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Abuse, proportionality and the burden of proof in CJEU's case law on direct taxation

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1. Introduction

Abuse is one of the core issues in EU direct tax matters. Much has been written over the past years.[2] The discussion on the interpretation and application of the different elements of the anti-abuse clauses appears to be settling. However, an equally fascinating discussion appears to be emerging: in applying anti-abuse provisions, who faces the burden of the proof of abuse: the taxpayer or the tax authority?[3]

Among the different research questions that could be addressed, one of the most interesting ones appears to be the following: what guidance can one extract from the direct tax case law of the Court of Justice of the European Union in what concerns the distribution of the burden of proof in abuse situations?

This study addresses that research question. It solely focuses on direct taxation and the application of anti-abuse provisions.[4] It will purposedly adopt a wide concept of burden of proof, comprising all rules that deal with producing or evaluating evidence as well as the allocation of the respective burden.[5] However, it will focus on the subject that has to provide evidence of the existence of abuse, leaving aside the interesting intertwined questions of determining the object of that proof (i.e., what is abuse and what are its internal elements)[6] and the standard of that proof (i.e., the degree or intensity of the proof that has to be provided.

The discussion can be approached on both administrative and judicial levels. This research will focus on the onus in the framework of administrative proceedings, even if admitting that the discussion is also relevant for the judicial stage.

The article focuses on the guidance that may be extracted from the case law on direct taxation, excluding, at this stage, the consideration of other areas.[7] It will interchangeably use the notions of abuse and avoidance and the notions of burden and onus of proof.

2. Relevance

The burden of proof is, in practice, one of the most relevant issues of any legal adjudication system. It serves nothing holding a protected subjective legal position if one is not able to produce or provide the evidence needed to exercise it.

Despite its importance, there is no consensual system or universal regarding the distribution of the burden of proof. On the one hand, we find systems in which the burden is left to the party claiming the fact or entitlement; on the other hand, there are systems in which the burden is left to the party that has the knowledge or access to a certain fact.

In direct tax matters, the issue is particularly relevant in abuse cases. On the one hand, abuse entitles tax authorities to requalify a certain entity or transaction and they are those primarily interested in its proof; on the other hand, and particularly when abuse entails both an objective and a subjective element, the taxpayer is the one in the best position to provide evidence of both elements.

Accordingly, and in the absence of a universal, ascertaining who has the onus of the proof of abuse is a matter of interpretation of the *sub judice* rule that is being interpreted or applied. The situation becomes more difficult to address when applying general principles, unwritten clauses, or fuzzy concepts since no wording can be relied upon as guidance for such heuristic or hermeneutic exercise.

The Court of Justice of the European Union (CJEU) has, for many years, worked with the unwritten principle of prohibition of abusive practices.[8] Moreover, and when assessing the compatibility of domestic law with EU law, it often refers to the unwritten 'justification of fight against tax avoidance and evasion',[9] also formulated as 'fight against tax avoidance'[10], prevention or risk of 'tax avoidance'[11] or fight or prevention of 'abuse'[12] or of 'abusive practices'[13], 'the need to prevent tax evasion and avoidance',[14] to prevent 'tax evasion and abuses',[15] to prevent or combat 'tax evasion'[16], to combat 'fraud and tax evasion'[17] or to prevent 'fraud and abuse'.[18] In both clusters (unwritten principle and avoidance justification), the CJEU has provided *obiter dictae* that appear to provide relevant guidance on the burden of proof of abuse.

Any analysis of this research question should start with a careful mapping and revision of the CJEU's case law in this respect. This will be done in the following section.

3. Revision of the Court's case-law abuse and the burden of proof

3.1 Introduction

According to some authors, the CJEU's case law on direct tax law appears inconsistent, not to say contradictory, in what concerns the burden of proof.[19] Whereas in some decisions, the CJEU appears to place the burden of abuse on taxpayers, in others, the burden is moved to tax authorities. The required level of evidence would also be inconsistent.

