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Article

Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance?

Cihat Öner*

The primary aim of this article is to question whether the general anti-abuse rule (GAAR) of Anti-Tax Avoidance Directive (ATAD) is an effective tool to tackle tax avoidance. By using a comparative technique as a method, other directives that include a GAAR will be analysed as a companion to the ATAD to identify whether there is a common understanding of the concept of abuse of tax laws within the EU legal order. Then the general consequences of the application of the GAAR of the ATAD will be exposed. The difficulties which could be encountered in the application procedure will be explained around some potential scenarios, based on simple models developed by the author.

Keywords: Tax Avoidance, Abusive Tax Practices, Artificial/Genuine Arrangement(s), Main Purpose(s) Test, Tax Advantage, General Anti-abuse Rule(s) (GAARs), Anti-Tax Avoidance Directive (ATAD), Interest-Royalties Directive, Merger Directive, Parent-Subsidiary Directive.

1 INTRODUCTION

On 12 July 2016,¹ The Council of the European Union adopted Directive 2016/1164 (Anti-Tax Avoidance Directive or ATAD), laying down rules against tax avoidance practices that directly affect the functioning of the internal market. The general anti-abuse rule (GAAR) is formulated in Article 6 of the ATAD, which provides that the EU Member States (MSs) shall, for the purposes of calculating corporate tax liability, ignore arrangements that have the main purpose, or one of the main purposes,² of obtaining a tax advantage that defeats the objective or purpose of the applicable tax law and that are not genuine having regard to all relevant facts and circumstances.

The function of GAARs in tax systems is to tackle abusive tax practices that are not addressed in specifically designed provisions. Therefore, the general aim of GAARs is to fill the gaps in the tax systems in order to prevent abuse.³ The GAAR under the ATAD also embraces that aim by stipulating that even if there are other specific anti-abuse rules (SAARs) in national legal systems, they should not affect the applicability of this rule.⁴ Naturally, MSs are allowed to enact other anti-abuse rules, but after the adoption of the ATAD, the domestic rules must remain within the borders of the 'abuse' concept as reorganized in the ATAD.⁵ In the law-making⁶ and application process, other GAARs regulated at the EU level and the fundamental principles developed both in the literature and case-law should be taken into account. This very fact necessitates a comparative academic research to be conducted in this area.

The case-law of the Court of Justice of the European Union (CJEU) is rather settled in this regard. For instance, the justification of the direct tax restrictions on free

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¹ For the objectives of ATAD and its relationship with the fundamental freedoms granted by the Treaty on the Functioning of the European Union (TFEU), see G. Bizioli, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?*, 26(3) EC Tax Rev. 172 et seq. (2017) and A. Cordewener, *Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards Under Treaty Freedoms and EU Directives?*, 26(2) EC Tax Rev. 61–62 (2016).

² The test included in the first proposal of the EU Commission on 28 Jan. 2016 was 'essential purpose test', see COM (2016) 26 final 2016/0011 (CNS) Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Art. 7. The literature stated that it should be welcomed that the Commission decided to opt for an 'essential purpose test' instead of 'main purpose test'. A. Navarro, L. Parada & P. Schwarz, *The Proposal for an EU Anti-avoidance Directive: Some Preliminary Thoughts*, 25(3) EC Tax Rev. 124 (2016).

³ For details on the background of the ATAD 2 and the Commission's initial position, see T. Balco, *ATAD 2: Anti-Tax Avoidance Directive*, 57(4) Euro. Tax'n 127 et seq. (2017).

⁴ It means that there will be 'a whole new playground for the CJEU to explore'. Cordewener, *supra* n. 1, at 66. For the interaction between a common GAAR and domestic GAARs see S. V. Aramayo, *A Common GAAR to Protect the Harmonized Corporate Tax Base: More Chaos in the Labyrinth*, 26(1) EC Tax Rev. 13 et seq. (2016).

⁵ See the national transposition status of the ATAD at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=uriserv:OJ.L_.2016.193.01.0001.01.ENG (accessed 11 Dec. 2019).

⁶ L. De Broe & D. Beckers, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law*, 26(3) EC Tax Rev. 140 (2017).

movement rights has been shaped around the prevention of the abuse of law.⁷ Along with that, the direct tax directives include some provisions that allow MSs to withhold the application and to deny the benefits of the directives in certain situations or that authorize them to restrict the benefits entitlement of taxpayers by applying their domestic or treaty-based anti-abuse rules. These provisions, however, should be transposed into domestic law to take legal effect.⁸ This is likely to create various compliance problems, and it takes time to follow a consistent approach within the EU.⁹ Thus, the need for a GAAR at the EU level has frequently been discussed over the last decade.¹⁰

The main research question of the paper is shaped in line with all these developments: *Will the GAAR of the ATAD be an effective tool in tackling tax avoidance?*¹¹ In order to answer this question, the following sub-research questions will also be addressed: (1) *What are the similarities and differences, with regard to the aims, conditions and consequences, between the GAAR of the ATAD and other GAARs provided in the Interest-Royalties Directive¹² (IRD), Merger Directive¹³ (MG) and Parent-Subsidiary*

*Directive?*¹⁴ (PSD) (2) *What are the possible problems that may occur during the application of the GAAR of the ATAD?*

This article uses a qualitative research method by performing a literature review covering relevant theoretical discussions and case law. The scope of the paper is limited to the literal and purposive analysis of the GAAR of the ATAD. By using a comparative technique, other directives that include a GAAR will be examined as a companion to the ATAD to identify whether there is a common understanding of the concept of abuse of tax laws within the EU legal order. To reveal that, the aims and conditions of each GAAR will be evaluated and they will all be analysed comparatively. Then, the general consequences of the application of the GAAR of the ATAD will be exposed. The last section aims to present the difficulties which could be encountered in the application of the rule in certain potential scenarios, based on some simple models developed by the author to test the genuineness of the arrangement(s) mentioned in the GAAR of the ATAD.

2 BASE: GENERAL ANTI-ABUSE RULE OF THE ANTI-TAX AVOIDANCE DIRECTIVE

On 28 January 2016, the Commission presented its proposal for the ATAD as part of the Anti-Tax Avoidance Package. On 20 June 2016, the Council adopted the ATAD.¹⁵ It stated that the ATAD contains five legally-binding, anti-abuse measures that all MSs should apply against the common forms of aggressive tax planning.¹⁶ One of these measures is the design of a GAAR in Article 6 of the ATAD.¹⁷

When the terminology used throughout the ATAD is examined, at first sight, it is clear that it was not composed consistently. The text exemplifies the confused approach of the legislative authorities of the EU once again. For instance, the title of the ATAD is ‘*Council Directive ... laying down rules against tax avoidance practices ...*’, and the title of Article 6 is ‘*general anti-abuse rule*’. Some measures designed in the Directive will be applicable against the

⁷ See D. Smit, *EU Freedoms, Non-EU Countries and Company Taxation* 256–257 (Wolters Kluwer 2012). Also see A. Zalasinski, *The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case*, 52(9) Eur. Tax’n 449–450 (2012).

⁸ See P. A. H. González-Barredathe, *Holding Companies and Leveraged Buy-Outs in the European Union Following BEPS: Beneficial Ownership, Abuse of Law and the Single Taxation Principle* (Danish ECJ Cases C-115/16, 116/16, 117/16, 118/16, 119/16 and 299/16), 59(9) Eur. Tax’n 413 (2019) and decisions in which the Court rules the principle of prevention of abuse is not dependent on transposition in the way that the rest of the Directives is. Judgment of the (Grand Chamber) 26 Feb. 2019, Joint Cases of N Luxembourg I (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS (C-299/16), ECLI:EU:C:2019:134, para. 122 and 26 Feb. 2019, Joint Cases of T Denmark (C-116/16), Y Denmark Aps (C-117/16), ECLI:EU:C:2019:135, para. 95.

⁹ Even for the GAAR of ATAD, it is stated that the following Member States do not have any plans to implement, as they have rules deemed to have the same (or a broader) scope: Belgium, Bulgaria, Croatia, Finland, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. See O. Popa, *European Union – An Overview of ATAD Implementation in EU Member States*, 59(2/3) Eur. Tax’n 121 (2019).

¹⁰ See R. de la Feria, *Prohibition of Abuse of Community Law: The Creation of a New General Principle of EC Law Through Tax*, 45(2) Comm. Mkt. L. Rev. 395 et seq. (2008). Further, see, for the uniformed concept of abuse in EU direct taxation, Adolfo Martín Jiménez, *Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law*, 66(4/5) Bull. Int’l Tax’n 285 (2012).

¹¹ This article represents the second step in the author’s research on tax avoidance. For the first step see C. Öner, *Is Tax Avoidance the Theory of Everything in Tax Law? A Terminological Analysis of EU Legislation and Case Law*, 27(2) EC Tax Rev. 96–112 (2018).

¹² Council Directive, 2003/49/EC of 3 June 2003, on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

¹³ Council Directive 2009/133/EC of 19 Oct. 2009, on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets, and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (codified version). For the previous versions of this article, see Art. 11 of the Council Directive 90/434/EEC of 23 July 1990 and para. 13 of the Council Directive 2005/19/EC of 17 Feb. 2005.

¹⁴ Council Directive (EU) 2015/121 of 27 Jan. 2015. Before the amendment Art. 1(2) reads: ‘*This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse*’.

¹⁵ (EU) 2016/1164.

¹⁶ See https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en (accessed 11 Dec. 2019).

