29 January 2016.

European Commission, *Recommendation on aggressive tax planning*, of 6 December 2012, (2012/772/EU), OJEU 2012.

European Commission *Press release*, January 28th 2016, Brussels.

Treaty on the Functioning of the European Union (consolidated version published in the Official Journal C 326, on 26 October 2012).

Treaty on European Union – Masstrich Treaty, on 7 February 1992.

ERNEST & YOUNG. *European Holding and Financing Companies, the OECD MLI, and the EU Anti-Tax-Avoidance Directive*, tax notes international, 2018.

ERNEST & YOUNG, *GAAR Rising – strengthening the European Union Parent-Subsidiary Directive with a new general anti-abuse rule*, 2015.

DELOITTE, *EU Developments: Anti-Tax Avoidance Directive*, 2016.

LOYENS & LOEFF. *Netherlands implementation of the amendments to the EU Parent Subsidiary Directive: PSD GAAR and Anti-Hybrid Rule*, Edition 106, 2015.

VIEIRA DE ALMEIDA & ASSOCIADOS. *Impacts of a new EU GAAR on Portuguese dividend taxation*, Iberian Lawyer, 2016.