The following sections will map *obiter dictae* of direct tax decisions dealing with the application of anti-abuse provisions in which the CJEU provides statements that could be related with the burden of proof. Instead of following a chronological order, the analysis will group the citations *ratione materiae* by quoting the first (or one of the most representative) case(s) in which the CJEU formulates a certain position and then by referencing (without any attempt of exhaustiveness) other cases where a similar view is taken.[20] The examination will start with citations in which, apparently, the burden of proof of abuse is left to tax authorities moving, sequentially, to cases where the burden is apparently placed on the taxpayer.

3.2 Burden on the side of tax authorities

3.2.1 Identifying the relevant obiter dictae

First of all, one should note that not all CJEU transcripts on these matters should be considered for ascertaining the CJEU's view. For instance, in *SGI*,[21] one paragraph appears to place the burden of proof with the tax authorities as states: "the burden of proof as to the existence of an 'unusual' or 'gratuitous' advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities".[22] And, only when such would be considered demonstrated could the referring court check if "national legislation such as that at issue in the main proceedings is proportionate to the set of objectives pursued by it".[23] However, a more careful analysis of the case reveals that the CJEU is merely reproducing the arguments of the Belgium government without explicitly incorporating them in its reasoning.

The following sections already set aside citations in which the CJEU is merely referring to the views of the parties.

3.2.2 Need for prima facie evidence of abuse by tax authorities

Eqiom and *Deister Holding*, cases on the admissibility of domestic provisions implementing anti-abuse clauses of a directive, provide strong support for those claiming that the burden of the proof of abuse should be with tax authorities. In both judgments, the CJEU recognises that "[t]he imposition of a general tax measure automatically (…) without the tax authorities being required to provide even *prima facie* evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse".[24]

3.2.3 Restriction to wholly artificial arrangements

In *ICI*,[25] despite considering that the domestic measure had been issued under an acceptable justification, the CJEU noted upon application of the proportionality analysis - and more specifically, the necessity test - that the domestic measure *sub judice* was not restricted to avoidance cases, delimited as ’wholly artificial arrangements’ which are (now) characterized as ’arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory’.[26] An establishment amounts to a ’wholly artificial arrangement (…) when it is demonstrated (…) that the company is a fictitious establishment in so far as it does not carry out any genuine economic activity in the territory of the host Member State, account being taken, in particular, of the extent to which that company physically exists in terms of premises, staff and equipment. (…) [I]n particular those that have the characteristics of a 'letterbox' or 'front' subsidiary, can be subject to a specific tax regime for the purpose of preventing tax evasion and avoidance, and that the Treaty provisions on that freedom do not preclude such a regime’.[27]

This reference to wholly artificial arrangements is present in almost all of the direct tax cases on abuse, and namely on *Lankhorst-Hohorst*,[28] *Cadbury Schweppes*, [29]*Glaxo Welcome*,[30] *Lammers & Van Cleeff*,[31] *Jobra*,[32]

Masco Denmark,[33] *Commission vs UK*,[34] *Itelcar*,[35] *SIAT*,[36] *Secil*,[37] *Deister Holding*,[38] *X*,[39] and *Lexel*.[40]

This case law could be interpreted as requiring tax authorities to demonstrate that the taxpayer's conduct amounts to a "wholly artificial arrangement" and, consequently, requiring it to bear the burden of proof of such arrangement.

3.2.4 Prohibition of general presumptions based on the exercise of a fundamental freedom or of irrebuttable presumptions of abuse

The mere exercise of a fundamental freedom cannot give rise to a general presumption of abuse of domestic direct tax provisions. The CJEU stably reaffirms this position in a considerable number of cases such as *ICI*,[41] *Commission vs Belgium*,[42] *X and Y*,[43] *Commission vs France*,[44] *Cadbury Schweppes*,[45] *Test Claimants in the Thin Cap Group Litigation*,[46] *Jobra*,[47] *Elisa*,[48] *Lammers & Van Cleeff*,[49] *Foggia*[50], *Rimbaud*[51], *Jobra*,[52] *SIAT*[53], *Eqiom*,[54] and *X*.[55] In *Deister Holding* and *Eqiom*, the CJEU also considers inadmissible a 'general presumption of fraud and abuse (…) which compromises the objectives of a directive'.[56]