¹⁷ Art. 6: General anti-abuse rule:

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of para. 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with para. 1, the tax liability shall be calculated in accordance with national law.

common forms of 'aggressive tax planning',¹⁸ but the aim of the rule is presented as to tackle 'abusive tax practices'.¹⁹ Finally, the GAAR will be applicable to calculate corporate tax liability.²⁰ During this process, if a MS decides that an arrangement or a series of arrangements were put into place for the main purpose or one of the main purposes of obtaining a tax advantage, the MS shall ignore that arrangement or series of arrangements. In such cases, the tax liability shall be calculated in accordance with national law. Therefore, the rule displays some elements of various anti-avoidance doctrines,²¹ such as sham, substance-over-form, and *fraus legis*.²² Depending on the wording of the ATAD, it could be claimed that the GAAR has no single aim. In general, it is designed to cover not only tax avoidance cases practised by using non-genuine arrangements, but also other abusive practices, such as aggressive tax planning mentioned above.²³ Thus, its scope can be considered as rather comprehensive.²⁴

3 AIMS OF THE GAARs OF THE DIRECTIVES

The requirements to apply the anti-abuse rules are established around the aims and purposes of the directives;

thus, in this section, the aims of the GAARs provided in the mentioned Directives will be examined comparatively.²⁵

3.1 Interest-Royalties Directive

In the IRD, a GAAR is placed under the title of 'Fraud and Abuse' in Article 5.²⁶ The first paragraph presents the interaction between this article and the domestic or agreement-based provisions required for the prevention of 'fraud or abuse'.²⁷ The second paragraph formulates the rule limiting the use of the benefits granted by the IRD.²⁸

It is observed that the Directive equates fraud with abuse and aims at preventing both. Tax fraud is a particular form of (direct) breach of law and criminal activity whereas abuse is circumventing the law. Therefore, the prevention of fraud and the prevention of abuse are entirely different subjects requiring different mechanisms to tackle. Besides, the first paragraph only refers to the domestic or agreement-based provisions required for the prevention of fraud and abuse.²⁹ Tax evasion is not included in the first paragraph. In the second paragraph though, tax evasion, tax avoidance and abuse are mentioned; fraud is not mentioned for the transactions of which the principal motive or one of the principal motives could lead the MSs to withdraw the benefits of the Directive or refuse to apply the Directive.

By relying on purposive interpretation, it could be argued that fraud in the article covers tax fraud.³⁰

¹⁸ It could be interpreted in a way that the reference to 'aggressive tax planning' in para. 3 of the Preamble is related to the rules regarding hybrid entity and hybrid instruments. See https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en. In the following sentences there is a reference to OECD BEPS project and it is stated that 'this objective could be achieved by creating a minimum level of protection for national corporate tax systems against tax avoidance practices across the Union'. However, the definition of aggressive tax planning (especially the OECD's definition) does not imply avoidance or abuse per se. See A. P. Dourado, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, 43(1) *Intertax* 48 (2015). Further, see J. M. Calderón Carrero & A. Q. Seara, *The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border Between Legitimate and Illegitimate Tax Planning*, 44(3) *Intertax* 207 et seq. and 223 (2016).

¹⁹ See Preamble, para. 11.

²⁰ The term tax liability is not defined and is left to the interpretation of the MSs. A. Rigaut, *Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons*, 56(11) *Eur. Tax'n* 502 (2016).

²¹ Further, it is stated that the case-law on the principle of abuse operates in a manner similar to the general anti-tax avoidance rules. See A. P. Dourado, *A Single Principle of Abuse in European Union Law: A Methodological Approach to Rejecting a Different Concept of Abuse in Personal Taxation*, in *Prohibition of Abuse of Law 470* (R. de la Feria & S. Vogenauer eds, Hart Publishing 2011) and Dourado, n. 18 at 52-53.

²² D. Gutmann et al., *The Impact of the ATAD on Domestic Systems: A Comparative Survey*, 57(1) *Eur. Tax'n* 9 (2017).

²³ The European Commission defines aggressive tax planning as 'taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability'. See Commission's Recommendation on Aggressive Tax Planning C (2012) 8806 final [2012] OJ L 338/41, para. 2. https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf (accessed 11 Dec. 2019).

²⁴ This could be observed in the EU Commission's explanations as '... it thus allows abusive tax practices to be captured ...'. See Proposal, *supra* n. 2, s. 5 and in the Preamble as '... GAARs feature in tax systems to tackle abusive tax practices ...', see para. 11.

²⁵ In the literature, it is stated that a GAAR could be considered a principle of law rather than as a rule. J. D. Rolim, *The General Anti-Avoidance Rule: Its Expanding Role in International Taxation*, 44(11) *Intertax* 816 (2016). The author of this article disagrees with this opinion and accepts that GAARs are rules that must strictly follow the principles applied in tax law.

²⁶ Article 5 fraud and abuse:

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

2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.

²⁷ In the 1998 Draft, the term 'appropriate measures' was used. See Art. 6(1): 'This Directive shall not preclude a MS from taking appropriate measures to combat fraud or abuse'.

²⁸ There are ten requests pending before the European Court of Justice (CJEU) for preliminary ruling regarding Art. 5. See <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0049> (accessed 11 Dec. 2019).

²⁹ These articles leave Member States with the option of including anti-abuse and/or anti-fraud measures in domestic tax laws and denying the benefits of the Directive (2003). There is no clarification in the Directive as to what exactly anti-abuse and anti-fraud measures are. Fraud and abuse measure criteria do not offer certainty. See T. J. C. Dongen, *Thin Capitalization Legislation and the EU Corporate Tax Directives*, 52(1) *Eur. Tax'n* 24 (2012).

³⁰ Art. 5 must be interpreted in the light of the relevant ECJ anti-abuse case-law which requires anti-abuse measures to be appropriate and proportionate. Report from the Commission to the Council in accordance with Art. 8 of Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States/COM/2009/0179 final, s. 3.3.9. Also see Judgment

Nevertheless, it is not easy to determine the purpose of mentioning abuse in the same sentence³¹ as the scope of abuse is rather large. Provisions designed to prevent abuse could be found not only in domestic or international tax laws but also in other areas of law.³² For the application of this paragraph, it could be claimed that it does not matter if the rules dealing with abuse are designed in tax laws or other branches of law. If it is accepted that the abuse mentioned here is the abuse of law or just abuse of tax law, rules required for prevention of such abuse could have either broad (GAAR) or limited scope (SAAR). Moreover, both domestic and international law can regulate these rules. However, it is neither mentioned nor clarified in the IRD as to what those anti-abuse and anti-fraud measures are.³³ Again, with the help of purposive interpretation, it can be accepted that the paragraph covers all types of anti-abuse rules with either a general or specific scope.³⁴

3.2 Merger Directive

The GAAR of the MD is established under Article 15.³⁵ There is no title for the article in this Directive, and it is placed under the Final Provisions Section. The aim of the article is to prevent 'tax evasion or tax avoidance' by refusing to apply or withdraw the benefits of all or any part of the relevant provisions of the MD.³⁶ Therefore, the composition of the Article 15 of the MD is different from Article 5 of the IRD since

Article 15 starts with the conditions under which a MS may not apply or withdraw the benefits provided by the MD.

The rule, which limits the use of the benefits of the MD, could be applied before or during the application of the provisions, like the IRD. The benefits may be refused or withdrawn partly or wholly depending on the situation.³⁷ It is indeed a challenge to measure the abusive practices in this manner. In other words, it is somewhat difficult to estimate how much abuse is involved in a situation and to limit the benefits granted partly or wholly accordingly. It is not clear if refusing in the beginning or withdrawing afterwards is more difficult. The application becomes even more complicated, especially when the options that would partly or wholly limit the use of the benefits are considered. It is possible that MSs may decide not to apply or withdraw the benefits of all or any part of the provisions of Articles 4–14. Therefore, each situation should be evaluated separately.

A subjective element test is also visible in this article, but the term used is the *principal objective*.^{38,39} A motive is a reason for doing something; an objective is something to be achieved.⁴⁰ In addition to the terminology differing in the directives, the applications of the tests differ, too. In the MD, the aim is to test if the principal objective or one of the principal objectives of the operation is tax evasion or tax avoidance. A legal presumption is provided in the article to clarify what could constitute tax evasion or tax avoidance being a principal objective or one of the principal objectives.⁴¹ Interestingly, abuse

of (Grand Chamber) 26 Feb. 2019, in Joint Cases, N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Denmark I (C-119/16), Z Denmark ApS (C-299/16), ECLI:EU:C:2019:134, para. 109.

³¹ Further, under para. 6 of the Preamble, it is stated as a necessity not to preclude MSs from taking appropriate measures to combat fraud or abuse.

³² There is no coherent approach to the use of terminology to describe the forms of abuse in EU legislation, though. de la Feria, *supra* n. 10, at 396.

³³ van Dongen, *supra* n. 29, at 24.

³⁴ In addition to these arguments, the literature also has heavy discussions on whether this article only deals with direct taxes. See Zalasiński, *supra* n. 7, at 446 et seq.

³⁵ Art. 15:

1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Arts 4 to 14 where it appears that one of the following operations referred to in Art. 1 are found to exist, wherein the benefit:

(a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;

(b) results in a company, whether participating in the operation or not, no longer fulfilling the necessary conditions for the representation of employees on company organs according to the arrangements which were in force prior to that operation.

2. Para. 1(b) shall apply as long as and to the extent that no community law provisions containing equivalent rules on representation of employees on company organs are applicable to the companies covered by this Directive.

³⁶ The objective of the Merger Directive is stated in the Preamble as creating a common system of taxation. See Preamble, paras 3, 4 and 9.

³⁷ This should be transposed into domestic law in order to take legal effect since such a measure does not have a 'reverse direct effect' against individuals. However, the decisions in the Danish Cases (C-115/16, 116/16, 117/16, 118/16, 119/16 and 299/16) CJEU went a step further, enabling the anti-avoidance principle to be applied without requiring the Directive to contain any rule or the domestic order to have transposed it. See González-Barredathe, *supra* n. 8, at 419.

³⁸ The wording used by the CJEU has not been consistent, but has developed over time from 'sole purpose' to 'essential aim'. Terms 'sole', 'principal', 'essential', and 'predominant' are used to mention the subjective purpose of the taxpayers. For detailed information see Öner, *supra* n. 11, at 106. In VAT cases the Court has referred to 'essential aim'. The Court in cases regarding direct taxation, (as of Cadbury Schweppes) has accepted the concept of 'one of the main purposes'. Also see *infra* n. 41.

