



Universidade Católica Portuguesa

**Revisiting Article 9(2) of the Proposed
Unshell Directive in the light of CJEU's
concept of abuse in direct tax matters**

Diana Patrícia da Costa Boucinha

Mestrado em Direito

Faculdade de Direito | Escola do Porto

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Resumo

A nossa tese incide sobre o artigo 9(2) da Diretiva Unshell, o qual inclui uma cláusula de salvaguarda, com uma inversão do ónus da prova.

A Diretiva Unshell assenta num conjunto de presunções elidíveis. A elisão dessas presunções não pode ir além do ónus que o TJUE permite que seja imposto ao sujeito passivo e, no caso de um controlo ex-post, da existência de abuso.

Nesses termos, uma qualquer regulação nesta matéria apenas será legítima na medida em que a inversão do ónus da prova assente num teste com um conteúdo substantivo alinhado com a jurisprudência do Tribunal nesta matéria.

Começaremos a nossa dissertação com uma breve introdução e reflexão sobre o conceito de abuso pré *Cadbury-Schweppes*. De seguida, passaremos à apreciação do conceito de abuso nos termos deste acórdão. Após isso, passaremos à análise do desenvolvimento do conceito de abuso no âmbito da jurisprudência do TJUE e do BEPS. Posteriormente, passaremos à exposição do "novo" conceito de abuso que resulta da análise da jurisprudência do Tribunal em matéria de abuso. E, para concluir, passaremos à apresentação da proposta de alteração do artigo 9(2) da Diretiva Unshell.

Palavras-Chave: Diretiva Unshell; Cláusula de salvaguarda; Ónus da prova; Jurisprudência do TJUE; Abuso; *Cadbury-Schweppes*; BEPS; Proposta de alteração do artigo 9(2) da Diretiva Unshell.

Abstract

The present dissertation is focused on a critical examine of article 9(2) of the Unshell Directive, which includes a safeguard clause for inversion of the burden of proof.

The directive relies on a set of rebuttable presumptions. The rebuttal of these presumptions cannot go beyond the burden that the CJEU allows to be imposed on the taxable person in case of an ex-post control: the existence of abuse.

Accordingly, any regulation in this matter will only be legitimate to the extent that the inversion of the burden of proof is based on a test with a substantive content in line with the Court's jurisprudence on this matter.

We will begin our dissertation with a brief introduction and reflection on the pre-Cadbury-Schweppes concept of abuse. Next, we will consider the concept of abuse in terms of Cadbury-Schweppes. After that, we will analyse the development of the concept of abuse within the jurisprudence of the CJEU and BEPS. Subsequently, we will proceed to the exposition of the "new" concept of abuse that results from the analysis of the Court's jurisprudence on abuse. And to conclude, we will move on to the presentation of the proposed amendment to article 9(2) of the Unshell Directive.

Keywords: *Unshell Directive; Safeguard clause; Burden of proof; Case law of the CJEU; Abuse; Cadbury-Schweppes; BEPS; Proposed amendment to article 9(2) of the Unshell Directive.*

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List of acronyms and abbreviations

§	Paragraph
Art.	Article
BEPS	Base Erosion and Profit Shifting
CJEU	Court of Justice of the European Union
TFEU	Treaty on the Functioning of the European Union
OECD	Organization for Economic Cooperation and Development
EU	European Union
GAAR	General Anti-Abuse Rule
ATAD	Anti-tax Avoidance Directive
IRD	Interest and Royalties Directive
PSD	Parent-Subsidiary Directive
GDPR	General Data Protection Regulation
PPT	Principal Purpose Test
MLI	Multilateral Instrument
n.	Number
p.	Page
pp.	Pages
vol.	Volume

1. Introduction

1.1 Contextualisation

Since its ruling in the *Van Binsbergen*¹ case, more than thirty years ago, the Court of Justice of the European Union (hereinafter, CJEU) has been referring to abuse and abusive practices. Nevertheless, the relevance of these decisions remained unclear for quite a long time, and the CJEU's wording was not particularly consistent. The CJEU has referred to abuse and abusive practices in a variety of ways throughout the years², including “avoidance”³, “evasion”⁴, “circumvention”⁵, “fraud”⁶, and “abuse”⁷. After the *Emsland-Stärke*⁸ case, the term “abuse” has become the most commonly used.

“Abuse of law” is a notion that can be found in both domestic and European law. It comes as no surprise that the CJEU's case law includes various decisions in which tax authorities consider whether prima facie discriminatory or restrictive domestic tax measures are admissible under European Union (hereinafter, EU) primary law since they are intended to fight abuse of domestic tax law provisions. The assessment of the taxpayer's abusive behaviour also appears in cases connected with the access of entitlements flowing from EU tax law directives.

In recent years, this ongoing stream of judicial output has been accompanied by efforts at both OECD and the EU level, aimed at requiring countries to fight abusive arrangements under a unified banner. Action 6 of the BEPS Action Plan⁹ and article 6 of the Anti-Tax Avoidance Directive¹⁰ require lawmakers to enact rules applying a common

¹CJEU 3 December 1974, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid* (C-33/74) ECLI:EU:C:1974:131.

²See Piantavigna, “Tax Abuse in European Union Law: A Theory”, EC Tax Review, 2011-3, p. 3.

³*Van Binsbergen*, supra n. 1; CJEU 5 October 1994, *TV10 SA v. Commissariaat voor de Media*, (C-23/93, ECR 1994 p. I-04795) ECLI:EU:C:1994:362.

⁴CJEU 7 February 1979, *Knoors v. staatssecretaris van Economische Zaken*, (C-115/78) ECLI:EU:C:1979:31.

⁵CJEU 10 January 1985, *Leclerc v. Au blé vert* (C-229/83) ECLI:EU:C:1985:1.

⁶CJEU 12 May 1998, *Kefalas and others/Elliniko Dimosio and Organismos Oikonomikis Anasygkrotisis Epicheiriseon* (C-367/96, ECR 1998 p. I-2843) ECLI:EU:C:1998:222.

⁷CJEU 12 March 1996, *Pafitis and Others*, (C-441/93, ECR 1996 p. I-01347) ECLI:EU:C:1996:92.

⁸CJEU 14 December 2000, *Emsland-Stärke* (C-110/99, ECR 2000 p. I-11569) ECLI:EU:C:2000:695.

⁹OECD, “Action Plan on Base Erosion and Profit Shifting”, OECD Publishing, 2014. See Jiménez, “Tax avoidance and Aggressive Tax Planning as an International Standard – BEPS and the “New” Standards of (Legal and Illegal) Tax avoidance”, in Ana Paula Dourado (Ed.), “Tax Avoidance Revisited in the EU BEPS Context”, October 2017, pp. 25-62, at pp. 48-59.

¹⁰Council Directive (EU) 2016/1164 of 12 July 2016. See Cédelle, “The EU Anti-Tax Avoidance Directive: A UK perspective”, British Tax Review, 2016, pp. 490-507.

notion of tax avoidance to combat cross-border structures, namely those set up by multinational corporations¹¹. That common notion is commonly known as the principle purpose test (PPT).¹²

Two key concerns stand out when it comes to the definition and implementation of the idea of “abuse of law” in EU (tax) law scenarios:

1. One is of a methodological and constitutional nature. It relates to the legal basis for this idea under European law, the methodological requirements for its implementation, its position within the hierarchy of European law (primary vs secondary law), and its direct or indirect impact on domestic law (in particular domestic law implementing European law);
2. The other issue concerns the subjective scope and content of the concept, as well as its objective and elements, specifically whether they should be interpreted narrowly (confined to artificial arrangements solely established to avoid taxes) or broadly (also covering real arrangements that may fulfil a commercial purpose).

Our dissertation focuses on the second topic. In our view, and despite the huge number of decisions and doctrinal texts, this remains a pressing academic issue, considering that the Court has significantly broadened the concept’s scope in recent years¹³. The Court’s recurring statement that “European law cannot be relied on for abusive or fraudulent ends”¹⁴ has now been acknowledged as a “general principle of

¹¹The notion of “tax avoidance” in the BEPS context is laid out in Ana Paula Dourado (Ed.), “Tax Avoidance Revisited in the EU BEPS Context”, October 2017.

¹²This concept was also adopted by the CJEU, recently, on the Danish beneficial ownership cases, § 100 of the *T-Danmark* case (CJEU 26 February 2019, *T-Danmark* (Joined Cases C-116/16 and C-117/16) ECLI:EU:C:2019:135).

¹³See Nogueira, “Abuso de Direito em Fiscalidade Direta – A emergência de um “novo” operador jurisprudencial comunitário”, *Revista da Faculdade de Direito da Universidade do Porto*, Ano VI, Coimbra Editora, 2009, pp. 233-299; Weber, “Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 1”, *Eur. Taxn.*, vol. 53, n. 6, 2013; Mitroyanni, “Chapter 2: European Union in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World”, *WU – Tax Law and Policy Series*, M. Lang et al. eds., May 2016; Piantavigna, “Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies”, *World Tax Journal*, vol. 9, n. 1, 2017; *T-Danmark*, supra n. 12; CJEU 26 February 2019, *N Luxembourg 1* (Joined Cases C-115/16, C-118/16, C-119/16 and C- 299/16) ECLI:EU:C:2019:134; CJEU 22 November 2017, *Cussens and others* (C-251/16) ECLI:EU:C:2017:881; and CJEU 10 November 2011, *Foggia – SGPS* (C-126/10, ECR 2011 p. I-10923) ECLI:EU:C:2011:718.

¹⁴CJEU 21 February 2006, *Halifax and others* (C-255/02, ECR 2006 p. I-1609) ECLI:EU:C:2006:121, § 68; CJEU 12 September 2006, *Cadbury-Schweppes and Cadbury-Schweppes Overseas* (C-196/04, ECR

European law”¹⁵ with far-reaching implications. According to the Court, Member States are not simply allowed to combat abusive behaviour, they are effectively obliged to do so¹⁶.

Last but not least, the existence or absence of specific anti-abuse legislation under European or domestic law no longer appears to play a role in the fight against avoidance or evasion¹⁷: unlike previously understood based on a straightforward reading of *Kofoed*¹⁸.

1.2 Research Question

The present dissertation will address the following research questions: “Are the requirements on which the rebuttal of the presumption depends, under the current proposed Unshell Directive, compatible with the case law of the Court?”. Furthermore, “if not, what phrasing could the EU legislator adopt in order to ensure such alignment?”.