More generally, the CJEU considers that 'competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination. According to established case law, such an examination must be open to judicial review'.[57] Moreover, a general presumption is not allowed even if 'made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority'.[58]

Domestic rules that apply automatically are 'comparable, in essence, to an irrebuttable presumption of tax evasion or avoidance' and 'they are not, as such, sufficient grounds to find that [a transaction] by a taxable person residing in a Member State necessarily constitutes an artificial scheme in all cases'.[59]

When examining this stream of cases, one could be led to conclude that – if general presumptions are prohibited – the burden of proof of abuse lies with tax authorities. This appears to be explicitly recognised in *Eqiom* when the CJEU stated that '[t]he imposition of a general tax measure automatically excluding certain categories of taxpayers from the tax advantage (…) would go further than is necessary for preventing fraud and abuse'.[60]

3.2.5 Need for a casuistic approach

Besides prohibiting general presumptions, the CJEU also requires tax authorities to ascertain abuse on a casuistic basis. This is notably evident in *Leur-Bloem*, where the CJEU mentioned that 'competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination'[61] or 'must carry and out an individual examination of the whole operation at issue'.[62] This approach has been followed in many other cases, such as *Glaxo Welcome*[63], *Deister Holding*, and *Eqiom*.[64]

Again, if a case-by-case approach is required, and tax authorities are the only institution that can implement such analysis, this could mean that tax authorities have the burden of proof of abuse.

3.2.6 Need to take into account objective facts, ascertainable by third parties

In *Cadbury Schweppes*, the CJEU required to ascertain the presence of the objective element of abuse on 'objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment'.[65] In *Thin Cap Group litigation*, the CJEU refers to 'objective and verifiable elements'[66] and in *CFC and Dividend Group Litigation* to 'objective factors'.[67]

Moreover, 'if checking those factors leads to the finding that the [company] is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that CFC must be regarded as having the characteristics of a wholly artificial arrangement'.[68]

The same reasoning has been repeated in *Thin Cap Group litigation*,[69] *CFC and Dividend Group Litigation*,[70] *Commission vs UK*[71] and *Impresa Pizzarotti*[72].

Despite not being explicitly said, the party interested in the finding that an entity is a 'fictitious establishment' is the tax authority. Accordingly, this could again be interpreted as placing the burden of proof of abuse (i.e., absence of adequate objective factors such as staff, premises and equipment) on the side of tax authorities.

3.2.7 Possibility of requiring mutual assistance

In *Cadbury Schweppes*[73], the CJEU noted that competent national authorities could obtain evidence through cross-border mechanisms on mutual assistance between tax authorities, covering not only the EU mechanisms but also the relevant tax treaties.[74] In *Elisa*, it goes further by not admitting a discriminatory rule which was also based on the fact that the information needed for the application of a domestic regime was outside of the jurisdiction insofar as "tax authorities can reliably request from foreign tax authorities all the information they need to corroborate the returns made by [the taxpayers]."[75]

Even in cases where that exchange is impossible and within the EU, "there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied".[76]

Despite not being said, tax authorities are the only party that may recur to administrative assistance. Therefore, and if evidence could be collected by these mechanisms, that could be interpreted as indicating that tax authorities have (actually) an interest in recurring to those mechanisms since they would bear the burden of the proof of abuse.

3.2.8 Burden of proof of the internal elements of an anti-abuse provision

In *N Luxembourg 1*, the CJEU noted that "where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in [a directive] to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular, the fact that the company to which the interest has been paid is not its beneficial owner".[77]

This appears to place the burden of abuse on tax authorities. In this case, the CJEU further clarified that tax authorities would not be obliged to provide evidence regarding the beneficial owner's identity. To deny EU law benefits, tax authorities were only required to provide evidence of an abusive situation - understood as providing evidence that the objective and subjective elements of the abuse test are fulfilled, in the case. Furthermore, denying EU law entitlement to rights is not only an option but an obligation of the Member States[78], which could also be understood as requiring tax authorities to investigate and deny benefits in abusive cases (and, accordingly, to identify them), thus bearing the burden of proof.