³⁹ The wording of 'one of its principal objectives' in the Merger Directive must be interpreted to mean that the essential or principal aim of the transaction is to obtain a tax advantage. See E. Kemmeren, *Where Is EU Law in the OECD BEPS Discussion?*, 23 (4) EC Tax Rev. 193 (2014).

⁴⁰ Compare via Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/motive> and <http://dictionary.cambridge.org/dictionary/objective> (accessed 11 Dec. 2019).

⁴¹ It is accepted as [... 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] in the case law of the CJEU. See Judgment of 5 July 2007, *Kofoed*, ECLI:EU:C:2007:408, para. 38. Also see to that effect, Judgment of 9 Mar. 1999, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, C-212/97, ECLI:EU:C:1999:126, para. 24; Judgment of 21 Feb. 2006, *Halifax and Others*, C-255/02, ECLI:EU:C:2006:121, ECLI:EU:C:2006:241, paras 68 and 69; Judgment of 6 Apr. 2006, *Agip Petroli SpA v. Capitaneria di porto di Siracusa and Others*, C-456/04, paras 19 and 20; Case C-196/04 Judgment of 12

is not mentioned in the wording of the article, most likely because it was found unnecessary.

3.3 Parent-Subsidiary Directive

The GAAR of the PSD is set in Article 1.⁴² This article also limits the use of the benefits granted by this Directive. The aim of the Article is stated in the Preamble and in the text as, in general, to prevent abuse of the Directive and tackle non-genuine arrangement(s). This article intends to guarantee that the application of anti-abuse rules is proportionate and serves the specific purpose of tackling an arrangement or a series of arrangement(s).⁴³ From a policy perspective, the provision's aim is stated as to oblige MSs to adopt the common anti-abuse rule to achieve a common standard for anti-abuse provisions against the abuse of the Directive⁴⁴ that 'will ensure clarity and certainty for all taxpayers and tax administrations' and to guarantee 'an equal application of the EU Directive without possibilities for "directive-shopping" (i.e. to avoid that companies invest through intermediaries in member states where the anti-abuse provision is less stringent or where there is no rule)'.⁴⁵

The PSD also designs a test that necessitates controlling the purposes of those arrangement(s). In the IRD, the applied test was called 'principal motive',⁴⁶ then in the MD it became 'principal objective',⁴⁷ and in the PSD, it is the 'main purpose' (or one of the main purposes) test.⁴⁸

A purpose is either a reason for doing something or a reason why something exists.⁴⁹ Therefore, all of these terms represent a different perception of the concept of abuse of law.⁵⁰ The term *purpose* has a different scope

when compared to the term *objective*.⁵¹ This issue is also reflected in paragraph 2, where both terms are mentioned.⁵² This paragraph addresses the first possible conflict between the purpose of the arrangement(s) and the purpose of the PSD.

3.4 Anti-Tax Avoidance Directive

The GAAR of the ATAD is formulated in Article 6. The title and the Preamble⁵³ provide that the general aim is to tackle the abuse of law and more specifically to prevent the abuse of the corporate tax system. For that reason, MSs are given the opportunity to ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law. If Article 6 of ATAD is compared with Article 5 of the IRD, it is observed that in the latter, the aim is to tackle the abuse of the provisions of the Directive. This aim is clearly mentioned in the text of the article, along with tax evasion and tax avoidance. A similar approach is also followed in the MD, by giving a MS the authority to refuse to apply or withdraw the benefit of all or any part of the Directive in case one of the operations referred has as its principal objective or as one of its principal objectives tax evasion or tax avoidance.

The wording of Article 6 of ATAD is like the wording of Article 1(2) of the PSD.⁵⁴ Both articles include a similar purpose test. For that reason, the analyses developed above for the PSD could be valid for the ATAD to a certain extent, but there are some differences. For instance, in the PSD, the aim is stated as: 'inclusion of a common minimum anti-abuse rule would be very helpful to prevent misuse of that Directive and to ensure greater consistency in its application in different Member States'.⁵⁵ As stated, the general aim of the ATAD is to prevent the abuse of corporate taxation systems⁵⁶; to fill the gaps in this regard, and even provide the MSs with the opportunity to apply penalties where the GAAR is applicable.⁵⁷

Sept. 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, ECLI:EU:C:2006:544, para. 35.

⁴² The GAAR of the Parent-Subsidiary Directive in the amended version of the Directive 2011/96/EU of 30 Nov. 2011, Art. 1(2) is replaced by the following paragraphs:

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

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

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

⁴³ See Preamble, paras 2,5 and 6.

⁴⁴ IFA, *Anti-Avoidance Measures of General Nature and Scope – GAAR and Other Rules*, EU Report, IFA Cahier vol. 103a, 29 (2018).

⁴⁵ The explanation in the Commission's Proposal for a Council Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM(2013) 814 final (25 Nov. 2013).

⁴⁶ See Art. 5: '... the principal motive or one of the principal motives ...'.

⁴⁷ See Art. 1(a): '... principal objective or as one of its principal objectives ...'.

⁴⁸ For further analysis see R. Lyal, *Cadbury Schweppes and Abuse: Comments, in Prohibition of Abuse of Law 427–434* (R. de la Feria & S. Vogenauer eds, Hart Publishing 2011).

⁴⁹ <http://dictionary.cambridge.org/dictionarypurpose>.

⁵⁰ In the literature, the main purpose test is found unacceptable. See F. Debelva & J. Luts, *The General Anti-Abuse Rule of the Parent-Subsidiary Directive*, 55(6) Eur. Tax'n 225 (2015).

⁵¹ 'Objective' means directed to or pertaining to an end or object. 'Purpose' is to have the intention of doing or accomplishing something. It also includes aims and designs. See The New International Webster's Comprehensive Dictionary of the English Language, Encyclopedic Edition, 2003. For that reason, the author believes that the use of the term 'purpose' is more appropriate.

⁵² In the literature, it is stated that distinguishing the terms would not be an important issue in practice. See R. Kok, *The Principal Purpose Test in Tax Treaties Under BEPS 6*, 44(5) Intertax 409 (2016). The author does not agree with this view. Further, in the case law of the CJEU, several terms are used, such as spirit and purpose, aims and results, aside from objective and purpose.

⁵³ See Preamble para. 11.

⁵⁴ For a comparison with the OECD's principal purpose test see Kemmeren, *supra* n. 39, at 192–193.

⁵⁵ See Preamble, para. 5.

⁵⁶ See Preamble, para. 1.

⁵⁷ In line with this, see Rigaut, *supra* n. 20, at 502. This broad scope is considered as conflicting with the criteria developed by the

4 CONDITIONS TO APPLY THE GAARs OF THE DIRECTIVES

This section will comparatively examine the conditions for the application of the GAARs as regulated in the EU directives.

4.1 Interest-Royalties Directive

The second paragraph of Article 5 of the IRD sets the general conditions to apply the GAAR of the Directive; or in other words, the conditions for withdrawal or refusal of the application of the Directive. MSs may withdraw the benefits or refuse to apply this Directive in case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance, or abuse.

The term *transaction* is used in the wording of the paragraph.⁵⁸ Further, the context of the paragraph is kept broad to cover tax evasion, tax avoidance, and abuse.⁵⁹ The abuse placed here is not limited to the abuse of the directive and has a general meaning of abuse of rights.⁶⁰ Tax evasion and tax avoidance are covered, fraud is not mentioned though.⁶¹ The question then arises naturally, as to whether the conditions of the principal motive test would not be applied to the transactions involving tax fraud. Abuse, on the one hand, could encompass tax fraud due to its abusive character (according to purposive interpretation), which could lead the interpreter to force the limits of the principle of legality. As stated above, tax fraud is a criminal activity and a direct breach of the law and for that reason, criminal sanctions would be applicable. Although there is no definition provided in the IRD for these terms, it is proposed in the literature that tax evasion is deemed to be like fraud, while tax avoidance may be considered close to abuse.⁶² The author does not agree with this view since every concept must be evaluated and used separately.

According to the 'principle motive'⁶³ test formulated in the second paragraph,⁶⁴ the other condition is that the

motive (or one of the principal motives) of the transactions, should principally be tax evasion, tax avoidance, or abuse.⁶⁵ It is possible to realize all these concepts with a single principal motive. If the principal motive of the transactions is more than one, then one of them should aim at tax evasion, tax avoidance, or abuse, in order to apply the article. Considering the complexity of the transactions carried on within the EU, this may create another difficulty for the MSs to find out which motive is the principal or one of the principal motives of the transactions. Furthermore, the IRD does not mention the situations in which a transaction may be presumed to have tax evasion, tax avoidance, or abuse as its principal motive or one of its principal motives.⁶⁶

4.2 Merger Directive

Article 15 of the MD starts by setting the conditions when a MS may refuse to apply or withdraw the benefit of all or any part of the provisions of that Directive. An example is provided in the article in subparagraph (a) to shed light on the kind of operations that are considered as having the principal objective or one of its principal objectives as tax evasion or tax avoidance which could lead to the application of the article. For that reason, this paragraph also constitutes the legal presumption part of the provision.⁶⁷

The term *transaction* is not used in the wording; instead, the *operation* is preferred. Accordingly, if the operation is not carried out for valid commercial reasons, it will fall within the scope of the article.⁶⁸ Moreover, the

jurisprudence. See D. Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44(2) *Intertax* 109 (2016); O. Koriak, *The Principal Purpose Test Under BEPS Action 6: Is the OECD Proposal Compliant with EU Law?*, 56(12) *Eur. Tax'n* 556 (2016).

⁵⁸ See for comparison, M. Lang, *The General Anti-Abuse Rule of Article 80 of the Draft Proposal for a Council Directive on a Common Consolidated Corporate Tax Base*, 51(6) *Eur. Tax'n* 224 (2011).