1.3 Object

1.3.1 Positive Delimitation

The dissertation focuses on the proposal for a Council Directive 2021/0434, which establishes rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. In particular, it critically assesses article 9(2) of the proposed Unshell Directive. The dissertation is also based on a thorough examination of the Court’s case law on abuse in direct tax matters.

1.3.2 Negative Delimitation

2006 p. I-7995) ECLI:EU:C:2006:544, § 35; CJEU 5 July 2007, *Kofoed* (C-321/05, ECR 2007 p. I-5795) ECLI:EU:C:2007:408, § 38; CJEU 18 December 2014, *Italmoda* (Joined Cases C-131/13, C-163/13 and C-164/13) ECLI:EU:C:2014:2455, § 43, 46 and 56; CJEU 11 July 2018, *Commission/Belgium* (C-356/15) ECLI:EU:C:2018:555, § 99; *Cussens*, supra n. 13, § 27; *T-Danmark*, supra n. 12, § 70 and 90; and *N Luxembourg I*, supra n. 13, § 96.

¹⁵See De La Feria, “Prohibition of abuse of (Community) law: the creation of a new general principle of EC law through tax”, *Common Market Law Review*, vol. 45, issue 2, 2008, pp. 345-441.

¹⁶*N Luxembourg I*, supra n. 13, § 110, “it is incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends”.

¹⁷*T-Danmark*, supra n. 12, § 86 and 88-90; and *N Luxembourg I*, supra n. 13, § 114 and 116-118.

¹⁸*Kofoed*, supra n. 14, § 41, 42, 43, 45 and 46.

The dissertation will not address any other provisions of the proposed unshell directive. Likewise, it will not focus on concepts other than the concept of abuse, as discussed in the Court’s jurisprudence.

1.4 Methodology

For the elaboration of this present thesis, we performed a legislative, jurisprudential and bibliographical review, mostly based on an analysis of doctrinal articles. We also dedicated our attention to documents released by international organisations such as the EU and OECD.

In writing the thesis, we followed the style manual of the Universidade Católica Portuguesa – Centro Regional do Porto.

1.5 Sequence

Chapter 2 provides a detailed analysis of the concept of abuse in pre-*Cadbury-Schweppes* decisions. In particular, an analysis will be made of *Cadbury-Schweppes* and its impact on the concept of abuse.

Chapter 3 looks at the development of the concept of abuse in the Court’s jurisprudence. We will also present the “new” concept of abuse resulting from the Court’s case law.

Chapter 4 revises article 9(2) of the proposed Unshell Directive and elaborates on the amendments that it may require in order to align with the CJEU’s concept of abuse.

Finally, in chapter 5, we will state our conclusions.

2. The evolution of the concept of abuse, in matters of direct and indirect taxation, in the jurisprudence of the CJEU

The CJEU has consistently adopted a duplex notion of abuse, using diverse terms to designate abuse of law in non-harmonised tax areas (“wholly artificial arrangements”, since the leading case *Cadbury-Schwepes*) and abuse of rights in tax harmonised areas (“abusive practices”, since the *Halifax* case law).

2.1 The road to *Cadbury-Schwepes*

Initially, the CJEU did not define abusive practices. It only acknowledged that Member States have the right to oppose so-called “U-turn” or “circumvention” transactions.¹⁹

The Court held in *Van Binsbergen*, the earliest case in which the notion of abuse can be found, 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 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state.*²⁰

Nevertheless, as the CJEU clarified in *Kefalas* and *Centros*²¹, the *Van Binsbergen* jurisprudence did not suggest that Member States have free rein in applying their own national anti-abuse measures.²² The CJEU refused to rule that state laws forbidding “U-turn” or “circumvention” transactions were beyond the purview of implementing fundamental freedoms. Inasmuch as those measures restrict free movement, the fact that they intended to address abusive conduct must thus be regarded as a legitimate rationale for such a limitation.

In *Centros*, the CJEU concluded that just exercising one’s right to free movement did not constitute abuse. The CJEU also noted that “the right to form a company in accordance with the law of a Member State and to set up branches in other Member States

¹⁹In relation to this notion, see De La Feria, *supra* n. 15, at p. 399.

²⁰*Van Binsbergen*, *supra* n. 1, § 13.

²¹CJEU 9 March 1999, *Centros* (C-212/97, ECR 1999 p. I-1459) ECLI:EU:C:1999:126.

²²Weber, “Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, *Emsland-Stärke*”, *Legal Issues of Economic Integration*, vol. 31, issue 1, 2004, pp. 43-55, at p. 50.

is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty”.²³

Consequently, *Van Binsbergen*, *Kefalas*, and *Centros* all emphasise the importance of an approach that can discriminate between cases regarding the lawful exercise of fundamental freedom and those resulting in abusive acts.

The CJEU used the *Emsland-Stärke* case as an opportunity to develop a test, commonly referred to as the “abuse test”, that would enable national courts to discern between circumstances concerning the lawful exercise of basic freedom and those concerning abusive conduct.²⁴

Emsland-Stärke is, thus, a trailblazing decision because it establishes, for the first time, the guidelines for assessing the presence of abuse in the framework of EU law.²⁵

In *Halifax*,²⁶ the CJEU held that “community law cannot be relied on for abusive or fraudulent ends”²⁷ and “the application of Community legislation cannot be extended to cover 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”.²⁸

The Court went on to acknowledge that the “principle of prohibiting abusive practices also applies to the sphere of VAT”.²⁹ The CJEU emphasised that taxpayers “may choose to structure their business so as to limit their tax liability”.³⁰ The CJEU was

²³*Centros*, supra n. 21, § 27. See Werlauff, “The consequences of the *Centros* decision: Ends and means in the protection of public interests”, *Eur. Taxn.*, vol. 40, n. 12, 1 December 2000, pp. 542-545; and Eicker, “In the *Centros* case the ECJ delivered a decision with far-reaching implications for company law and tax law”, *Intertax*, vol. 27, issue 10, 1999, pp. 391-392.

²⁴In § 52 and 53 of the *Emsland-Stärke* case, the Court stated what requires a finding of an abuse. See also CJEU 12 March 2014, *O. and B.* (C-456/12) EU:C:2014:135, § 58.

²⁵See De La Feria, supra n. 15, at p. 410; and Weber, supra n. 22, at p. 51.

²⁶A case involving the implementation of the Sixth 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, (1977) OJ L145/1.

²⁷*Halifax*, supra n. 14, § 68.

²⁸*Halifax*, supra n. 14, § 69.

²⁹*Halifax*, supra n. 14, § 70. This decision was unexpected, especially given the Court’s past jurisprudence on provisions concerning the site of supply of services, see De La Feria, “‘Game Over’ for aggressive VAT planning?: RAL v. Commissioners of Customs & Excise”, *British Tax Review*, 2005, pp. 394-401; Harris, “*Abus de droit* in the field of Value Added Taxation”, *British Tax Review*, n. 2, 2003, pp. 131-152; and Farmer, “VAT Planning: Assessing the ‘Abuse of Rights’ Risk”, *The Tax Journal*, 27 May 2002, pp. 15-17.

³⁰*Halifax*, supra n. 14, § 73. In *Halifax* the CJEU reiterated the statement made in *Emsland-Stärke*. In *Cadbury-Schweppes* the CJEU followed the argumentation in *Centros* and *Inspire Art* (CJEU 30 September

therefore compelled to supply the national court with a procedure capable of discriminating between admissible and abusive VAT transactions.³¹

In contrast to *Emsland-Stärke*, *Halifax* did not discuss the “subjective element” of abuse. The concerns some academics and Advocates General leveled before the CJEU’s ruling in *Halifax* may explain this quiet. According to Advocate General (hereinafter, A.G.) Poiares Maduro the subjective purpose of individuals asserting the EU right in issue is not “decisive for the assessment of the abuse. It is instead the activity itself, objectively considered.”³² Moreover, “the intentions of the parties to improperly obtain an advantage from Community law are merely inferable from the artificial character of the situation to be assessed in the light of a set of objective circumstances.”³³

Arguably, a possible reading of *Halifax* suggests that the presence of objective criteria may be sufficient to establish that a transaction includes abusive conduct.³⁴ This will be decisive for our assessment of the *sub judicio* clause of the Unshell proposal.

2.2 *Cadbury-Schweppes*

Cadbury-Schweppes constitutes an excellent case study from which insights may be drawn on how the CJEU handles the challenge of expressing how wide (or rigorous) anti-abuse rules must be to comply with EU law.

2003, *Inspire Art Ltd.* (C-167/01, ECR 2003 p. I-10155) ECLI:EU:C:2003:512) by stating in § 38 that: “establishment of subsidiaries in another Member State for the purpose of benefiting from the favourable tax regime which that establishment enjoys does not in itself constitute abuse”.

³¹To that end, it recognized in § 74 and 75 of the *Halifax* case the circumstances under which an abusive practice occurs. As stated by the A.G. 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”. The *Halifax* decision sparked intense controversy. For a detailed summary of the ruling’s purported “weaknesses”, see Victoria Sánchez, “El Concepto de Abuso de Derecho en el Ambito del IVA: El ‘Caso *Halifax*’”, *Fiscal*, n. 124, 2006, pp. 40-49.

³²Opinion of A.G. Poiares Maduro of 7 April 2005, C-255/02 *Halifax and Others*, ECLI:EU:C:2005:200, § 70.

³³Opinion of A.G. Poiares Maduro, *supra* n. 32, § 71. According to the A.G. “the use of the term ‘abuse of rights’ ... may actually be misleading”. A.G. uses the expression “prohibition of abuse of Community law” instead of “abuse of rights”.

³⁴Pistone claims that *Halifax* indicates that “the existence of objective factors [is] sufficient for detecting the existence of abusive practices”. See Pistone, “Abuse of Law in the Context of Indirect Taxation: From (before) *Emsland-Stärke 1* to *Halifax* (and Beyond)”, in De La Feria and Vogenauer (eds.) - “Prohibition of Abuse of Law: A New Principle of EU Law?”, Hart Publishing, 2011, pp. 381-394, at p. 387.

The United Kingdom (hereinafter, UK) controlled foreign companies (hereinafter, CFC) legislation was at the center of this dispute.³⁵

The CJEU concluded that the CFC rules were never relevant to domestic corporations and were also not relevant if the enterprise was created in a Member State in which profits were taxed at a rate equal to or higher than 75% of the UK rate. Consequently, the CJEU held that the UK CFC regulations constituted a limitation on freedom of establishment.