3.3 Burden placed on the side of taxpayers

3.3.1 Introduction

There are also some decisions of the CJEU where it appears that the CJEU shifts the burden of proof of abuse - i.e. the proof of the genuineness of the situation or the presence of valid commercial reasons - on the taxpayer. The cases cited below illustrate such situations.

3.3.2 Proof of the requirements of a right or entitlement

The CJEU does not object domestic legislators to set requirements for the enjoyment of a benefit derived from domestic law or from a directive insofar as it requires implementation by domestic law. That also covers cases where the underlying proof is somehow related to abuse. This is explicitly recognised in *N Luxembourg 1*, where it is stated that the CJEU ‘has moreover held, more generally, that there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied’.[79]

This position is not expressed merely in the context of abuse. It merely reproduces the stable position of the CJEU, since its early cases on direct taxation, that ’[a]s regards the burden of proof and the degree of detail which the evidence required must meet in order to benefit from a tax [feature], it must be borne in mind that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether or not to grant that advantage’.[80]

SIAT appears to admit, in general terms, a rule requiring the taxpayer with 'the need to provide proof of the genuine and proper nature of the transactions and the normal nature of the expenses incurred'[81]. However, in that specific case, the rule was considered incompliant with EU law due to the infringement of the EU principle of legal certainty.[82]

In conclusion, the CJEU appears to allow the domestic legislator to subject rights and entitlements - of both domestic and EU law - to the production of evidence. It also appears that the domestic legislator is not even obliged to break down a certain status into objectively ascertainable facts. Therefore, this could be interpreted as, in practice, allowing a Member State to (always) shift the burden of proof of (absence of) abuse to the taxpayer.

3.3.3 Possibility of providing (counter-)evidence

In many decisions, the CJEU seeks to ensure that the taxpayer is provided with the opportunity to provide (counter-)evidence of the commercial reasons of its conduct[83] before tax authorities are able to conclude for the existence of abuse. This is even considered an obligation of the Member States, which must be made available without 'undue administrative constraints'.[84] The fulfilment of such an obligation 'must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified'.[85]

Cadbury Schweppes[86] notes that '[t]he resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine'.[87] Furthermore, in *Elisa*, it is stated that 'the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes'.[88]

This reasoning is followed in many cases such as *Test Claimants in the Thin Cap Group Litigation*,[89] *CFC and Dividend Group Litigation*,[90] *SGI*,[91] *Établissements Rimbaud*,[92] *SIAT*,[93] *ITELCAR*,[94] *Emerging Markets*,[95] *Hornbach-Baumarkt*[96], *X*,[97] *Impresa Pizzarotti*[98] and *Lexel*.[99]

This may and was interpreted as placing the burden of proof regarding the existence of abuse on the taxpayer.[100] If the taxpayer is given the opportunity to provide evidence, that would mean that he would be interested in doing so and, accordingly, would be the one bearing the burden of proof.

4. Understanding the CJEU's case-law

4.1 Introduction

A *prima facie* reading of the CJEU's case law indeed appears to reveal some inconsistencies and even contradictions. However, in the author's view, a more careful reading of the case law reveals that those

apparent inconsistencies result from the lack of consideration of the different contexts considered by the CJEU. And that the CJEU is, despite the diversity, quite consistent in its analysis.

As already mentioned, the CJEU's case law on direct taxation deals with abuse in two different contexts. One is on the framework of abuse of domestic systems, and more concretely with the admissibility of *prima facie* discriminatory or restrictive domestic tax measures with EU primary law on the ground that they aimed at fighting avoidance of domestic law. The second deals with the application of EU anti-abuse rules. This second cluster can be subdivided into two areas: (i) the assessment of the admissibility of domestic measures implementing EU secondary law anti-abuse clauses and (ii) the fight against abuse through the general unwritten principle.