⁵⁹ E. Picq, *Abuse of EU Holding Companies: Fundamental Freedoms, EC Parent-Subsidiary Directive and the French Constitution – Part 1*, 49 (10) *Eur. Tax'n* 447 (2009).

⁶⁰ See Preamble, para. 6. The 'abuse of rights' concept also mentioned in the ruling of the Joint Cases C-115/16, C-118/16, C-119/16 and C-299/16, see para. 181, sub-para. 3–5.

⁶¹ Combating fraud and abuse is mentioned in the Preamble. See para. 6.

⁶² A. Rädler, *Do National Anti-Abuse Clauses Distort the Internal Market?*, 34(9) *Eur. Tax'n* 312 (1994). Also see M. Tenore, *Taxation of Dividends: A Comparison of Selected Issues Under Article 10 OECD MC and the Parent-Subsidiary Directive*, 38(4) *Intertax* 232 (2010).

⁶³ Interestingly in the 1998 Proposal the term principle objective was used. See Art. 6(2): 'A MS may withdraw the benefit of or refuse to apply this Directive in the case of any transaction which has as its principal objective or as one of its principal objectives tax evasion or tax avoidance'.

⁶⁴ Art. 5 must be interpreted in light of the relevant CJEU anti-abuse case law, which requires anti-abuse measures to be appropriate and proportionate. *Ibid.*, para. 3.3.9. The Case mentioned here is the Judgment of 17 July 1997, *Leur-Bloem*, C-28/95, ECLI:EU:C:1997:369, para. 44. Also see A. Zalasinski, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, 35(5) *Intertax* 310 (2007); B. Terra & P. Wattel, *European Tax Law* 746 (5th ed., Kluwer 2008).

⁶⁵ Domestic legislation or a DTC provision that denies relief on the sole grounds that the parent company is controlled by a third-country resident – or by one of its own residents – is unlikely to meet the proportionality test, as it does not 'have the specific purpose of preventing wholly artificial arrangements'. *Ibid.*, para. 3.3.9. The Case mentioned here is the Judgment of 13 Mar. 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, ECLI:EU:C:2007:161, para. 79. Also see Judgment of 7 Sept. 2017, *Egiom and Enka*, C-6/16, EU:C:2017:641, para. 30 which confirms this position.

⁶⁶ L. Cerioni, *Comments on the Main Articles of Directive 2003/49/EC (Interest and Royalties Directive)*, 44(1) *Eur. Tax'n* 48 (2004). For the conditions for instance see M. Helminen, *EU Tax Law – or Direct Taxation*, s. 3.2.5. (IBFD 2013), Online Books IBFD.

⁶⁷ Indeed refusing to apply or withdrawing the benefits of the Directive are not conditions for applying the GAAR, but are consequences when the conditions of the article are met.

⁶⁸ It is questionable though whose commercial reasons must be reviewed in the context of reorganization and only business

article gives an example of a valid commercial reason, namely the restructuring or the rationalization of the activities of the companies participating in the operation. The presumption is that if the operation does not concern, for example, the restructuring or rationalization of the activities of the companies participating in the operation, it may be assumed that the operation has tax evasion or tax avoidance as its principal objective or one of its principal objectives. As a rule, the burden of proof requires that MSs should assume the facts are valid for the assessment until they are challenged by some other evidence proving otherwise.⁶⁹ It is stated that the activities mentioned in the subparagraph (a) may constitute a presumption, which means that it is not an irrebuttable assumption.

An examination of the wording of the article shows that the operations should be carried out for a certain amount of time. Because the term ‘*operation*’ is different in nature from the term ‘*transaction*’; it involves some activities – including transactions – that are planned to achieve something. A transaction could be a one-time event. There is no explanation, however, for how long the operation should be carried out.

It is necessary to determine whether tax evasion or avoidance was intended as a condition for the principal objective test to be applied here. The test will be applied to the restructuring or rationalization of the activities of the companies participating in such a restructuring or rationalization. There could be one or more principal objectives of the operations in this Directive. For instance, if the single principal objective of the operation is tax evasion or tax avoidance, paragraph 1(a) could apply. In a case where there are multiple objectives, first, the principal or one of the principal objectives should be detected from amongst the entire lot. If one of the principal objectives is tax evasion or tax avoidance, again, this paragraph applies. Thus, having more than one principal purpose does not mean that they all aim at tax evasion or tax avoidance. It is possible, however, that all the principal purposes target tax evasion or tax avoidance. This last option probably facilitates the work of the tax authorities.

4.3 Parent-Subsidiary Directive

The benefits of the PSD will not be granted if the conditions mentioned in Article 1(2) are met. In the IRD and MD, as discussed above, the terms *transaction* and *operation* were used.⁷⁰ In the PSD, the *arrangement(s)*⁷¹ are

purpose of a company is enough. See K. Petrosovitch, *Abuse Under the Merger Directive*, 50(12) Eur. Tax'n 562 (2010).

⁶⁹ Although the Directive does not contain a general rule on the burden of proof, for further discussion See J. Englisch, *Curbing 'Abusive' International Tax Planning Under EU Law: The Case of the Merger Directive*, in *Movement of Persons and Tax Mobility in the EU* 69–72 (Dourado ed., 2012). Available at SSRN: <https://ssrn.com/abstract=2924519> (accessed 11 Dec. 2019).

under focus and emphasized further. As a condition, the arrangement or a series of arrangements mentioned must be put into place for the main purpose or for one of the main purposes of obtaining a tax advantage.⁷² This tax advantage should defeat the object or the purpose of the Directive. If it is decided that such an arrangement or series of arrangements are non-genuine, this consideration shall be made depending on all relevant facts and circumstances.⁷³ The reason why these arrangements are accepted as non-genuine is that they are not put into place for valid commercial reasons that reflect economic reality.⁷⁴

To apply the paragraph, the main purpose or one of the main purposes of the arrangement or the series of arrangements must either defeat the object or the purpose of the Directive.⁷⁵ Therefore, it could be claimed that this phrasing consists of a two-stage test. The purpose of the arrangements should be tested by two determinants, as stated in the paragraph, namely, the object and purpose of the Directive. It is not clear, though, whether there is precedence between them or if both should be taken into consideration simultaneously.

Moreover, it could be questioned whether these determinants are sufficient in order to not grant the benefits of the Directive if the main purpose or one of the main purposes of the arrangement or a series of arrangements defeats one of them. The most probable

⁷⁰ In the COM(2011) 121/4 2011/0058 (CNS) Proposal for a Council Directive, on a Common Consolidated Corporate Tax Base (CCCTB Proposal) the term ‘artificial transactions’ is used. See Art. 80.

⁷¹ The term ‘arrangements’ has a broader and vaguer scope than the term ‘transactions’. See Lang, *supra* n. 58, at 224.

⁷² In the scope of this Directive ‘abusive scenarios’ are often aimed at allowing a third State resident to benefit from the Directive’s regime through the interposition of a company in a MS. See M. Tenore, *Taxation of Dividends: A Comparison of Selected Issues Under Article 10 OECD MC and the Parent-Subsidiary Directive*, 38(4) Intertax 233 (2010).

⁷³ In the settled case law of the CJEU, those arrangements are referred to as artificial arrangements. By this, however, it is certain that the opposite of being artificial is being genuine, which has never been mentioned in the case law, for instance, as normal, proper or acceptable. This might change the perception of the CJEU, as the Court has always been describing the situation from a negative point of view, i.e. the synonyms used for artificial are improper, abusive, wrongful, and fraudulent. Further, see S. Vogenauer, *The prohibition of Abuse of Law: An Emerging General Principle of EU Law*, in *Prohibition of Abuse of Law* 540 (R. de la Feria & S. Vogenauer eds, Hart Publishing 2011).

⁷⁴ Another view finds the term ‘artificial’ lacking in logical and coherent correspondence of the arrangement and underlining economic reality more precisely. See V. R. Almendral, *Tax Avoidance and the European Court of Justice: What Is at Stake for European General Anti-Avoidance Rules?*, 33(12) Intertax 565 (2005).

⁷⁵ In the Preamble the *objective* of the Directive is stated as to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate the double taxation of such income at the parent company level. See Preamble, para. 3. Also the Directive is designed to eliminate tax obstacles for profit distributions between parent companies and subsidiaries based in different Member States. See European Commission, MEMO, Brussels, 25 Nov. 2013, Questions and Answers on the Parent Subsidiary Directive at https://europa.eu/rapid/press-release_MEMO-13-1040_en.htm (accessed 11 Dec. 2019).

answer to this question is in the affirmative as it seems that there is no hierarchy between the object and the purpose of the Directive. The use of the conjunction *or* also supports this view. Although the purpose of the PSD is written in the singular form in the article, it is apparent that the Directive serves more than one purpose.⁷⁶ To confirm this, in paragraph 3 of the article, the purposes of paragraph 2 are mentioned. In the end, it is evident that there are several purposes of the PSD and that they should simply be in harmony with each other.⁷⁷ The object of the Directive represents the subject matter and the scope it applies which is eliminating any disadvantage to cooperation between companies of different MSs as compared with cooperation between companies of the same MS and thereby to facilitate the grouping together of companies at EU level.⁷⁸ More specifically, the object is to eliminate cases of double taxation of profits distributed by subsidiaries to their parent companies.⁷⁹

Different from the MD, arrangement(s) must be ‘*put into place*’ for valid commercial reasons. This wording suggests that the reasoning for the arrangement(s) should be examined at the beginning and even at the stages before the arrangement is applied. Carrying out arrangements for a particular period is not a condition.⁸⁰ For that reason, this expression provides a more robust position for tax authorities against taxpayers.

The paragraph necessitates taking all relevant facts and circumstances into consideration. During the application of Article 1(2), it is expected that all relevant facts and circumstances will be evaluated both by the tax

administrations and judicial bodies. The phrase *all relevant facts and circumstances* refer to the ones that might be relevant in general for determination. At most, it can be claimed that the article is trying to provide a broad field of possibilities for the application and interpretation of the provision.