Based on its precedents,³⁶ the Court stated that

*in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent 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.*³⁷

The CJEU then examined whether the UK CFC legislation could be justified by combating abuse and considered that the only proportional measure would be one targeting solely wholly artificial arrangements.

“Wholly artificial arrangements”³⁸ were characterised as “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”.³⁹ A “company is a fictitious establishment in so far as it does not carry out any genuine economic activity in the

³⁵CFC laws, in general, are anti-avoidance measures designed to prevent capital from being diverted to low-tax jurisdictions, see Weber, “Tax Avoidance and the EC Treaty Freedoms – A Study of the Limitations under European Law to the Prevention of Tax Avoidance”, Eucotax Series, Kluwer Law International, 2005, pp. 121-122. The conformity of UK CFC laws with EC legislation has been questioned for some years, see Schön, “CFC Legislation and European Community Law”, British Tax Review, 2001, pp. 250-260, at p. 256; and Lang, “CFC legislation and Community Law”, Eur. Taxn., 2002, pp. 374-379.

³⁶CJEU 16 July 1998, *Imperial Chemical Industries/Colmer (ICI)* (C-264/96, ECR 1998 p. I-4695) ECLI:EU:C:1998:370; and CJEU 12 December 2002, *Lankhorst-Hohorst* (C-324/00, ECR 2002 p. I-11779) ECLI:EU:C:2002:749.

³⁷*Cadbury-Schweppes*, supra n. 14, § 55.

³⁸*Cadbury-Schweppes*, supra n. 14, § 51, 55, 57, 61, 63, 68, 69, 72 and 75. Precedents are: *ICI*, supra n. 36, § 26; *Lankhorst-Hohorst*, supra n. 36, § 37; CJEU 21 November 2002, *X and Y* (C-436/00, ECR 2002 p. I-10829) ECLI:EU:C:2002:704, § 61 and 62; and CJEU 13 December 2005, *Marks & Spencer* (C-446/03, ECR 2005 p. I-10837) ECLI:EU:C:2005:763, § 57. In relation to this notion, see Lang and Heidenbauer, “Wholly artificial arrangements”, in “A Vision of Taxes Within and Outside European Borders”, ed. L. Hinnekens and P. Hinnekens, The Netherlands: Kluwer Law International, 2008, pp. 597-615.

³⁹*Cadbury-Schweppes*, supra n. 14, § 55; and CJEU 20 January 2021, *Lexel* (C-484/19) ECLI:EU:C:2021:34, § 49.

territory of the host Member State, account being taken, in particular, of the extent to which that company physically exists in terms of premises, staff and equipment”.⁴⁰

The *Cadbury-Schweppes* restricted the notion of “legitimate circumvention”: in non-harmonised tax areas, only “wholly artificial arrangements” are deemed to be abusive. As a result, this concept must be interpreted rigorously, as it should not result in a denial of fundamental freedom protection. “Wholly” excludes from the scope of abuse transactions that are not entirely and purely artificial. The exclusivity of artificiality implies that there are no other grounds outside tax (undue) savings⁴¹. Any transaction involving a *quid pluris* must be deemed legal.

In *Cadbury-Schweppes*, the Court relied 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”⁴² to determine the presence of the objective element of abuse. In this case, one should note that the activity at stake was already a highly passive and digitalised one (treasury and financing activities). However, the Court still appears to be asking for physical (i.e., tangible) elements to determine whether the company is genuine. If the exam of those tangible elements reveals that the company is “a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement”.⁴³

The CJEU reaffirms, in *Cadbury-Schweppes*, that “the mere exercise of a fundamental freedom cannot give rise to a general presumption of abuse of domestic

⁴⁰CJEU 26 February 2019, *X (Controlled companies established in third countries)* (C-135/17, *Publié au Recueil numérique*) ECLI:EU:C:2019:136, § 82.

⁴¹In *Cadbury-Schweppes*, abuse, and artificiality were thought to be closely related notions, see Edwards and Farmer, “The concept of abuse in the freedom of establishment of companies: A case of double standards?”, in Arnall, Anthony – “Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs”, Oxford University Press, 2008, pp. 205-227.

⁴²*Cadbury-Schweppes*, supra n. 14, § 67.

⁴³*Cadbury-Schweppes*, supra n. 14, § 68.

direct tax provisions”.⁴⁴ Accordingly, competent national authorities must examine each case individually rather than relying on predetermined generic criteria.⁴⁵

2.2.1 *Cadbury-Schweppes*: Restricting tax avoidance to abuse of European Union legislation

In *Cadbury-Schweppes*, a dispute arose involving a taxpayer and the national tax authority, as well as two distinct legal systems: the EU treaty and the national tax legislation. From a legal standpoint in the EU, the *Cadbury-Schweppes* case should be viewed as a proper implementation of the TFEU’s freedom of establishment, rather than as an issue of national tax evasion.

Two factors are critical in the *Cadbury-Schweppes* ruling.

The first is that avoiding taxes by moving to another Member State or conducting cross-border transactions is not considered abusive as long as the move is authentic. If fundamental freedom is exercised effectively and genuinely, the subjective desire of benefiting from a tax break is immaterial⁴⁶.

The second is about recognising the artificial nature of the cross-border movement.

In many instances, the Court has set a clear bar for the illegitimate exercise of basic rights: only a purely artificial structure falls short of putting treaty liberties into practice.

As a constraint on fundamental freedoms, only anti-tax evasion legislation that aims solely at purely artificial structures is admissible: the explicit goal of such a limitation must be to prohibit behaviour that entails the creation of entirely artificial structures that do not represent economic reality.

⁴⁴See Nogueira, “Abuse, Proportionality and the Burden of Proof in CJEU’s Case Law on Direct Taxation – Taxes Crossing Borders (and Tax Professors Too)”, *Liber Amicorum Prof. Dr R.G. Prokisch*, Maastricht University Press, 2022, pp. 225-248. Precedents are: *ICI*, supra n. 36, § 26; CJEU 26 September 2000, *Commission/Belgium* (C-478/98, ECR 2000 p. I-7587) ECLI:EU:C:2000:497, § 45; *X and Y*, supra n. 38, § 62; and CJEU 4 March 2004, *Commission/France* (C-334/02, ECR 2004 p. I-2229) ECLI:EU:C:2004:129, § 27.

⁴⁵*Cadbury-Schweppes*, supra n. 14, § 50.

⁴⁶If the transaction is real and complies with EU law, tax motives are legitimate. See Vinther and Werlauff, “Tax Motives are Legal Motives – The Borderline between the Use and Abuse of the Freedom of Establishment with Reference to the *Cadbury-Schweppes* Case”, *Eur. Taxn.*, vol. 46, n. 8, 2006, pp. 383-386; and Whitehead, “What’s Your Motive?”, *Taxation*, vol. 157, 21 September 2006, pp. 682-684.

Cadbury-Schweppes looks to define three prerequisites for an anti-abuse regulation that works under a legal presumption of abuse:

1. An objective criterion that can be fact-checked by a third party to evaluate if a transaction is entirely or partially a wholly artificial structure that does not represent economic reality in order to evade the standard tax imposed on profits created by operations carried out on national territory;
2. The taxpayer is given the chance to show proof of any business purpose for such an arrangement, without being subjected to unnecessary administrative restraints.
3. When such factors lead to the judgment that the transaction under consideration is a wholly artificial arrangement with no subjacent business purpose, the redefinition is confined to abuse scenarios.⁴⁷

The Court's first condition for the legal presumption of abuse is that the anti-abuse provision must be targeted to real cases of artificiality⁴⁸; only because of such a regulation may the taxpayer bear the burden of establishing that there is no abuse in his particular circumstance. The Court's overall indication is that such investigation must be based on an "objective element, verifiable by a third party, being applied to test for the existence of a wholly artificial arrangement".⁴⁹ It is unclear why a third party must be able to verify the objective criterion. This criterion initially emerged in *Cadbury-Schweppes*, but given the secrecy applicable in many Member States to information concerning a taxpayer's tax situation, it is unclear why a third party is required to check the objective requirement. The CJEU was most likely influenced by *Eurofood*⁵⁰. In this decision, the CJEU declared that "the centre of main interests" (Article 3(1) of the Insolvency Proceedings Regulation⁵¹) must be determined using "factors that are both objective and ascertainable by third parties".⁵² The necessity of third-party verification in *Eurofood* is justified since a third party was interested in understanding where the debtor's centre of main interests

⁴⁷CJEU 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, ECR 2007 p. I-2107) ECLI:EU:C:2007:161, § 83.

⁴⁸The Court addressed the arrangement's artificiality in terms of justifications and proportionality, but not when applying the freedom as such. In this regard, see Weber, *supra* n. 35; and *Cadbury-Schweppes*, *supra* n. 14, § 36-38.

⁴⁹*Thin Cap Group Litigation*, *supra* n. 47, § 81; and CJEU 5 July 2012, *SIAT* (C-318/10, *Publié au Recueil numérique*) ECLI:EU:C:2012:415, § 56.

⁵⁰CJEU 2 May 2006, *Eurofood IFSC Ltd.* (C-341/04, ECR 2006 p. I-03813) ECLI:EU:C:2006:281.

⁵¹Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/01.

⁵²*Eurofood*, *supra* n. 50, § 37.

was located⁵³. That's not the situation in (direct) taxation. Thus, the sole important criterion is that a legal presumption of abuse has to include an "objective element" in "order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, which does not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory".⁵⁴

The second condition is that an anti-abuse provision must always provide the taxpayer the chance to show proof of any commercial rationale without being subject to unnecessary administrative restraints.⁵⁵ Basically, the taxpayer must establish that there was no issue of a purely artificial arrangement in his situation but that the transactions represented a genuine economic reality.

The third criterion is that the anti-abuse provision must address tax evasion proportionally. As a result, abuse can only be combated insofar as it exists. In *Halifax*, the Court noted that: "(...) transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice".⁵⁶ Certain transactions may be redefined as long the abuse is eliminated. Nevertheless, the eradication of abuse (requalification) isn't that simple.

⁵³Verifiability is demanded by the Proceedings Regulation for this reason (as mentioned in consideration 13 of its preamble).

⁵⁴*Cadbury-Schweppes*, supra n. 14, § 64; *Emsland-Stärke*, supra n. 8, § 52 and 53; and *Halifax*, supra n. 14, § 74 and 75.

⁵⁵*Thin Cap Group Litigation*, supra n. 47, § 82.