The following sections will assess each one of those different contexts and will try to shed some light on the different CJEU rulings and their relevance for the allocation of the burden of proof of abusive practices, covering both abuse of domestic tax systems and of EU law.

4.2 Compatibility of domestic anti-abuse provisions with EU Law (abuse of domestic direct tax systems)

4.2.1 Introduction

Most CJEU cases in direct tax matters refer to the admissibility of a domestic tax rule with EU law. Abuse (*rectius*: fight against tax avoidance and evasion or its alternative wordings, as mentioned in section 1) appears as justification put forward by the Member States to adopt a *prima facie* restrictive domestic tax measure aimed at protecting the domestic tax system. The CJEU's cognoscibility is limited to the issue of whether a non-resident is treated less favourably than a resident when both are in a objectively comparable situation.

4.2.2 Reason for the (apparent) references to the burden of proof

Most of the above-mapped references to the burden of proof are not the expression of the CJEU's position on how the burden of proof should be distributed in abuse cases but are merely the result of the proportionality reasoning.[101]

In ascertaining the *prima facie* discriminatory measure's admissibility, the CJEU ascertains whether the domestic measure is adequate and necessary to the fight against abuse. Therefore, despite recognising the fight against abuse as a valid justification, the CJEU (significantly) narrows its scope through proportionality.

The underlying reason behind this posture could be the maximization of the EU interest and, concretely, of the EU fundamental freedoms. In fact, in the context of assessing the admissibility of *prima facie* discriminatory domestic tax measures, the CJEU is confronted with two opposing interests: on the one hand, the EU interest of optimising the fundamental freedoms[102]and, on the other hand, the Member State’s interest of fighting

abuse of its domestic direct tax system.[103] In the balancing act between the two, the CJEU appears to maximize the EU interest, which is done by applying a strict proportionality analysis.[104]

Proportionality allows narrowing the scope of the justification to wholly artificial arrangements, circumscribed in a minimalistic way as situations devoid of economic reality. [105] For the same reason, it does not accept domestic discriminatory measures based on general presumptions or general assessments, as they would prevent the exercise of an EU fundamental freedom beyond cases of proven abuse (understood as wholly artificial arrangements). This means that a case-by-case approach is required. Depriving access to the fundamental freedoms cannot result from administrative discretion and tax authorities have to justify that denial of such access on objective factors ascertainable by third parties.

References to administrative assistance between tax authorities should also not be understood as placing the burden of proof on the latter as they are a mere faculty of action for tax authorities.[106] As AG Trstenjak notes in *Commission vs Spain*: '[I]t has consistently been held that Directive 77/799 may be relied on by a Member State for the purposes of obtaining from the competent authorities of another Member State any information which is necessary to enable it to effect a correct assessment of the taxes covered by the directive. (…) [T]he Directive provides, inter alia, that the national tax authorities may ask the competent authority of another Member State for information to which they themselves do not have access. In the [CJEU]'s opinion, the use of the word 'may' in that connection indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. Consequently, it is for each Member State in principle to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State'.[107] Thus, the mere existence of a mutual assistance instrument cannot place or shift the burden of proof.[108]

The case law on the admissibility of *prima facie* domestic direct tax measures should also not be read as requiring the taxpayer to face the burden of proof of (absence of) abuse. The mentioned possibility for the taxpayer to provide counter-evidence[109] appears as an outcome of proportionality. As clearly expressed in *X*, '[i]t is settled case-law that, as regards relationships between the Member States, national legislation, in order for it to be proportionate to the aim of preventing tax evasion or avoidance, must, on each occasion on which the existence of artificial transactions cannot be ruled out, give the taxable person an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for the transaction at issue'.[110] One should note that the CJEU never clarified what would be an opportunity of providing counter-evidence without undue administrative constraints[111], leaving that task to the referring court.[112]

4.2.3 The CJEU's jurisdiction and the burden of proof of abuse

The previous section shows that the mapped citations actually do not refer directly to the burden of proof. Direct tax cases appear before the CJEU as infringement procedures or preliminary rulings, and in neither of them, the CJEU has to decide (*stricto sensu*) the eventual underlying litigation between a taxpayer and a tax authority/entity (i.e., the context in which a decision on the burden of proof would take place).