The term *tax advantage* is used in Article 1(2) as a condition linked with the purpose(s) of the arrangement (s).⁸¹ It is a broad term that can mean preventing a tax obligation from arising or benefitting from a tax concession or deferral.⁸² Having a tax advantage should not be considered an abuse and automatically defeat the object or the purpose of this Directive. The conditions of this article could be interpreted by evaluating the aim of the arrangement or series of arrangements put in place. In this case, unlike with the MD, the test will be applied first to determine whether the main purpose or one of the main purposes of the arrangement or a series of arrangements is to obtain a tax advantage, and then whether it would defeat the object or purpose of the PSD. Therefore, the principal purpose test under this Directive works in two steps: (1) obtaining a tax advantage and (2) contradicting the directive’s object or purpose.

The other concept used in the PSD is genuineness.⁸³ The arrangement(s) must be genuine to be granted the benefits of this Directive. Genuineness is tested by looking at the purpose of the arrangement(s). For that reason, the main purpose test is used for two considerations: (1) to reveal if the main purpose or one of the main purposes of the arrangement or arrangements is a tax advantage, and (2) to test if the arrangement or series of arrangements are genuine. It can also be argued that the latter would be the result of the application of the test. This result could be reached by reading the article but excluding the phrases that explain the purpose of the arrangements. In this case, the

⁷⁶ In the beginning the Directive had two purposes: first to ensure that the MS of the parent company either refrains from taxing the profits distributed by a subsidiary that is resident in another MS or, if taxing such profits, authorizes the parent company to deduct from the amount of tax due the corporate income tax paid by the subsidiary in the other Member State; and second to exempt profit distributions by the subsidiary to the parent company from withholding tax. The Directive was amended by Directive 2003/123, which extended the application to the cases in which profit distributions by subsidiaries in one Member State are received by permanent establishments of companies situated in another MS. Then the Directive 2011/96 and its successive amendments were adopted on 30 Nov. 2011 (2011/96) for the sake of clarity. The recast repealed the previous versions of the Directive, and entered into force on 20 Dec. 2011.

⁷⁷ Further, see Preamble, para. 1. However, in the literature, the wording of the Directive is not seen as capable of nullifying the restrictive and discriminatory effects. See Debelva & Luts, *supra* n. 50, at 228.

⁷⁸ Judgment of 4 Oct. 2001, *Athinaiki Zithopia AE and Elliniko Dimosio*, C-294/99, ECLI:EU:C:2001:505, para. 25.

⁷⁹ Judgment of 22 Dec. 2008, *État belge – Service public fédéral Finances v. Les Vergers du Vieux Tauves SA*, C-48/07, ECLI:EU:C:2008:758, para. 37. For instance, Weber assumes that when an arrangement does not lead to the prevention of double taxation or does not lead to facilitating of the regrouping of companies within the EU this is in conflict with the object of the directive. See Weber, *supra* n. 57, at 113.

⁸⁰ This is because ‘put something into place’ means to spend a particular amount of time doing something, or to make a particular amount of effort in order to do something. See <https://dictionary.cambridge.org/dictionary/english/put-sth-in-into-sth?q=put%2Binto> (accessed 11 Dec. 2019).

⁸¹ The term ‘tax advantage’ is also used in the case law of the CJEU regularly, especially after the Halifax case. See Judgment of 21 Feb. 2006, *Halifax and Others*, C-255/02, ECLI:EU:C:2006:121, para. 75.

⁸² Even though tax advantage seems related to subjective intentions, the evaluation should be based on objective circumstances. In line with this see M. Lang, *Cadbury Schweppes’ Line of Case Law from the Member States Perspective*, in *Prohibition of Abuse of Law 449* (R. de la Feria & S. Vogenauer eds, Hart Publishing 2011); Lyal, *supra* n. 48, at 430–432. The authors criticize the approach as it accepts in advance that all taxpayers have subjective intentions. The author of this paper agrees with that opinion. In the literature, there are some authors who find the condition as most important and the arrangements can be traced back to the taxpayer’s intention. See D. Weber, *Abuse of Law in the Context of Indirect Taxation: Why We Need Subjective Intention Test, When Is Combating Abuse an Obligation and Other Comments*, in *Prohibition of Abuse of Law 398* (R. de la Feria & S. Vogenauer eds, Hart Publishing 2011). The other opinion is that there is no need for an inquiry into the motives of the parties. The artificial nature of an arrangement reveals the ultimate purpose. See L. De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies 765* (IBFD 2008).

⁸³ In the case law of the CJEU, genuine economic activity is used.

paragraph becomes simpler: MSs shall not grant the benefits of this Directive to an arrangement or a series of arrangements that are not genuine. A non-genuine arrangement or a series of arrangements are put in place for the main purpose or one of the main purposes of obtaining a tax advantage. These arrangements should also defeat the object or purpose of the Directive. As explained above, obtaining a tax advantage would not automatically defeat the objective or the purpose of the PSD.⁸⁴ Thus, to understand what constitutes genuine arrangement(s), it is necessary to look at the place where genuineness is formulated in the article.

Another option is combining these two paragraphs and reading them as if both were defining the non-genuine arrangements in the context of the Directive. In this case, non-genuine arrangements are those that have been put into place (1) for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, and (2) for reasons that are not valid commercial reasons that reflect economic reality. The question then arises as to why these two different elements of the definition are mentioned in two separate paragraphs. Moreover, if these two phrases on non-genuine arrangements are combined, the necessity to identify all relevant facts and circumstances emerges.⁸⁵

Another option is to argue that the second paragraph explains what constitutes a 'not genuine' arrangement, and thus, that the third paragraph clarifies the term 'not genuine' used in paragraph two. This is a choice of the legislative bodies. However, the logical structure of a legal rule should consist of at least these three components, and it would be better if it followed the order of (1) hypothesis, (2) disposition, and (3) sanction.⁸⁶

The phrase '*an arrangement may comprise more than one step or part*' aims to cover several types of initiatives.⁸⁷ For

instance, some arrangements could have been made solely to hide some other arrangements for the purpose of obtaining a tax advantage.⁸⁸ In order to reveal the true substance, it is necessary to evaluate several stages of an arrangement.⁸⁹ This could sometimes even involve investigating several different arrangements as indicated by the phrase '*an arrangement or a series of arrangements*'.

An arrangement being complicated could justify a tax inspection conducted by the tax authorities. It is a matter of national procedural tax law regulating the discretionary power and administration of tax authorities. At the Directive level, however, the presence of several parts or steps (or being complicated) should not lead tax authorities to evaluate that arrangement(s) are not genuine, even though they create such an image. As mentioned, this provision is related to the structure of the arrangement(s), not to the main purpose or one of the main purposes. Even the most complicated arrangement structures can be justified by the taxpayer by proving that they were put into place for valid commercial reasons that reflect economic reality.

4.4 Anti-Tax Avoidance Directive

The wording of Article 6 of the ATAD is like that of the PSD. If the conditions of the provision are satisfied, MSs can use this provision for the purposes of calculating the corporate tax liability. It is not applicable to other taxes, and it is clarified⁹⁰ that Article 6 is not intended to apply to the situations addressed by the anti-abuse rules included in other Directives.⁹¹ The first condition is that there must be an arrangement or a series of arrangements that have been put into place for some special purposes. In the IRD transactions; in the MD operations were covered as discussed above respectively. In this Directive, the main purpose or one of the main purposes of those arrangement(s) should be obtaining a tax advantage that defeats the object and the purpose of the applicable law.⁹² Therefore it is sufficient if either the object or purpose is defeated as is in the PSD.

⁸⁴ At first sight, the test applied under the Parent-Subsidiary Directive seems like the other tests. However, it is not. In other directives, the genuineness of the transactions or operations were not discussed. The tests for other directives are applied to reveal whether the transactions or operations are carried on principally for tax evasion or tax avoidance (or abuse).

⁸⁵ CJEU requires a case-by-case assessment in this regard. See Judgment of 13 Nov. 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paras 93 and 94; Judgment of 8 Mar. 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, para. 81; Judgment of 7 Sept. 2017, *Egiom and Enka*, C-6/16, EU:C:2017:641, para. 44; Judgment of 20 Dec. 2017, *Deister Holding AG*, Joined Cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009, para. 81.

⁸⁶ See for further information on this M. S. Mason, *The Logical Structure of a Proposition of Law*, 11(3) *Jurimetrics J.* 99–122 (1971) and E. Oeser, *Evolution and Constitution The Evolutionary Selfconstruction of Law* 64 et seq. (Kluwer Academic Publishers 2003).

⁸⁷ This paragraph could also be used to determine whether an arrangement or a series of arrangements are partly or wholly artificial. For instance, a distribution of profits falling within the scope of the Parent-Subsidiary Directive could be partly or wholly artificial. See E. Kokolia & E. Chatziioakeimidou, *BEPS Impact on EU Law: Hybrid Payments and Abusive Tax Behaviour*, 55(4) *Eur. Tax'n* 154–155 (2015).

⁸⁸ Depending on the situation, it is possible to detect tax evasion as it could mean that not all facts and circumstances are disclosed by the taxpayer.

⁸⁹ This means that it is possible to find arrangements that could be partly artificial. The method of dealing with them is mentioned in para. 8 of the Preamble, which reads as follows: '*While Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may also be cases where single steps or parts of an arrangement are, on a standalone basis, not genuine. Member States should be able to use the anti-abuse clause also to tackle those specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. That would maximise the effectiveness of the anti-abuse clause while guaranteeing its proportionality*'.

⁹⁰ See Preamble, para. 11.

⁹¹ C. Docclo, *The European Union's Ambition to Harmonize Rules to Counter the Abuse of Member States' Disparate Tax Legislations*, 71(3) *Bull. Int'l Tax'n* 377 (2017).