⁵⁶*Halifax*, supra n. 14, § 94.

3. Concept of abuse resulting from the analysis of the Court's case law

3.1 Development of the concept of abuse on CJEU's case law until BEPS

In *Cadbury-Schweppes*, the Court noted that a domestic anti-deferral rule (UK CFC rule) would be compatible with the fundamental freedoms only to the extent it applies to wholly artificial arrangements designed to avoid paying the national tax that would otherwise be due. Even if driven by tax reasons, a wholly artificial arrangement does not exist if the taxpayer engages in genuine economic activity.

The Court is also required to determine if the objective factor of abuse is present 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”.⁵⁷ The Court used the term “objective factors”,⁵⁸ in *CFC and Dividend Group Litigation*, and “objective and verifiable elements”⁵⁹ in *Thin Cap Group Litigation*.

Furthermore,

*if checking those factors leads to the finding that the [company] is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement.*⁶⁰

In *Cadbury-Schweppes*, the Court addressed wholly artificial economic transactions intended to avoid the application of the Member State's laws using the EU abuse of law concept. The Court allowed “jurisdiction shopping” as long as the structure of its financing operations through controlled subsidiaries was not entirely fictitious, which meant that the subsidiaries' creation and their financing activities had to show

⁵⁷*Cadbury-Schweppes*, supra n. 14, § 67.

⁵⁸CJEU 23 April 2008, *Test Claimants in the CFC and Dividend Group Litigation* (C-201/05, ECR 2008 p. I-2875) ECLI:EU:C:2008:239, § 19.

⁵⁹*Thin Cap Group Litigation*, supra n. 47, § 82 or CJEU 3 October 2013, *Itelcar* (C-282/12) ECLI:EU:C:2013:629, § 37.

⁶⁰*Cadbury-Schweppes*, supra n. 14, § 68.

economic substance.⁶¹ In the *Cadbury-Schweppes* understanding, this means that a financial structure is artificial if it is not established for commercial purposes related to economic reality.

This ruling was largely followed in the subsequent CJEU case law on direct and indirect taxation such as *Thin Cap Group Litigation*⁶², *CFC and Dividend Group Litigation*⁶³, *Commission vs UK*⁶⁴, and *Impresa Pizzarotti*⁶⁵.

In *Deister Holding*⁶⁶ and *Eqiom*⁶⁷, the CJEU held that a general assumption of tax evasion couldn't justify tax legislation restricting a Directive's goals or exercising fundamental rights under EU law.⁶⁸ According to these decisions, tax authorities may not use general assumptions to determine whether a structure is abusive without evidence of the taxpayer's abusive behaviour. These recent instances imply that the CJEU is becoming more willing to identify abuse based on general signs emerging from the structure.

In *Foggia*, the Court optimizes the idea of wholly artificial economic transactions and concludes that the term encompasses more than just the pursuit of a tax advantage. The Court emphasised the need to carefully consider each case and that applying broad criteria is insufficient. With this decision, artificiality appears to have been downplayed, and the CJEU placed a greater emphasis on legitimate commercial reasons.⁶⁹ According to *Cussens*, a structure would be considered purely artificial if there were factors that suggested that a transaction's primary goal was to achieve a tax benefit. The CJEU's reasoning in the *Foggia* and *Cussens* cases shows that, before the Danish cases, the CJEU had already taken a more nuanced or expanded view of the abuse of law notion as

⁶¹ See Panayi, "Double Taxation, Tax Treaties, Treaty Shopping and the European Community", Eucotax Series, Kluwer Law International, 2007, pp. 179-193; and O'Shea, "The UK's CFC rules and the freedom of establishment: Cadbury-Schweppes plc and its IFSC subsidiaries – tax avoidance or tax mitigation?", EC Tax Review, vol. 16, issue 1, 2007, pp. 13-33, at pp. 21 and 29.

⁶² *Thin Cap Group Litigation*, supra n. 47, § 82.

⁶³ *CFC and Dividend Group Litigation*, supra n. 58, § 19.

⁶⁴ CJEU 13 November 2014, *Commission/United Kingdom* (C-112/14) ECLI:EU:C:2014:2369, § 27.

⁶⁵ CJEU 8 October 2020, *Impresa Pizzarotti (Avantage anormal consenti à une société non-résidente)* (C-558/19) ECLI:EU:C:2020:806, § 36.

⁶⁶ CJEU 20 December 2017, *Deister Holding* (C-504/16 and C-613/16) ECLI:EU:C:2017:1009.

⁶⁷ CJEU 7 September 2017, *Eqiom and Enka* (C-6/16) ECLI:EU:C:2017:641.

⁶⁸ *Deister Holding*, supra n. 66, § 61; and *Eqiom and Enka*, supra n. 67, § 31.

⁶⁹ *Foggia*, supra n. 13, § 30, 33, 34, 36, 43, 45, 46, 49. Eventually as it was interpreting the specific anti-abuse provision of the Merger Directive.

articulated in the *Cadbury-Schweppes* case. The Danish beneficial ownership cases appear to be consistent with the judgments in the *Foggia* and *Cussens* cases.

3.2 The concept of abuse developed in the context of BEPS

The OECD's Base Erosion and Profit Shifting initiative⁷⁰ extended the definition of abusive significantly:

1. It has definitely influenced the ATAD's GAAR⁷¹, according to which Member States must disregard any arrangement or series of arrangements established for the primary objective or one of the primary objectives of attaining a tax benefit that defies the goal or intention of the relevant tax legislation. Such an arrangement or series of arrangements are not genuine in light of all relevant facts and circumstances. An arrangement or series of arrangements are deemed artificial if they are not established for legitimate business purposes that represent economic reality. Demonstrating the existence of a commercial reason for the arrangement or demonstrating a sufficient level of substance is insufficient to avoid the anti-abuse provision's application. Regardless of how a national court or the CJEU interprets Article 6 ATAD in secondary EU law, the limitations on basic freedoms deriving from these readings must meet *Cadbury-Schweppes*'s "wholly artificial arrangement" threshold to be aligned with the CJEU's case law. When a taxpayer legitimately exercises his economic freedom, there is no room for abuse of the TFEU. Hence the TFEU's impact is given priority, meaning that tax avoidance cannot be used to justify a discriminatory limitation. The ATAD includes various anti-avoidance regulations that reflect the suggestions of the BEPS Action Plan, which conforms to the directive's declared goal. Article 3 of the ATAD permits stronger domestic or agreement-based restrictions, although not to combat tax fraud or evasion as in the former Article 1(2) of the PSD, but rather to safeguard the national company tax base.

⁷⁰Particularly in what concerns the work developed in the framework of Action 6 of the BEPS Plan. OECD (2021), BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Revised Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

⁷¹ATAD directive, supra n. 10.

2. The Principal Purpose Test (PPT) in the Multilateral Instrument (MLI) requires denial of tax treaty advantages whenever “it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit”⁷². There is no exception for taxpayers who can establish that the transaction or arrangement is driven by legitimate commercial reasons that reflect economic reality. This measure is broader on various levels: it includes a subjective valuation (it is fair to conclude); the tax advantage must be one of the arrangement’s primary goals; the benefit can be direct or indirect; and both an “arrangement” and a “transaction” can be considered abusive.

3.3 The “new” concept of abuse developed by the Court

Abuse is a major concern in EU direct and indirect tax matters, and much has been published in recent years.⁷³ The debate over the meaning and execution of the various elements of the anti-abuse clauses looks to be coming to a close. As seen in the recent CJEU rulings in the Danish cases⁷⁴, we are approaching the stage where the wording of BEPS regulations in OECD publications (ATAD GAAR and MLI) serves as the legal basis for interpreting EU directives.

According to the *Danmark* cases, abuse of law in tax matters entails engaging in purely formal or artificial transactions with no economic or commercial reason, solely for the purpose of gaining an unfair advantage. This approach to the idea of abuse is not new, and the CJEU has used it on several occasions when dealing with direct tax matters. It is critical to recall the *Cadbury-Schweppes* case, which used anti-abuse as a reason for limiting treaty freedoms in the presence of wholly artificial arrangements aimed at avoiding the implementation of the relevant Member State’s laws or, as it refers in more detail later in the same decision to the establishment of entirely fictitious arrangements that do not represent economic reality in order to avoid paying taxes on profits created by operations carried out on the national territory. Despite the differences in wording, the

⁷²Article 7, n. 1 of the 2017 Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting.

⁷³See Nogueira, supra n. 13; Weber, supra n. 13; and Piantavigna, supra n. 13.

⁷⁴*T-Danmark*, supra n. 12, § 97, 98 and 100.

concepts used in *Danmark* and *Cadbury-Schweppes* are the same. Or almost. Initially, the CJEU used the expression “wholly artificial”. However, in *Danmark*, it avoids the expression wholly, and it adds to the concept of the expression “purely artificial”.

The CJEU also refers to the essential purpose or aim in the case of abuse. Concerning the purpose, it is not essential for the judgment of abuse that the entire or almost sole purpose of the transaction performed is the abuse; it is sufficient that the “primary” or “predominant” purpose is tax avoidance. The Court explains that the term “the essential aim of the transactions concerned” does not indicate the only goal; if the “principal aim” of the transaction is tax avoidance, it may be sufficient to establish abuse, which is forbidden. Where there are other goals, it can be concluded that the arrangement is not wholly artificial. According to the Court, any arrangement or series of arrangements established for the primary or one of the primary reasons of getting a tax benefit that defies the intent or purpose of the relevant tax law must be disregarded. An arrangement or set of arrangements are deemed artificial if they are not established for legitimate commercial motives that represent economic reality⁷⁵. Providing evidence of a commercial purpose for the arrangement or proving a sufficient level of substance is insufficient to avoid the application of the anti-abuse clause.

The CJEU’s decision in the Danish Beneficial Ownership cases is unquestionably a watershed moment in the prohibition of abuse of rights in European and international tax practices. The EU’s concept of abuse of rights and the OECD benchmarks, specially the PPT, are becoming more similar. As a result, it is clear that the CJEU’s criteria of abuse will have repercussions in post-BEPS treaty practices. In certain ways, the conclusions reached by the CJEU in the Danish instances might be viewed as Europe’s contribution to the internationally acknowledged idea of a GAAR. There are two cumulative prerequisites for this notion: a subjective (desire to acquire a benefit) and an objective aspect (resulting in the defeat of the objective of the relevant rule).