Infringement procedures are solely focused on the admissibility of a domestic provision. Therefore, and in the absence of a fact pattern, the CJEU is never directly faced with a burden of proof issue. Determining the relevant facts (in which it has to apply rules on evidence and the burden of proof) is solely a matter for the (domestic) referring court.[113]

Preliminary rulings also leave out issues regarding the allocation of the burden of proof since the questions submitted concern merely the application and interpretation of EU law.[114]. A preliminary ruling is ’an instrument of cooperation between the [CJEU] and national courts by means of which the former provides the latter with the interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate’.[115] As AG Hogan notes, ’a preliminary ruling is a judge-to-judge procedure’ and ’there is no burden of proof on the parties’. ’Indeed, the procedure provided for by Article 267 TFEU is not an adversarial procedure, but an instrument for cooperation between the [CJEU] and the national courts, by means of which the [CJEU] provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them."[116]Accordingly, the CJEU is also not faced directly with any burden of proof issue.

4.2.4 Consequences for the design of domestic anti-abuse provisions

From the above, several conclusions may be extracted.

First and foremost, one should note that, given the context in which all the above references are made,[117] nothing prevents the Member States from adopting any design feature in what concerns their domestic anti-abuse rules as long as they apply equally to residents and non-residents.[118] In fact, most of the above references refer to the assessment of *prima facie* discriminatory or restrictive rules. Therefore, Member States remain entirely free to rely on general presumptions and to select the facts that may trigger presumptions. They are free to restrict taxpayers from access to tax benefits, which can be done by means of a non-rebuttable presumption of abuse or by simply negatively delimitating them from the scope of persons that may access that benefit.[119] They also may allow assessments that are not based on objective and verifiable elements.[120] Nothing prevents a State from restricting access to a benefit to companies without economic activity[121] or from subjecting all companies to an effective tax rate (or withdrawing certain tax benefits from companies that are not effectively taxed at a certain level).

Secondly, and even if the CJEU is not concerned with the burden of proof as such, the above-mentioned cases have an impact on the distribution of the burden of proof in *prima facie* discriminatory or restrictive provisions.

Furthermore, they increase the pressure on Member States to design non-discriminatory anti-abuse rules.[122]

Third, and even if not completely addressed by the cited case law, a domestic rule on evidence or production of evidence cannot amount to covered or *de facto* discrimination, insofar as their application is inherently limited to cross-border cases. That would, namely, be the case where domestic law requires a specific document with a specific format that makes it very difficult or almost impossible for the production of evidence in the cross-border context. Or that, despite being non-discriminatory at face value would, 'in practice, […] makes it virtually impossible or excessively difficult'[123] to exercise a certain fundamental freedom. This was already recognised as inadmissible in the framework of custom duties.[124]

Fourth, the cited case law may also be relevant in the framework of the domestic rules implementing the special and general anti-avoidance rules of the ATAD directive.[125] Nothing prevents a Member State from going beyond the minimum level of protection set by the Directive.[126] Said rule will be subject to the limitations mentioned above insofar as they apply in a *prima facie* discriminatory or restrictive fashion. If States implement them along the wording foreseen in the Directive, those domestic rules should be compatible as the anti-abuse rules were designed on the basis of the CJEU's case law.

In conclusion, the mapped CJEU's case law, despite not addressing the issue of the burden of proof directly, has an impact on how Member States design their anti-abuse provisions and the distribution of the onus, namely when they lead to the worse treatment of non-residents.

4.3 Abuse of EU law

4.3.1 Introduction

The situation changes when it comes to cases of abuse of EU Law, including abuse of secondary and primary EU law. The following sections will deal separately with these two contexts and, within secondary law, two other situations.