⁹² This does not mean that the article refers to the term '*artificial*' as it is claimed. This is not in accordance with the jurisprudence that has been developed so far. Navarro, Parada & Schwarz, *supra* n. 2, at 124.

In the IRD principal motive or one of the principal motives of the transactions should be ‘*tax evasion, tax avoidance or abuse*’. In the MD principal objective or one of the principal objectives of the operations should be ‘*tax evasion or tax avoidance*’. In the PSD, a similar wording is used, but an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a *tax advantage* should defeat the object or purpose of the Directive. The conditions of a non-genuine or a series of non-genuine arrangements set in ATAD⁹³ are: an arrangement or a series of arrangements which having been put into place for the main purpose or one of the main purposes of obtaining a *tax advantage* should defeat the object or purpose of the *applicable tax law*.⁹⁴ Under these conditions, and by taking all relevant facts and circumstances into consideration, a MS shall decide that an arrangement or a series of arrangements are non-genuine.⁹⁵

It would be useful to discuss the term ‘*arrangement*’ here too⁹⁶ since an arrangement or a series of arrangements are the prerequisite contexts that will lead to the application of the article. As shown in the next section, within the concept of ‘*arrangement*’, several issues presumably can occur while searching for the main purpose or one of the main purposes. The arrangement is a complex concept that refers to a series of actions including preparatory measures, plans, preparations, agreements, deals, and (most importantly) contracts. In the Commission Recommendation on aggressive tax planning,⁹⁷ the term ‘*arrangement*’ means any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking, or event. Further, according to the settled case-law of the CJEU, anti-abuse rules may only be justified if they are aimed at ‘*wholly artificial arrangements*’.⁹⁸ In this context, the term

arrangement needs to be interpreted in light of the relevant case law when it is implemented and applied by national tax administrations.⁹⁹

To decide if an arrangement or a series of arrangements is non-genuine, the MS should examine whether the arrangement or the series of arrangements are put into place for valid commercial reasons which reflect economic reality. Besides defeating the object or the purpose of the applicable tax law, the arrangement or the series of arrangements should not be based on valid commercial reasons that reflect economic reality. Therefore, to that extent, the analysis made for the PSD is valid for the ATAD.

In the IRD, there is no genuineness test applied for the transactions. In the MD a test is applied to check whether the operations are carried out for valid commercial reasons. In line with the case-law of the CJEU, the concept of ‘*wholly artificial arrangement*’ also adequately characterizes the lack of ‘*valid commercial reasons*’ within the meaning of all Directives.¹⁰⁰

4.5 The Interrelationship Between the Rules

There is no explanation in the MD or in the wording of ATAD for the interaction between the GAARs and other provisions provided under the domestic laws dealing with the abuse of law. In the Preamble of ATAD, however, its relationship with the other specific anti-abuse provisions is mentioned. Accordingly, GAARs have a function aimed to fill in gaps which should not affect the applicability of specific anti-abuse rules.¹⁰¹ The relationship between other GAARs and ATAD’s GAAR is not touched upon.

In the first paragraph of Article 5 of the IRD and the last paragraph of Article 1 of the PSD, the interaction between other provisions provided for anti-avoidance

⁹³ It is questionable, though, why the legislator deviates from the terminology developed in the case law. In line with this see Navarro, Parada & Schwarz, *supra* n. 2, at 124.

⁹⁴ It creates an image as this article aims to look at the substance of an arrangement instead of the abuse of a certain provision of tax law. T. Franz, *The General Anti-Abuse Rule Proposed by the European Commission*, 43(11) Intertax 664 (2015).

⁹⁵ The phrase used in the Parent-Subsidiary Directive is ‘*not genuine*’. The definition of wholly artificial arrangements already created several interpretative doubts, see Jiménez, *supra* n. 10, at 274; the use of the term non-genuine is also criticized in the literature as it does not follow the case law’s terminology and adds little value to the objective and subjective tests. See De Broe & Beckers, *supra* n. 6, at 143.

⁹⁶ The choice of the word arrangement, instead of transaction could be explained as the abusive schemes might exist in many different ways, and the legislator did not want to be limited to transactions, which is a more narrow term. M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law 299* (Linde Verlag, Vienna 2016).

⁹⁷ See 2012/772/EU: Commission Recommendation of 6 Dec. 2012 on aggressive tax planning, para. 4.3. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012H0772> (accessed 11 Dec. 2019).

⁹⁸ Judgment of 24 Nov. 2016, *Secil*, C-464/14, ECLI:EU:C:2016:896, para. 59; Judgment of 17 Sept. 2009, *Glaxo Wellcome*, C-182/08,

EU:C:2009:559, para. 89; Judgment of 3 Oct. 2013, C-282/12, *Itelcar*, EU:C:2013:629, para. 34; Judgment of 17 Dec. 2015, *Timac Agro Deutschland GmbH*, C-388/14, ECLI:EU:C:2015:829, para. 42; Judgment of 7 Nov. 2013, K, C-322/11, ECLI:EU:C:2013:716, para. 61; Judgment of 8 July 1999, *Baxter and Others*, C-254/97, ECLI:EU:C:1999:368, para. 18; Judgment of 9 Nov., *Commission v. Belgium*, C-433/04, ECLI:EU:C:2006:702, para. 35; Judgment of 19 June 2014, *Strojirny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, ECLI:EU:C:2014:2011, paras 55–56; Judgment of 14 Sept. 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, ECLI:EU:C:2006:568, para. 61; Judgment of 9 Nov., *Commission v. Belgium*, C-433/04, ECLI:EU:C:2006:702, para. 35; Judgment of 6 Oct. 2009, *Commission v. Spain*, C-153/08, ECLI:EU:C:2009:618, para. 39; Judgment of 16 July 1998, *Imperial Chemical Industries v. Colmer*, C-264/96 ECLI:EU:C:1998:370, para. 26; Judgment of 12 Sept. 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, ECLI:EU:C:2006:544, para. 55; Judgment of 1 Apr. 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, ECLI:EU:C:2014:200, paras 31–34; Judgment of 13 Mar. 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, ECLI:EU:C:2007:161, para. 74; Judgment of 5 July 2012, *SIAT*, C-318/10, ECLI:EU:C:2012:415, para. 40; Judgment of 7 Sept. 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paras 33–34.

⁹⁹ Further, see IFA EU Report, *supra* n. 44, at 21.

¹⁰⁰ Englisch, *supra* n. 69, at 53.

¹⁰¹ See Preamble para. 11.

under either domestic law or international law is regulated. It is stated that the provisions will not prevent or affect each other in the application process and the directives do not preclude the application of domestic or international law GAARs and SAARs, 'required for the prevention of fraud or abuse' or 'required for the prevention of tax evasion, tax fraud or abuse'. Rules to prevent tax avoidance are not mentioned here. Most probably, abuse is meant to cover tax avoidance too.

5 CONSEQUENCES OF THE APPLICATION OF THE GAARs OF THE DIRECTIVES

5.1 In General

The differences in the consequences of the application of the Directives could be displayed as follows: If the GAARs of the IRD and MD are applied, MSs may refuse to apply or withdraw the benefits of the Directives. The PSD has also a similar limitation rule; however, when compared with these two Directives, that rule is different in terms of the time to limit the benefits.¹⁰² The only phrase observed in the wording in the PSD is that the MSs shall not grant the benefits.¹⁰³ There is no explanation on when this limitation could be used.¹⁰⁴ If Article 6 of the ATAD is applicable, the relevant arrangement or the series of arrangements shall be ignored. The main consequence of ignoring an arrangement or a series of arrangements is calculating the tax liability in accordance with national law.¹⁰⁵

However, the term 'ignore' seems controversial. Drawing the limits of 'ignoring' is very difficult, and it is not clear what the term itself means.¹⁰⁶ Ignoring could be refusing to take notice of or disregarding the arrangements or paying no attention to the arrangements, etc. The term is most likely all-encompassing. In legal terminology, ignore was used in the development of

constitutional law in a landmark case in the nineteenth century in the United States.¹⁰⁷ In most of the MSs¹⁰⁸ the tax law terminology is not familiar with the term.¹⁰⁹ The most common consequences are the denial of tax gains and the re-characterization of the facts amongst the countries.¹¹⁰ However, assessments based on fictitious facts are sometimes allowed under some laws, depending on certain circumstances. For that reason, the term ignore can be considered as bringing in a new exception to the principle of legality and measures that raise concerns with respect to fundamental taxpayers' rights, such as the right to legal certainty,¹¹¹ the freedom to arrange one's economic affairs,¹¹² and the principle of equal treatment: what is economically comparable should be treated in the same manner.

The consequences of ignoring an arrangement or a series of arrangements differ in situations of substitution and re-characterization.¹¹³ In the case of ignoring, tax authorities do not have to recognize the arrangement(s) as a basis for taxation. In line with this, paragraph 3 provides the MSs with the opportunity to calculate the tax due depending on their national laws. However, consideration of the taxable event in this calculation would dramatically differ within the EU, and this would not serve the aim of creating a more harmonized EU-wide taxation system. Eventually, the proper functioning of the internal market would be hampered again.

¹⁰⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁸ In the Netherlands, the statutory base to ignore is provided in the legislation. In 1959, 'richtige heffing' (rightful taxation or correct taxation) was transferred to Arts 31–36 of the *Algemene Wet Inzake Rijksbelastingen* (General Tax Act). For a more detailed explanation see R. Kok & I. M. Valderrama, *National Report*, in *IFA Cahier* vol. 103a, 5–7 (2018).