The Court appears to have abandoned its essentially formalistic approach in favour of a lower threshold for abuse that must be assessed in the context of each particular case’s facts and circumstances.

⁷⁵See Baerentzen, “Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?”, *World Tax Journal*, vol. 12, n. 1, 9 January 2020.

Perhaps the most significant development is that the CJEU has recognised that all Member States must fight abuse and have to do so solely based on principles derived from EU law, even in the absence of a domestic GAAR. This is yet one more step toward harmonising EU legislation with BEPS developments and, most critically, the PPT.

If, on the one hand, this more thorough assessment of abuse may deter tax evasion within the Union in the short-term, which is desirable, on the other hand, it will almost certainly generate some level of additional legal uncertainty, which is an undesirable “externality”.

This legal uncertainty may be compounded if the ATAD III proposal is approved in its current form without proper guidance on what comprises the elements it regards to be substance indicators. An increase in the level of legal certainty can only be accomplished with additional guidance from CJEU case law or EU institutions.

To summarise, the CJEU appears to take into account the continued evolution of the concept of abuse in international taxation. After more than ten years of using the *Cadbury-Schweppes* doctrine, which held that only wholly artificial arrangements could be denied access to fundamental freedoms, the CJEU appears to be aligning its perspective with the more recent abuse concept derived of the ATAD GAAR and of the MLI/BEPS6: a structure established for, as well as others, tax reasons may be denied the benefits of an EU directive. In simple terms, where *Cadbury-Schweppes* said that tax reasons are protected if they are supported by adequate substance, the new concept of abuse appears to condemn any transaction or arrangement that is completely or primarily targeted at achieving abusive tax advantages.

3.4 The burden of proving the abuse practice

Direct tax disputes are heard by the Court as either infringement processes or preliminary rulings and in neither situation does the Court have to consider the circumstances under which a burden of proof determination would be made.

The admissibility of a domestic provision is the exclusive focus of infringement processes. As a result, the Court is never confronted with a burden of evidence dilemma if there is no fact pattern. The domestic referring court is fully responsible for determining

the relevant facts (including the application of evidence and burden of proof standards).⁷⁶ Preliminary rulings exclude problems concerning the allocation of the burden of evidence because the issues addressed involve only the application and interpretation of EU legislation.⁷⁷ As a result, the Court is not directly confronted with a burden of evidence question.

Some scholars argue that the CJEU's case law on direct tax legislation is incoherent regarding the burden of evidence.⁷⁸ Although the CJEU appears to impose the burden of abuse on taxpayers in certain cases, tax authorities appear to bear the burden in others.

The Court concluded in *Emsland-Stärke* that evidence for both the subjective and the objective abuse test “must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined”.⁷⁹ As a result, the CJEU defers to the national courts the split of the burden of proof. It should be noted that, in reality, objective and subjective tests frequently entail a split of the burden of evidence. It is then up to the tax authorities to establish that the objective criterion has indeed been met; if this condition is met, there seems to be a suspicion of abuse, which the concerned party can disprove by establishing that his transaction was motivated by something other than tax-related reasons. This is also evident in *Cadbury-Schweppes* and *Thin Cap Group Litigation*, where the CJEU allows the legislator to deem certain scenarios abusive but then gives the taxpayer the chance to present facts to the contrary. The CJEU, therefore, acknowledges that in such a case, the taxpayer has the burden of proof. The Court stated in *Cadbury-Schweppes* that “competent national authorities” might gather evidence via cross-border procedures for mutual cooperation between tax authorities, which included EU mechanisms and relevant tax treaties⁸⁰. In case there are doubts from the tax authorities regarding the evidence submitted by the taxpayer, it is

⁷⁶*Foggia*, supra n. 13, § 51; and CJEU 17 September 2009, *Glaxo Wellcome* (C-182/08, ECR 2009 p. I-8591) ECLI:EU:C:2009:559, § 98. See Nogueira, supra n. 44, at p. 239.

⁷⁷Regarding the notion of preliminary rulings, see footnote 10 of the opinion of A.G. Hogan, 25 Feb. 2021, Joined cases C-478/19 and C-479/19, *UBS Real Estate Kapitalanlagegesellschaft mbH v. Agenzia delle Entrate*; and Nogueira, supra n. 44, at pp. 239 and 240.

⁷⁸See Ravelli and Franconi, “Numerous EU Member States are in Breach of EU Law by Requiring Taxpayers to Demonstrate Absence of Abuse”, *Eur. Taxn.*, vol. 61, n. 10, 2021; Jiménez, “Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law”, *Bull. Intl. Taxn.*, vol. 66, April/May 2012; and Nogueira, supra n. 44, at p. 228.

⁷⁹*Emsland-Stärke*, supra n. 8, § 54.

⁸⁰*Cadbury-Schweppes*, supra n. 14, § 71. See Nogueira, supra n. 44, at p. 232.

expected that they will further investigate and authenticate the information using either a tax treaty or the Mutual Assistance Directive.

The proof issue has always been inextricably tied to the legal framework of anti-abuse measures. It was so in *Eqiom*, which involved anti-directive shopping restrictions. They referred to national legislation which subjected the grant of the PSD benefits where the parent company is controlled by residents of third countries provided that the parent firm establishes proof that the primary or one of the primary objectives is not to benefit from the exemption. *Deister Holding* was similar and referred to those controlling the parent firm who would not have been eligible for PSD benefits. These rules entailed shifting the burden of proof to the taxpayer, who had to provide evidence of their eligibility to receive PSD benefits.

The CJEU reaffirmed (since *Leur-Bloem*⁸¹) some general principles on the burden of proof in anti-abuse cases: a fiscal measure that endangers the exercise of a basic freedom or undermines the goals of a directive cannot be justified based on a general presumption of fraud or abuse. The CJEU consistently maintains this view in a large number of judgments including *ICI*⁸², *Commission vs Belgium*⁸³, *X and Y*⁸⁴, *Commission vs France*⁸⁵, *Cadbury-Schweppes*⁸⁶, *Test Claimants in the Thin Cap Group Litigation*⁸⁷, *Jobra*⁸⁸, *Elisa*⁸⁹, *Lammers & Van Cleeff*⁹⁰, *Foggia*⁹¹, *Établissements Rimbaud*⁹², *SLAT*⁹³, *Eqiom*⁹⁴ and *X*⁹⁵. If general presumptions are forbidden, tax authorities bear the burden of proof of abuse.

⁸¹CJEU 17 July 1997, *Leur-Bloem/Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (C-28/95, ECR 1997 p. I-4161) ECLI:EU:C:1997:369.

⁸²*ICI*, supra n. 36, § 26.

⁸³*Commission/Belgium*, supra n. 44, § 45.

⁸⁴*X and Y*, supra n. 38, § 62.

⁸⁵*Commission/France*, supra n. 44, § 27.

⁸⁶*Cadbury-Schweppes*, supra n. 14, § 50.

⁸⁷*Thin Cap Group Litigation*, supra n. 47, § 73.

⁸⁸CJEU 4 December 2008, *Jobra* (C-330/07, ECR 2008 p. I-9099) ECLI:EU:C:2008:685, § 37.

⁸⁹CJEU 11 October 2007, *ELISA* (C-451/05, ECR 2007 p. I-8251) ECLI:EU:C:2007:594, § 91.

⁹⁰CJEU 17 January 2008, *Lammers & Van Cleeff* (C-105/07, ECR 2008 p. I-173) ECLI:EU:C:2008:24, 27.

⁹¹*Foggia*, supra n. 13, § 37.

⁹²CJEU 28 October 2010, *Établissements Rimbaud* (C-72/09, ECR 2010 p. I-10659) ECLI:EU:C:2010:645, § 34.

⁹³*SLAT*, supra n. 49, § 38.

⁹⁴*Eqiom and Enka*, supra n. 67, § 33-34.

⁹⁵*X*, supra n. 40, § 80.

In addition, the Court demands tax authorities to investigate abuse on a case-by-case basis. This is especially noticeable in *Leur-Bloem*, according to which “competent national authorities cannot confine themselves to applying predetermined general criteria, but must subject each particular case to a general examination”⁹⁶. Abuse must, in principle, be established on a casuistic basis in order to prohibit excessive access to rights given by EU law. Imposing a broad tax measure that automatically denies tax benefits to specific types of taxpayers without requiring tax authorities to present prima facie proof of fraudulent or abusive activity, would exceed what is required to prevent such activities. The blanket exclusion of all or a subset of cross-border instances due to the remote chance of abuse is disproportional or even inadequate for achieving the purpose of abuse prevention. This rationale has been used in numerous other instances, including *Glaxo Wellcome*⁹⁷, *Deister Holding*⁹⁸ and *Egiom*⁹⁹. The burden of proof regarding abuse may fall on tax authorities if a casuistic approach is deemed necessary and they are the only entity capable of conducting such an examination.

In general, two basic rules on the burden of proof can be inferred from the CJEU case law: there should be at least prima facie proof of fraud and abuse – presented by the tax authority – which might still be predicated on the exclusion of specific types of cross-border cases from tax advantages, provided that such exclusion is based on objective and relevant presumptive criteria. Furthermore, the taxpayer should be given the opportunity to refute such prima facie evidence by demonstrating commercial justification.

In several rulings, the Court strives to guarantee that the taxpayer is given a chance to submit proof of the business motives for his action¹⁰⁰ before tax authorities may infer that abuse exists. The CJEU perspectives the fight against abuse as a Member State’s obligation that must be met without “undue administrative constraints”.¹⁰¹ Fulfilling such an obligation “must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be

⁹⁶*Leur-Bloem*, supra n. 81, § 41. See Nogueira, supra n. 44, at p. 231.

⁹⁷ *Glaxo Wellcome*, supra n. 76, § 99.

⁹⁸ *Deister Holding*, supra n. 66, § 62.

⁹⁹ *Egiom and Enka*, supra n. 67, § 32.

¹⁰⁰As an example, and with *SIAT* in mind, this is the situation with domestic law “providing that payments made to non-resident providers are not to be regarded as business expenses unless the taxpayer demonstrates that they relate to genuine and proper transactions and do not exceed the normal limits” (*SIAT*, supra n. 49, § 42).

¹⁰¹*Thin Cap Group Litigation*, supra n. 47, § 82. See Nogueira, supra n. 44, at p. 235.

verified”¹⁰². This approach is observed in many instances, including *Thin Cap Group Litigation*¹⁰³, *CFC and Dividend Group Litigation*¹⁰⁴, *SGI*¹⁰⁵, *Établissements Rimbaud*¹⁰⁶, *SIAT*¹⁰⁷, *Itelcar*¹⁰⁸, *Emerging Markets*¹⁰⁹, *Horbach-Baumarkt*¹¹⁰, *X*¹¹¹, *Impresa Pizzarotti*¹¹² and *Lexel*¹¹³. This was considered to mean that the burden of evidence concerning the presence of abuse was placed on the taxpayer.¹¹⁴ If the taxpayer is provided with the chance to present evidence, it is assumed that he will do so and, as a result, will carry the burden of proof.

In *Lexel*, “wholly artificial arrangements” are characterised as “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”¹¹⁵. Nearly all the direct tax cases involving abuse refer to “wholly artificial arrangements”, including *Lankhorst-Hohorst*¹¹⁶, *Cadbury-Schweppes*¹¹⁷, *Glaxo Wellcome*¹¹⁸, *Lammers & Van Cleeff*¹¹⁹, *Commission vs UK*¹²⁰, *Itelcar*¹²¹, *SIAT*¹²², *Secil*¹²³, *Deister Holding*¹²⁴ and *X*¹²⁵. The interpretation of this case law could potentially require tax authorities to provide evidence that the actions taken by the taxpayer constitute a “wholly artificial arrangement”, thereby placing the burden of proving the presence of such arrangement on the taxpayer.

¹⁰²*X*, supra n. 40, § 91. See Nogueira, supra n. 44, at p. 235.

¹⁰³*Thin Cap Group Litigation*, supra n. 47, § 82-86.

¹⁰⁴*CFC and Dividend Group Litigation*, supra n. 58, § 84.

¹⁰⁵CJEU 21 January 2010, *SGI* (C-311/08, ECR 2010 p. I-487) ECLI:EU:C:2010:26.

¹⁰⁶*Établissements Rimbaud*, supra n. 92, § 37-38 and 45-46.

¹⁰⁷*SIAT*, supra n. 49, § 50.

¹⁰⁸*Itelcar*, supra n. 59, § 37.

¹⁰⁹CJEU 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company* (C-190/12) ECLI:EU:C:2014:249, § 85.

¹¹⁰CJEU 31 May 2018, *Hornbach-Baumarkt* (C-382/16, *Publié au Recueil numérique*) ECLI:EU:C:2018:366, § 49-53.

¹¹¹*X*, supra n. 40, § 87.

¹¹²*Impresa Pizzarotti*, supra n. 65, § 36.

¹¹³*Lexel*, supra n. 39, § 50.

¹¹⁴See Ravelli, supra n. 78, at p. 442. See Nogueira, supra n. 44, at p. 236.

¹¹⁵*Lexel*, supra n. 39, § 49.

¹¹⁶*Lankhorst-Hohorst*, supra n. 36, § 37.

¹¹⁷*Cadbury-Schweppes*, supra n. 14, § 51.

¹¹⁸*Glaxo Wellcome*, supra n. 76, § 81 and 99-101.

¹¹⁹*Lammers & Van Cleeff*, supra n. 90, § 26 and 28.

¹²⁰*Commission/United Kingdom*, supra n. 64, § 25 and 28.

¹²¹*Itelcar*, supra n. 59, § 37.

¹²²*SIAT*, supra n. 49, § 40.

¹²³CJEU 24 November 2016, *SECIL* (C-464/14) ECLI:EU:C:2016:896, § 59-61, 146 and 199.

¹²⁴*Deister Holding*, supra n. 66, § 60, 64 and 65.

¹²⁵*X*, supra n. 40, § 73 and 82.

In *N Luxembourg I*¹²⁶, the Court seems to place the burden of proof on tax authorities. The Court stressed in this ruling that disclosing evidence of the beneficial owner's identity is not mandatory for tax authorities. Tax authorities merely needed to produce proof of an abusive situation (that is, giving proof that the objective and subjective aspects of the abuse test were met in the instance), in order to withhold EU law advantages.

In *T-Danmark*, the domestic court referred the burden of proof question to the CJEU. For the decision of the instance, it was relevant to establish to what degree the tax administration had to settle the facts of the abuse and establish who had the right to apply the directive, i.e., who was the beneficial owner of the payment. The CJEU confirms that tax authorities may request taxpayers to provide proof of their claim to the IRD exemption. This would result from a tax system based on self-assessment in which a corporation does not withhold a tax, and the tax administration needs to require from it the elements demonstrating that it acted in accordance with the law. When it comes to proving abuse, the CJEU emphasises unequivocally that it is a matter regarding the tax administration. This is an issue about the right to be found “guilty” of an unlawful – abusive – act. It is the tax administration's responsibility to prove the existence of unlawful, abusive acts in the context of tax inspections. In brief, determining who is required to prove abuse may result in the imposition of legal or administrative obligations on the taxpayer. As such, it is a matter that may have an impact on fundamental freedoms. It is not only a practical issue, but it also has broad consequences on how to structure anti-abuse legislation implementing EU anti-abuse rules.

¹²⁶*N Luxembourg I*, supra n. 13, § 142. See Nogueira, supra n. 44, at p. 233.

4. Proposal for amendment of Article 9(2) of the Unshell Directive

4.1 Introduction

The Unshell Directive aims at preventing entities within the EU with no or limited economic activity from benefiting from any EU or tax treaty benefits.

In recent years, the European Commission has focused on policies to combat tax avoidance and evasion. However, there are presently no clear provisions aimed specifically at shell companies, defined as entities that do not perform any actual economic activity¹²⁷, even if they're allegedly involved in one economic activity, which might be misused for tax avoidance or evasion purposes. Existing EU anti-avoidance regulations are insufficient to address tax problems involving shell entities, and concerted work to promote cross-border uniformity in the relevant tax treatment of shell arrangements is to be commended. The Unshell Directive proposal explicitly targets arrangements that involve the establishment of companies within the EU that, actually, do not undertake any commercial operations. Rather, they allow some tax benefits to be transferred to their beneficial owner or affiliated group.

4.2 Rebuttal of the presumption (article 9)

The Unshell Directive establishes minimum substance indicators (a substance test) for enterprises resident in the Member States, as well as rules regarding the tax treatment of undertakings not meeting the indicators. The proposed directive establishes a reasonable sequence of steps in respect of the substance of an undertaking.

The fourth step concerns the right of the alleged shell enterprise to establish the contrary (to demonstrate that it has substance or that it is not being misused for tax reasons). This is a critical opportunity since the substance test is dependent on indicators and, as a result, might not capture the exact facts and circumstances of each instance. As a result, taxpayers will have a legitimate opportunity to assert that they are not a shell as defined by the directive.

The level of communication needed between taxpayers and tax authorities throughout the EU is expected to rise considerably due to the proposed Directive. Entities

¹²⁷Definition according to the Explanatory Memorandum to the proposed Unshell Directive.

presumed to be a “shell” will need to rebut such presumption properly to avoid the harsh consequences. To claim a rebuttal of the presumption, taxpayers must provide tangible proof of the activities they perform. The evidence presented by the prima facie “shell” entity is required to contain information on the business (non-tax) grounds for establishing and operating the enterprise, which does not require a physical location, a bank account, or dedicated management or personnel. It is required to contain data on the resources used by such an enterprise to carry out its activities. Finally, it is also required to provide data that enables the verification of the connection between the enterprise and the Member State where it asserts residency for tax reasons (to ensure that the critical determinations regarding the profitable operations of the enterprise occur in that specific location).

Despite the fact that the foregoing information is crucial and must be provided by the rebutting enterprise, the enterprise is free to present other evidence¹²⁸. The tax administration of the State of tax residency of the enterprise should, subsequently, evaluate this information.

4.3 Is Article 9(2) of the proposed directive in line with the Court’s case law on abuse?

As discussed, by automatically assuming abuse on the basis of prescribed indicators and then putting the burden of proof on taxpayers to rebut the presumption, the proposed directive appears to run contrary to the CJEU’s guidance that general presumptions are not permitted.¹²⁹

As explained earlier¹³⁰, anti-abuse law cannot be applied based on fixed criteria. Rather, it must be determined on a casuistic basis whether the substance of an undertaking

¹²⁸Proposal for a Council Directive 2021/0434 laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU – Explanatory Memorandum, at p. 11.

¹²⁹*Leur-Bloem*, supra n. 81, § 41; *SIAT*, supra n. 49, § 55 and 56; CJEU 8 March 2017, *Euro Park Service* (C-14/16) ECLI:EU:C:2017:177, § 55; *Egiom and Enka*, supra n. 67, § 32; and *Deister Holding*, supra n. 66, § 74.

¹³⁰*Egiom and Enka*, supra n. 67; and *Deister Holding*, supra n. 66. In *Glaxo Wellcome*, A.G. Bot (Opinion of A.G. Bot, in case C-182/08, *Glaxo Wellcome*, ECLI:EU:C:2009:438, point 167) demanded that an anti-abuse clause must be adapted to the type of abuse to be addressed. See Terra and Wattel, “European Tax Law”, 7th edition Wolters Kluwer, vol. 1, 2018, at p. 273: “The measure implemented must be reasonable for combating the detected abuse, it may not be more restrictive than required to achieve that purpose, the abuse must be real, and the companies involved must have an opportunity to challenge any legal presumption of abuse under judicial review”.

is inappropriate for the activities performed¹³¹. As a result, domestic discriminatory measures that rely on general assumptions or evaluations are not allowed since they would limit the exercise of EU basic freedoms beyond circumstances of proven abuse (which refers to wholly artificial arrangements). This restricts the scope of anti-abuse measures to cases completely devoid of genuineness and would not easily allow any simplistic or arbitrary definitions of an entity as being a shell. Any attempts to do so risk generating chronic legal uncertainty for years to come pending a decision by the CJEU. Anti-abuse legislation should not create an unassailable presumption of fraud or abuse. Instead, the taxpayer must be given a chance to show proof of the structure's suitability.

Through the mechanism for identifying entities that allegedly lack minimum substance for tax purposes, this proposal appears to be placing the burden of proof on the taxpayer, despite the fact that the Court has explicitly said that the burden of proof should, at least primarily, lie with the competent tax authority. The Court doesn't require evidence of authenticity, but rather "proof of an abusive practice"¹³² or "examination of a set of facts (...) needed to establish whether the constituent elements of an abusive practice are present"¹³³.