¹⁰⁹ The term has begun to be used in the opinions of the Advocate General in pending cases before the CJEU such as 1 Mar. 2018, *Skatteministeriet v. T Danmark*, C-116/16, ECLI:EU:C:2018:144, para. 108; *Skatteministeriet v. Y Danmark Aps*, C-117/16, ECLI:EU:C:2018:145, para. 108; *Skatteministeriet v. X Danmark*, C-118/16, ECLI:EU:C:2018:146, para. 122; *Skatteministeriet v. T C Danmark I*, C-119/16, ECLI:EU:C:2018:147, para. 110; *Skatteministeriet v. Z Danmark*, C-229/16, ECLI:EU:C:2018:148, para. 111; *N Luxembourg 1 v. Skatteministeriet*, C-115/16, ECLI:EU:C:2018:143, para. 112. The Advocate General's opinion is based on the settled case law of the CJEU. The 'reality doctrine' developed in Denmark is interpreted in conformity with EU law in the opinions. It appears that the Advocate General sees no difference between wholly artificial and abusive arrangements. Accordingly, both of them shall be ignored: '... ignore wholly artificial or abusive arrangements, where they exist ...'.

¹¹⁰ See IFA EU Report, *supra* n. 44, at 9.

¹¹¹ CJEU has concluded that anti-avoidance rules that do not meet the requirement of the principle of certainty should not be considered as proportionate to the objectives pursued. See Judgment of 3 Oct. 2013, C-282/12, *Itelcar*, EU:C:2013:629, para. 44.

¹¹² See IFA (2018), *supra* n. 99, at 35.

¹¹³ See C. Panayi, *Advanced Issues in International and European Tax Law*, 166 (Hart Publishing 2016). Under the domestic law of the Netherlands, both ignoring and substituting are possible. There are two different concepts: a statutory GAAR, namely *richtige heffing* and a court-developed GAAR, namely *fraus legis*. Unlike the latter, *richtige heffing* does not make it possible to re-characterize transactions but only ignores them. See Kok & Valderrama, *supra* n. 108, at 6.

¹⁰² This provision does not specify when the benefits of the Directive may be denied. S. M. Fernandes et al., *A Comprehensive Analysis of Proposals to Amend the Interest and Royalties Directive – Part 2*, 51 (11) Eur. Tax'n 461 (2011).

¹⁰³ It is stated in the literature that the use of the anti-abuse measures of the Directive seems quite limited in purely EU situations. See Tenore, *supra* n. 72, at 233. For a different view depending on the inconsistency observed within the EU, see E. Picq, *Abuse of EU Holding Companies: Fundamental Freedoms, EC Parent-Subsidiary Directive and the French Constitution – Part 2*, 49(11) Eur. Tax'n 537–538 (2009).

¹⁰⁴ For a detailed assessment explaining the opinion claims that the tax authorities must ignore the non-genuine arrangements in the context of Parent-Subsidiary Directive, see Weber, *supra* n. 57, at 129.

¹⁰⁵ It is worth asking what a MS shall do besides applying the national law. Thus, this paragraph can be considered as a descriptive part of this article. If this paragraph were not placed in the article, the same consequence may have occurred in any case.

¹⁰⁶ The term ignore has not been used in the case law of the CJEU so far. However, in the Halifax case, the Court decided that the transactions must be redefined in order to re-establish the situation that would have prevailed. It is stated in the literature that the Court not only required that the transactions had to be ignored but also that the levy of taxes had to be based on some fictions. See Lang, *supra* n. 58, at 226.

The term *ignore* should also be evaluated by considering the principles governing the burden of proof. When the existence of a non-genuine arrangement is detected, the taxpayer should be given the opportunity, without being subject to any other administrative constraints, to produce evidence¹¹⁴ of any commercial justification¹¹⁵ in order to prove the rationale behind the transactions.¹¹⁶ This can, at most, be determined on a case-by-case basis.¹¹⁷

Moreover, the claim of being non-genuine for an arrangement or a series of arrangements depends on certain conditions. For instance, the object or purpose of the applicable tax law must be tested, but the corporate income tax laws differ amongst the MSs.¹¹⁸ If such a claim is made, the tax authorities should first put forward a prima facie evidence of abuse, and then it could be possible for the taxpayers to prove the genuineness of the arrangements.¹¹⁹ This opportunity should cover all other steps or parts of the arrangement or the series of arrangements. Although ignoring arrangements appears to have a rather comprehensive scope, it may be possible to impose limits on it. However, one could also ask what should be left to be ignored for tax authorities in the final stage.

It appears that if a tax authority decides to ignore an arrangement or a series of arrangements, the facts

derived from that arrangement or series of arrangements will not be taken into consideration in the tax assessment process. However, they will continue to exist in the legal world and can be used to refute the assessment of the tax authority by exposing the economic substance of the arrangements, if the issue is brought before the court. This way, the discretionary power of the tax authorities can be questioned, and the decision can be built on the proof supplied by both parties by taking the principle of equality of arms into account. If a tax authority decides to ignore some parts of an arrangement or a series of arrangements, it would mean that the other parts continue to be genuine. Thus, it would be a challenge to detect the genuine parts if the arrangement or the series of arrangements comprised several intricate steps or parts.

Lastly, it should be noted that the genuine parts must constitute a taxable event. Only in this way, the decision of the tax authorities or courts finding an arrangement or a series of arrangements partly non-genuine would make sense. Nevertheless, such a decision would affect the arrangements as a whole, as shown in the next section.

5.2 Possible Scenarios on Genuineness

In this section, some possible scenarios will be discussed by examining the structure of the arrangement(s). The aim of the section is to display how it would be difficult to apply the GAAR of ATAD in practice. This is also valid for PSD's GAAR to a certain extent as it contains a similar wording and main purpose test. In order to apply these GAARs, the genuineness of the arrangement(s) should be tested not only by taking the object and purpose of the Directive or applicable tax law but also the structure of the arrangement(s). Thus, in every scenario, all possibilities in the application process will be shown around some simple formulas using different variables. It is possible to evaluate this part as a tool that could be used by tax authorities, courts and taxpayers to test whether the arrangement(s) are genuine or not. Analysing a legal text by using a possibility calculation/formula could seem confusing; however, it is also the author's intention to present the importance of a well-designed legal norm that would directly affect taxation systems.

A gradual methodology is followed in the formulas. The first area of focus is the single arrangement, after which a series of arrangements will be analysed. During the analysis, the complexity and consequences of comprising more than one step or part and having more than one main purpose will be demonstrated for each scenario.

5.2.1 One Arrangement Scenario

In order to measure the applicability of the provision, it would be better to start by applying Article 6 to a single

¹¹⁴ Also see C. A. Alvarrenga, *International/European Union/Brazil/Spain/United Kingdom/United States – Preventing Tax Avoidance: Is There Convergence in the Way Countries Counter Tax Avoidance?*, 67(7) Bull. Int'l Tax'n. 360 (2013).

¹¹⁵ Accepting that tax is a cost for businesses, a reduction of tax, would increase the firms' after-tax returns. For that reason, at first sight, following a tax-optimization strategy by implementing a legal arrangement may be considered as a commercial reason. However, the word valid draws the limits and it should be understood as excluding any tax considerations from the assessment. See M. F. de Wilde, *The ATAD's GAAR: A Pandora's Box?*, s. 224 (2017). Available at SSRN: <https://ssrn.com/abstract=3040709> or <http://dx.doi.org/10.2139/ssrn.3040709> (accessed 11 Dec. 2019).

¹¹⁶ Additionally, a general presumption of fraud and abuse cannot justify either a fiscal measure that compromises the objectives of a directive or a fiscal measure that prejudices the enjoyment of a fundamental freedom guaranteed by the treaties. Judgment of 7 Sept. 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, para. 31 and Judgment of 20 Dec. 2017, *Deister Holding AG – (formerly Traxx Investments NV), Juhler Holding A/S*, Joined Cases C-504/16 and C-613/16, ECLI:EU:C:2017:1009, para. 61; Judgment of 31 May 2018, *Hornbach-Baumarkt AG*, C-382/16, ECLI:EU:C:2018:366, para. 57.

¹¹⁷ However, in the literature it is also stated that the inconsistency in the jurisprudence would increase the extent of mistrust in the GAARs. See S. V. Aramayo, *A Common GAAR to Protect the Harmonized Corporate Tax Base: More Chaos in the Labyrinth?* *Subscribed*, 25(1) EC Tax Rev. 17 (2016).

¹¹⁸ In line with this view, see D. Smit, *The Anti-Tax Avoidance Directive (ATAD)*, in *Terra/Wattel European Tax Law* 275 (P. J. Wattel-O. Marres-H. Vermeulen eds, 7th ed., Wolters Kluwer 2018).

¹¹⁹ In the Judgment of 7 Dec. 2000, *Italy v. Commission*, C-482/98, ECLI:EU:C:2000:672, paras 52–53, it is stated as at the very least, concrete evidence of a serious risk of evasion, avoidance, or abuse. In *Euro Park Service*, C-14/16, paras 55 and 56 and Judgment of 7 Sept. 2017, *Eqiom and Enka*, C-6/16, ECLI:EU:C:2017:641, paras 32 and 36 the Court decided that the imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage, without the tax authorities being obliged to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse.

arrangement.¹²⁰ A single arrangement may have been put into place for the main purpose or for one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law. At this stage, it is necessary to look at the purpose(s) of the arrangement. First, it is assumed that this arrangement has only one purpose, namely the main purpose. Second, if this single arrangement has more than one purpose, then one of the main purposes should be obtaining a tax advantage. According to the Directive, an arrangement could comprise one or more than one step or part. This is, of course, related to the structure of the arrangement. However, in order to reveal the main purpose or one of the main purposes of the arrangement, those steps and parts should be carefully examined. These simple patterns could schematize what has been stated until here:

5.2.1.1 One Purpose¹²¹

In this scenario, there is only one arrangement that comprises one step or part and has only one main purpose.¹²²

One Arrangement [(One step/part), (One main purpose, Tax advantage)] → Not genuine

A [(S/P), (MP, TA)] → NG

The arrangement could comprise more than one step or part. In this case, the scenario would be:

One Arrangement [(More than one step/part) ... , (One main purpose, Tax advantage)] → Not genuine

A [(S/P1), (S/P2) ... , (MP, TA)] → NG¹²³

5.2.1.2 More than One Purpose

In this scenario, it is assumed that the arrangement has one step or part, more than one purpose, and the main purpose or one of the main purposes is obtaining a tax advantage.