The taxpayer seems to be granted a secondary role, relegated to "the opportunity to adduce evidence to the contrary".¹³⁴ In particular, the Court stated unequivocally, in numerous decisions, that tax authorities under any domestic anti-abuse legislation, whether purely domestic or as a result of the application of EU secondary law, may not limit themselves to adopting predefined criteria but must perform an individual evaluation of the entire operation in question.¹³⁵ The burden that tax authorities bear has limitations. They must only present proof of abuse, not of the actual transaction or reality evaded by the taxpayer.¹³⁶

The Court further confirmed that whenever tax authorities establish that a taxpayer is engaging in abusive behaviour, "the taxpayer must be given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial

¹³¹See Nogueira, supra n. 44, at p. 238.

¹³²*N Luxembourg 1*, supra n. 13, § 124.

¹³³*N Luxembourg 1*, supra n. 13, § 125.

¹³⁴*N Luxembourg 1*, supra n. 13, § 126. See Nogueira, supra n. 44, at p. 245.

¹³⁵In that regard, see § 32 of the *Egiom and Enka* case.

¹³⁶*N Luxembourg 1*, supra n. 13, § 142-144.

justification”¹³⁷. On the other hand, the unshell directive provisions on the rebuttal expose the taxpayer to considerable administrative restraints in order to determine the business justification and the absence of tax motivations. Furthermore, any anti-abuse law must not be “manifestly inappropriate with regard to the objective pursued”¹³⁸, and “any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved”¹³⁹. It must also be consistent with primary EU law.¹⁴⁰

In the Danish cases on beneficial ownership, the CJEU emphasised the necessity for anti-abuse legislation to comply with EU primary law.¹⁴¹

Proportionality overrides secondary EU legislation as a general principle of EU law, and directives must be compliant with it. In this regard, when denying directive or treaty advantages the proposal must guarantee proportionality. In accordance with the idea of proportionality, the directive shall not go further than rejecting improperly acquired tax advantages.

Failing to produce evidence of the minimum substance requirements outlined in the proposed directive may suffice to consider that an undertaking amounts, prima facie, to an artificial arrangement. However, according to the Court’s case law on the subject, if the initial prima facie standard of proof is met, the taxpayer must be given the chance to present evidence of the non-artificiality. The Unshell Directive accomplishes exactly that. However, the nature of the rebuttal differs significantly from what the Court’s prescribed in its case law¹⁴². According to the case law, once a prima facie case of abuse is established, the taxpayer should be provided with a chance to present the business reasons behind an arrangement since such justification would prevent concluding for the existence of abuse. And the case law requires nothing else than the commercial justifications for the rebuttal. Article 9 empowers Member States to “take appropriate measures” to allow undertakings to refute the presumption of being considered as a shell corporation under the meaning of the proposal. The principle of legal certainty would

¹³⁷*Thin Cap Group Litigation*, supra n. 47, § 82.

¹³⁸CJEU 3 December 2019, *Czech Republic v Parliament & Council* (C-482/17) ECLI:EU:C:2019:1035, § 119.

¹³⁹*Czech Republic v Parliament & Council*, supra n. 138, § 79.

¹⁴⁰CJEU 13 November 1990, *Fedesa and Others* (C-331/88, ECR 1990 p. I-04023) ECLI:EU:C:1990:391, § 19-21.

¹⁴¹*N Luxembourg 1*, supra n. 13, § 142.

¹⁴²See Nogueira, supra n. 44.

demand the existence of clear and predictable administrative procedures that do not impose a burden of proof on the taxpayer that is either realistically unattainable or unreasonably difficult.

Further guidance and clarifications in the proposal on the administrative procedures for the rebuttal of the presumption, as well as a harmonised application of that rebuttal across Member States, would promote a more efficient, fairer, and simpler functioning of the proposal. Taxpayers would benefit from such explanations by potentially lowering compliance costs. This would significantly reduce the possibility of taxpayers being confronted with differing interpretations of the same provision or concept by different Member States. Such guidance and clarifications should, in particular, establish procedural principles to be applied consistently across the EU, such as the length of the rebuttal procedure, to impose a time limit within which tax authorities must respond to the request for rebuttal of the presumption and offer appropriate and effective remedies. Given the above, in particular, in order to simplify and reduce the administrative burden, we believe it is prudent to introduce a common EU documentation requirement (in a standard format) to be filed by the taxpayer for the purposes of article 9 and communicated to the tax authorities with the tax return referring to the year in which the presumption is met, and the rebuttal is required.

According to the proposal, an entity may give further proof of the commercial operations they engage in to produce the relevant income. In particular, the taxpayer may present the following extra evidence (i) a document outlining the commercial justification for the arrangement, (ii) information on the staff, such as the forms of their contract, decision-making powers and education, and (iii) concrete facts demonstrating that the decision making regarding the activity takes place in the enterprise's Member State.

The proposal does not explain the purpose underlying the "commercial rationale" requirement. It would thus necessitate appropriate clarifications on a common understanding of this concept, as well as clarifications on how the concept of "commercial rationale behind the establishment of the undertaking" should be assessed (the activity of a pure holding company is not, by definition, a commercial activity). It also necessitates clarifications on the actual elements of proof to be presented to the tax authorities to rebut the presumption. In this regard, it would be beneficial to provide clarification to taxpayers and tax administrations on the rationale of the information required under article 9(2)(b)

and 9(2)(c), taking into account the information and documentary proof already revealed for purposes of Article 7.

Article 9 requires information on the profiles of employees, which is meant to have previously been submitted for the tax return declaration under Article 7(2) and should thus already provide the tax administration with sufficient information in that regard. We fear that, as it stands, the workload linked to the evidence to produce and the expected length of the entire process could discourage taxpayers from invoking it. Without clear guidance on its use, we might also face abusive interpretations from fiscal authorities. Furthermore, in the light of EU data protection legislation¹⁴³, we disagree with the undertaking's requirement to provide information concerning personnel profiles.¹⁴⁴

While article 9(2)(a) of the proposed Unshell Directive is a matter of abuse, article 9(2)(c) concerns tax residence. Ascertaining the existence of substance is not the same as determining whether the existing substance is taken into account at the appropriate place for tax purposes. While determining the former is an issue of abuse, determining the latter does not amount to abuse but to the allocation of the taxable based following tax residency.

Regarding tax residence, the proper documentary evidence would be the tax certificate of residency of the undertaking. The provisions of the proposed Unshell Directive offer distinctive guidelines on the treatment that the country of the shell entity shall adopt. There are two options: either refuse to issue a certificate of residency for usage outside of the jurisdiction of the Member State or issue such a certificate but note that the enterprise is not entitled to the advantages of DTTs.

The mere fact of not being able to obtain a tax residence certificate or obtaining a limited tax residence certificate would have the disregard of the legal personality as a tax

¹⁴³Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

¹⁴⁴According to article 5(1)(c) of the GDPR, personal data shall be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”. The Union or the Member State law must serve a public interest purpose and be proportional to the lawful goal pursued, which is not the case here. The requirement to provide information concerning personnel profiles by the undertaking goes beyond what is necessary for preventing fraud and abuse.

consequence. The issue of residency would never be well resolved by a normative initiative that ends up with the disregard of the legal personality.

It is unclear if the proposed Unshell Directive is intended to address the existence of a shell corporation, its tax residence, transfer pricing, the coherence between its functions and the income ascribed to it, or simply to establish prima facie cases of tax evasion. Based on its objectives, it should concentrate entirely on abuse. A corporation with directors/employees that engage in crucial decision-making has substance and hence cannot be a shell. The geographical location of these individuals may be pertinent solely for determining the tax domicile of such an otherwise legitimate entity and possibly for the allocation of revenue between the headquarter and its Permanent Establishments. As a result, the directive makes it hard to draw a clear distinction between shell entities and legitimate exercise of the right of establishment in the EU since it conflates a variety of distinct tax issues: abuse, residency and transfer pricing.

The criteria of article 9(2)(c) of the Unshell Directive built upon indicators of corporate residence would make more sense in a proposal addressing tax residency than in a proposal addressing shell corporations (which refers not to the residence but to the fact that the entity acts as a mere conduit). Accordingly, we propose that this point is simply removed from the proposal.

After analysing the Court's jurisprudence on abuse, we believe that the mismatch with the case law is obvious since the unshell directive requires considerably more than proving the existence of a commercial rationale. However, what is more relevant is that the mechanics of its application are somehow flawed. The proposal begins by establishing that an entity is a shell with no substance to suggest, then that the rebuttal boils down to proving that there is substance. The structure of the rebuttal must thus be fundamentally different: it must recognise that one is dealing with a shell entity, but it should allow the taxpayer to establish that, even though the entity is a shell, it is not set up for tax reasons but for other commercial reasons. We can see such reasons arising from case law (e.g., *Centros*), namely taking advantage of minimum capital requirements under company law or imagining different scenarios where one might want to rely on a shell company without considering tax – e.g., shielding assets from creditors that then have to go through lengthy procedures challenging the transactions performed and potentially cross-border enforcement.

As a result, the quasi-functional analysis proposed in Article 11(3) to determine whether the rebuttal was successful is misplaced. In our opinion, it should be replaced with the sole criterion of whether the taxpayer is able to provide convincing proof that the arrangement pursues genuine (non-tax) economic purposes. In this sense, the problem with the additional criteria that the evidence must be in the form of “a document” is its lack of alignment with case law. Because the directive’s procedural rules would be left to the Member States’ national procedural autonomy, it would be a question of determining the admissible evidence under domestic law.¹⁴⁵

The very essence of abuse as a justification to restrict freedom of establishment, according to the Court’s case law, relates to a “wholly artificial arrangement intended to escape the national tax normally payable”.¹⁴⁶ As a result, there are two elements: a lack of substance (artificial arrangement) and a desire to avoid taxation (rather than some other non-tax aim). The unshell directive’s substance requirements target the establishment of an artificial arrangement (shell) and shift the burden of proof on the intention, which is pretty reasonable given that the taxpayer is best placed to explain the reasoning for its actions. What the directive cannot do, however, is to regard the conditions of abuse as non-cumulative by requiring the taxpayer to demonstrate in the rebuttal elements beyond intent.

The CJEU refers as abuse the case where “economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage”.¹⁴⁷ As a result of this, the grant of the benefit of EU law provisions must be rejected if they are relied on for the purpose of profiting from an advantage under EU law rather than accomplishing the purposes of those provisions.

¹⁴⁵The proposal may raise elements of legal uncertainty in respect of procedural matters. An example of such issues is a State’s power to request another State to conduct an audit in connection with the existence of indicators of a shell company (article 15 of the proposed Unshell Directive).

¹⁴⁶*Cadbury-Schweppes*, supra n. 14, § 75. See Nogueira, supra n. 13.

¹⁴⁷*T-Danmark*, supra n. 12, § 98. It’s crucial to emphasise that arrangements whose aim is to acquire a tax benefit complying with the laws to be applied are not contradictory to EU law and do not constitute an abusive conduct, as stated by the CJEU in *Halifax* and by the European legislator in § 11 of the foreword of the ATAD directive (supra n. 10).

In all cases, determining abuse should need a thorough examination of all relevant facts and circumstances (i.e., the primary non-tax reasons for creating a limited-substance corporation; and the lack of tax grounds for establishing an enterprise).

While we applaud the introduction of opportunities to rebut the presumption under Article 9 of the proposal, one should note that, in the matter of abuse, the CJEU explicitly held that the burden of evidence in case of potentially abusive practices lies primarily on the tax authorities (including in the case of shell corporations).¹⁴⁸ In contrast, under the proposal, the burden of proof is allocated *prima facie* to the taxpayer. The legitimacy of such a reversal is doubtful since the alleged absence of minimum substance does not necessarily imply abuse.

Although there is an opportunity to provide evidence of commercial purposes, the only way to rebut the presumption is to prove that the entity was not a shell and “had control over, and [bore] the risks of, the business activities that generated the relevant income” (article 9(3) of the proposed Unshell Directive). It is not possible to rebut solely on the basis that an entity is not being misused for tax purposes. The mere fact that the enterprise is deemed to be a shell for the purposes of the proposed directive is sufficient for the tax consequences to apply (per Articles 11 and 12). This would appear to be contrary to existing approaches to anti-abuse rules under EU and international law.¹⁴⁹

Under the proposed directive, it is up to the judgment of the Member State in question as to whether the rebuttal or exemption evidence is sufficient on a case-by-case basis. This poses questions of legal certainty for taxpayers, as well as of consistency in implementation between Member States. Further, it also appears contrary to the CJEU’s position that access to treaty freedoms cannot result from administrative discretion.¹⁵⁰

This being said, we can clearly conclude that article 9(2) of the proposed Unshell Directive is not in line with the Court’s case law on abuse.

4.4 What safeguard clause would we introduce into the directive to ensure compliance with CJEU case law?

¹⁴⁸See Nogueira, *supra* n. 44.

¹⁴⁹See cases cited in footnote 129.

¹⁵⁰See Nogueira, *supra* n. 44, at p. 238.

As explained earlier, once prima facie evidence of abuse is provided by tax authorities, the taxpayer should be given the chance to present proof of the business motives for his action before tax authorities may determine the presence of abuse. The CJEU perspectives the fight against abuse as a Member State’s obligation that must be met without “undue administrative constraints”.¹⁵¹ Accomplishing such an obligation “must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified”.¹⁵² On the other hand, the unshell directive provisions on the rebuttal expose the taxpayer to considerable administrative restraints in order to determine the business justification and the absence of tax motivations.

Taking this into account, we can conclude that the provisions of article 9(2) of the proposed directive go far beyond what can be required to consider an operation as abusive.

So, our proposed amendment for Article 9(2) is the following:

“Article 9 – *Rebuttal of the Presumption*

2. For the purposes of paragraph 1, undertakings shall provide the following additional evidence: Information on the commercial (i.e., non-tax) reasons for setting up and maintaining an undertaking which does not need its own premises and/or bank account and/or dedicated management or employees.”

Anti-abuse law cannot be applied based on fixed criteria. Rather, it must be determined on a casuistic basis whether the substance of an undertaking is inappropriate for the activities performed.¹⁵³ Thus, the proposed amendment for article 9(2) must also be assessed on a case-by-case basis. Tax authorities may not “confine themselves to applying predetermined general criteria, but must subject each particular case to a general examination”¹⁵⁴ or “must carry out an individual examination of the whole operation at issue”¹⁵⁵. Abuse must, in principle, be established on a casuistic basis to limit undue

¹⁵¹*Thin Cap Group Litigation*, supra n. 47, § 82. See Nogueira, supra n. 44, at p. 235.

¹⁵²*X*, supra n. 40, § 91. See Nogueira, n. 44, at p. 235.

¹⁵³See Nogueira, supra n. 44, at p. 238.

¹⁵⁴*Leur-Bloem*, supra n. 81, § 41.

¹⁵⁵*Deister Holding*, supra n. 66, § 62.

recourse to rights conferred by EU law. In other words, abuse must be assessed in the context of each particular case's facts and circumstances.

5. Conclusions

- I. In recent years, fighting tax avoidance and evasion has become one of the cornerstones of international tax policy. The CJEU is one of the most relevant stakeholders in this fight, particularly with its evolving concept of abuse in direct tax matters.
- II. The proposed Unshell Directive aims at preventing entities within the EU with no or limited economic activity from benefiting from any EU or tax treaty benefits.
- III. However, the regime currently foreseen in the proposed Directive suffers from some problems that end up compromising the effective accomplishment of its rationale. These problems could, in our opinion, be corrected in a revision of the proposal.
- IV. The Court has released a large number of rulings in direct taxation, the majority of which seek to address concerns related to abuse and the burden of proof.
- V. The majority of CJEU abuse cases concern the compatibility of a prima facie discriminatory domestic measure with primary EU law. National governments tend to use abuse as a basis to legitimise such prima facie discriminatory measures. In this scenario, allusions to the burden of proof usually arise from a proportionality evaluation, which requires the national measure to be properly calibrated to solely prohibit wholly artificial arrangements. This means that universal and incontrovertible presumptions demonstrating that particular transactions represent abusive practices infringe proportionality. Moreover, and from a procedural standpoint, Member States must give the individual or enterprise in question the opportunity to refute such presumptions, and domestic courts must be empowered to determine the presence of abuse on a casuistic basis.
- VI. In reality, by automatically assuming abuse on the basis of prescribed indicators and then putting the burden of proof on taxpayers to rebut the presumption, the proposed directive appears to run contrary to the CJEU's guidance that general presumptions are not permitted.
- VII. Besides the above-mentioned context (ascertaining the compatibility of a domestic tax rule with fundamental freedoms), abuse is also evoked by the

CJEU in ascertaining access to rights emerging from EU law (which can be rights stemming from primary or secondary EU law). In the latter context, the CJEU normally refers to the so-called unwritten EU general principle.

- VIII. Through the mechanism for identifying entities that allegedly lack minimum substance for tax purposes, this proposal appears to be placing the burden of proof on the taxpayer, despite the fact that the Court has explicitly said that the burden of proof should, at least primarily, lie with the competent tax authority. The legitimacy of such a reversal is doubtful since the alleged absence of minimum substance does not necessarily imply abuse.
- IX. In turn, the CJEU perspectives the fight against abuse as a Member State's obligation and sets the burden of evidence of abuse on tax authorities. As a result, it seems unacceptable to implement any domestic measure or administrative rule that intends to transfer the burden of proof back to the taxpayer.
- X. Failing to produce evidence of the minimum substance requirements outlined in the proposed directive may suffice to consider that an undertaking amounts, *prima facie*, to an artificial arrangement. However, according to the Court's case law in this regard, if the initial *prima facie* standard of proof is met, the taxpayer must be given the chance to present proof of the non-artificiality.
- XI. We believe that further guidance and clarifications on the administrative procedures for the rebuttal of the presumption, as well as a harmonised application of that rebuttal across Member States, would promote a more efficient, fairer, and simpler functioning of the proposal. In particular, in order to simplify and reduce the administrative burden, we believe it is prudent to introduce a common EU documentation requirement (in a standard format) to be filed by the taxpayer for the purposes of article 9 and communicated to the tax authorities with the tax return referring to the year in which the presumption is met, and the rebuttal is required.
- XII. Additionally, the proposal does not explain the purpose underlying the "commercial rationale" requirement. It would thus necessitate appropriate clarifications on a common understanding of this concept, as well as clarifications on how the concept of "commercial rationale behind the establishment of the undertaking" should be assessed.

- XIII. The CJEU refers as abuse the case where “economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage”.¹⁵⁶ As a result of this, the grant of the benefit of EU law provisions must be rejected if they are relied on for the purpose of profiting from an advantage under EU law rather than accomplishing the purposes of those provisions.
- XIV. Although there is an opportunity to provide evidence of commercial purposes, the only way to rebut the presumption is to prove that the entity was not a shell and “had control over, and [bore] the risks of, the business activities that generated the relevant income” (article 9(3) of the proposed Unshell Directive). It is not possible to rebut solely on the basis that an entity is not being misused for tax purposes. This would appear to be contrary to existing approaches to anti-abuse rules under EU and international law.
- XV. We consider that the proposal is a step forward towards eliminating the abuse of shells for tax reasons within the framework of the EU’s ongoing efforts towards fair taxation. The proposal’s rules must effectively complement international rules without being premature or overburdening. As a result, we believe that the proposal does not even meet its goals (tackling abuse and tax avoidance), particularly in terms of legal certainty and reduction of compliance costs.
- XVI. In our opinion, it is unclear if the proposed Unshell Directive is intended to address the existence of a shell corporation, its tax residence, transfer pricing, the coherence between its functions and the income ascribed to it, or simply to establish *prima facie* cases of tax evasion. Based on its objectives, it should concentrate entirely on abuse. However, the proposed Unshell Directive appears to erroneously combine residency and shell company issues.
- XVII. The directive relies on a set of rebuttable presumptions. The rebuttal of these presumptions cannot go beyond the burden that the CJEU allows to be imposed on the taxable person in case of an *ex-post* control: the existence of abuse. Accordingly, any regulation in this matter will only be legitimate to the

¹⁵⁶*T-Danmark*, supra n. 12, § 98.

extent that the inversion of the burden of proof is based on a test with a substantive content in line with the Court's jurisprudence on this matter.

- XVIII. After analysing the Court's case law, we conclude that article 9(2) is not aligned with the Court's concept of abuse.
- XIX. So, our proposed amendment for Article 9(2) is the following: "For the purposes of paragraph 1, undertakings shall provide the following additional evidence: Information on the commercial (i.e., non-tax) reasons for setting up and maintaining an undertaking which does not need its own premises and/or bank account and/or dedicated management or employees."
- XX. We believe that implementing this proposed amendment for article 9(2) would lead to a better implementation of the rationale behind the directive's adoption.

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