One Arrangement [(One step/part), (More than one purpose), (The main purpose tax advantage)] → Not genuine

A [(S/P), (P1), (P2) ... , (MP, TA)] → NG

Or; one of the main purposes is obtaining a tax advantage

A [(S/P), (P1), (P2) ... , (MP1, TA), (MP2) ...] → NG

Or; the scenario could be: One Arrangement [More than one step/part, More than one purpose, One of the main purposes tax advantage] → Not genuine

A [(S/P 1), (S/P 2) ... , (P1), (P2) ... , (MP1, TA), (MP2) ...] → NG

5.2.2 Series of Arrangements Scenario

5.2.2.1 One Purpose

[A series, (One main purpose (as a whole), Tax advantage)] → Not genuine

[A – B – C ... , (MP, TA)] → NG¹²⁴

Within the series, each arrangement could comprise one step or part. In this case:

[One step/part, One main purpose (as a whole), Tax advantage] → Not genuine

[A (A S/P) – B (B S/P) – C (C S/P) ... , (MP, TA)] → NG

Within the series, each arrangement could comprise one or more than one step or part. In this case:

[More than one step/part, One main purpose (as a whole), Tax advantage] → Not genuine

[A (A S/P1), (A S/P2) ... , – B (B S/P1), (B S/P2) ... , – C (C S/P1), (C S/P2) ... , (MP, TA)] → NG

5.2.2.1 More than One Purpose

Within the series, each arrangement can comprise one step or part, but the series itself is put into place for several purposes. If the main purpose or one of the main purposes is a tax advantage, and the result is not genuine.

[A (A S/P) – B (B S/P) – C (C S/P) ... , (P1), (P2) ... , (MP, TA)] → NG

or,

[A (A S/P) – B (B S/P) – C (C S/P) ... , (P1), (P2) ... , (MP1, TA), (MP2) ...] → NG

But what happens if such purposes are either of A, B, or C? For instance:

[A (A S/P), (A P1), (A P2) ... , (A MP, TA) – B (B S/P) – C (C S/P)] → ?

[A (A S/P), (A P1), (A P2) ... , (A MP1, TA), (A MP2) ... – B (B S/P) – C (C S/P)] → ?

Would it make only that arrangement within the series non-genuine or the series itself as a whole? The author believes that it should not affect the genuineness of the whole series, as the wording of the Article refers to the main or one of the main purposes of the series of arrangements. Another question arises here then: Would it be possible to accept only that single arrangement within the series as non-genuine? The answer is in the affirmative, as that arrangement is put into place for the main purpose or one of the main purposes of obtaining a tax advantage. However, the consequence of this acceptance, namely being partly non-genuine, is not regulated in the article.

Within the series, each arrangement could comprise more than one step or part and purpose, and the series

¹²⁴ A, B, and C constitute a series of arrangements.

¹²⁰ These scenarios could be applicable for the Parent-Subsidiary Directive, too.

¹²¹ From now on, the main purpose or one of the purposes assumed to defeat the object and purpose of the applicable tax laws.

¹²² A: Arrangement, S/P: Step/Part, P: Purpose, MP: Main purpose, TA: Tax Advantage, NG: Not Genuine.

¹²³ In the following scenarios the ellipsis is used to show that this is an infinite list. An arrangement could consist of an unlimited number of steps or parts.

itself is put into place for several purposes and the main purpose or one of the main purposes is to obtain tax advantage:

[A (A S/P1), (A S/P2) ... , (A P1), (A P2) ... – B (B S/P1), (B S/P2) ... , (B P1), (B P2 ...) – C (C S/P1), (C S/P2) ... , (C P1), (C P2) ... , (P1), (P2) ... , (MP, TA)]
→ NG

Or;

[A (A S/P1), (A S/P2) ... , (A P1), (A P2) ... – B (B S/P1), (B S/P2) ... , (B P1), (B P2 ...) – C (C S/P1), (C S/P2) ... , (C P1), (C P2) ... , (P1), (P2) ... , (MP1, TA), (MP2) ...] → NG

Within the series of arrangements scenario, the main purpose or one of the main purposes of the series should be obtaining a tax advantage. The steps and the parts of A, B, and C represent the structure of the arrangements involved in the series. However, in order to reveal the main purpose or one of the main purposes of the series, the elements of this structure should be checked carefully. Moreover, in these scenarios, deciding which purpose is the main purpose or one of the main purposes is not an easy task.

These possibilities can be doubled or even tripled while checking if an arrangement or a series of arrangements have been put in place where the main purpose or one of the main purposes of obtaining a tax advantage defeat either the object or purpose, or even both, of the applicable tax law (for PSD, the object or purpose of the directive itself). In this case, the application of the article would dramatically differ amongst the MSs, since the object or the purpose of the applicable domestic laws are most probably different from each other. Therefore, these simple scenarios aim at displaying some of the possible problems with which the MSs could be confronted and explaining how challenging it can be to find a uniform application of the Article in practice. It seems that the formulation of the ATAD's GAAR does not offer any better solution for these problems.

6 CONCLUSION

The main research question in this article is presented as 'Will the GAAR of the ATAD be an effective tool in tackling tax avoidance?' in the introduction. In order to provide an answer to that question, we need to answer the following questions too.

(1) *What are the similarities and differences, with regard to the aims, conditions and consequences, between the GAAR of the ATAD and other GAARs provided in the Interest-Royalties Directive, Merger Directive and Parent-Subsidiary Directive?*

Besides the jurisprudence, the development of the ATAD's GAAR has been affected by other rules already placed in the system. For that reason, it was necessary to start with this sub-question. The GAARs in the IRD, MD and the PSD aim at preventing the abuse of the benefits granted by these Directives. ATAD's GAAR has a more

comprehensive aim to tackle the abuse of the corporate taxation system. In order to realize these aims, in every Directive, a different approach and terminology have been developed. For instance, in the IRD, a principal motive test is formulated for the prevention of tax evasion, tax avoidance and fraud. However, in the MD, a principal objective test is designed to prevent tax evasion and tax avoidance. In the PSD and ATAD a main purpose test is established to counter non-genuine arrangement(s) which defeat either the object or purpose of the Directive or applicable tax law. Generally all of these GAARs do not preclude the application of other domestic or international provisions required for the prevention of abuse. Nevertheless, this is again formulated with different terminology in the texts of the articles or, for ATAD's GAAR, in the Preamble.

Conditions to apply these GAARs also differ. For instance, the IRD requires transactions, the MD covers operations, and the PSD and ATAD deals with arrangements. Moreover, for the application of the GAARs of the PSD and ATAD, these arrangements should be controlled whether they have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage. An explanation is also provided in these Directives to describe what constitutes a non-genuine arrangement. In line with the aims of the Directives, the consequences of the application of the GAARs are also different from each other. For the IRD, MD and the PSD, in case of abuse, the benefits of the Directives shall not be granted. The wording of this limitation is also different in every Directive i.e. '... withdraw the benefits of this Directive or refuse to apply this Directive ...'; '... refuse to apply or withdraw the benefit of all or any part of the provisions ...' and '... shall not grant the benefits of this Directive ...', respectively. Especially the wording of the PSD does not provide a clear answer to the question regarding the timing of the limitation that will be applied. For ATAD, in case of abuse, the general consequence will be to ignore the non-genuine arrangement(s) and apply the relevant national law.

(2) *What are the possible problems that may occur during the application of the GAAR of the ATAD?*

After discussing the background and its interrelationship with other GAARs, some possible application problems awaiting for ATAD's GAAR should be presented. The author believes that the wording in the GAAR of the ATAD appears to create greater uncertainty than ever before, which does not serve the aim of designing a more harmonized EU tax system. First, the terminology used is not clear, so the objective of the provision is not easily understood. This study is trying to reveal the confusion of the legislative authorities with respect to every provision dealing with the abuse of tax law in the EU legislation. Until the announcement of the EU-wide GAAR, the criteria developed to tackle tax avoidance has not been consistent. In every directive, different approaches, tools, and tests have been developed. It

seems like the ATAD has also followed that path, and made a new and controversial method available for the prevention of the abuse of tax law, i.e. ignoring the arrangements. The author does not think that this method will be successful; since setting the limits of ignoring is not easy.

Until the announcement of the ATAD, the jurisprudence has tried to set the scope of the anti-abuse rules by limiting the discretionary power of the MSs. For the new rule, it could take some time to meet the legitimate expectations of taxpayers with regard to the interpretation and application. Taxpayers will have to wait to see in what direction practice and case law will develop.

Moreover, the scope of the provision is vague. The structure of the arrangements could be so complex that it would be very difficult to set the criteria to be considered as a genuine arrangement or a genuine series of arrangements. Obtaining a tax advantage should not be considered abuse in advance. The limits of the discretionary power of the tax authorities in this context should be

drawn precisely. The possibility of being partly non-genuine and the consequences of this consideration are missing in the provision. As shown in the last section, with a simple possibility calculation, an infinite number of scenarios may occur.

Lastly, the author finds the initiative to create a general standard to tackle abuse of tax law with a general provision necessary. This could be useful for the MSs which do not have any GAAR under their domestic laws. However, it should be noted that, in the EU, taxpayers have a right to choose the most tax-efficient structure for their commercial affairs. Furthermore, it is essential to ensure that the GAARs are applied within the Union and vis-à-vis third countries in a uniform manner.¹²⁵ It is expected that their scope and the consequences of the application do not differ either in domestic or cross-border situations. Unfortunately, it is apparent that this goal cannot be realized with the current version Article 6 of the ATAD, and it will not be an effective tool to tackle tax avoidance.

¹²⁵ See Preamble, para. 11.