4.3.2 Abuse of secondary law (domestic provisions)

Starting with domestic law and focusing on the corporate tax directives,[127] such domestic rules can result either from implementing[128] a provision based on a secondary law authorisation to restrict the entitlement to benefits generated by that directive in cases of abuse[129] or from implementing an anti-abuse provision enshrined on secondary law[130]. It can also be the result of interpreting domestic law in accordance with secondary law of a (pre-)existing domestic law provision.[131]

Several cases are decided on this context, and namely *Leur-Bloem*,[132] *Kofoed*,[133] *Foggia*[134], *Eqiom*[135] and *Deister Holding*.[136]

In this framework, the domestic anti-abuse rule appears as protecting an EU interest. The provisions of corporate direct tax directives enhance the internal market and do so by compressing domestic (direct tax)

systems. Abuse of those entitlements means extending the compression of domestic tax systems beyond what is considered needed to enhance the EU internal market.

Abuse again appears linked with a proportionality analysis: the compression of the domestic interest by the pursuance of a directive's provision has to stay within the remits of that provision. Anything that goes beyond that should be prohibited and countered.

Even if – as in the previous section - we were dealing with the protection of the domestic interest and – here – we are dealing with the protection of the EU interest, the underlying balancing act is similar: the domestic provision that compresses the opposing interest (being it the EU interest or the domestic interest) is only allowed insofar as it stays within the remits of the authorisation for the compression of the respective interest.

Not surprisingly, in *Eqiom*, the CJEU noted that 'the objective of combating fraud and tax evasion, whether it is relied on under [an article of a directive] or as justification for an exception to primary law, has the same scope.'[137] In the author's view, this remission applies both to the standard of abuse and for the procedural matters as, in any case, it concerns a domestic rule designed by Member States.[138] Accordingly, the references made in the previous sections on evidence and on the burden of proof are fully applicable to domestic rules enacted in the implementation of EU secondary law, even if the domestic rule applies in a non-discriminatory fashion since it would still be an expression of the EU interest of countering abusive practices.

This means that Member States can never rely on general presumptions, have to ascertain whether a situation qualifies as abusive on a case by case basis and have to provide the taxpayer with the right to be heard before considering that their conduct amounts to abuse.[139] Besides those limitations, Member States are provided ample leeway to adjust the secondary law rule to their national idiosyncrasies and to set rules on both evidence and the burden of proof.[140] As there is already a link with EU law, all other EU law requirements have to be met and the Charter of Fundamental Rights of the European Union[141] has to be respected.

4.3.3 Abuse of EU Law (general principle)

The situation is different when it comes to applying the EU general principle of prohibition of abuse of rights, also formulated as the 'general legal principle that EU law cannot be relied on for abusive or fraudulent ends'[142] or 'general principle that abusive practices are prohibited'[143]).

According to the CJEU, this EU principle does not require implementation by Member States[144] and must be applied 'irrespective of whether rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive'.[145] It also applies in cases covered by other, written, anti-abuse rules.[146]

There is no wording that can be relied upon in its application, and that can be used to determine who bears the onus.

One should start by noting that there is no direct tax specificity in what concerns the issue of the burden. In this sphere, the existing case law closely follows the judicial doctrine developed by the CJEU for many decades since its decision in *Emsland-Stärke*[147] and, in indirect taxation, at least since *Halifax*.[148] In direct taxation, the most representative cases are the so-called Danish Beneficial Ownership cases, i.e., *N Luxembourg 1*[149] and *T Danmark*[150]. The following paragraphs will focus on those decisions. However, and given the partial overlap between them, the author will solely quote the first-cited case.

Abuse amounts to the non-fulfilment of requirements laid down by EU law for the entitlement to a specific right.[151] According to the CJEU, 'abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive (…) does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally'. This could be interpreted as requiring the taxpayer to provide evidence that he is entitled to a certain right not only formally but also substantially and to provide evidence that its conduct does not amount to abuse.

However, the CJEU (clearly) seems to shift the burden of proof to tax authorities. The CJEU does not require proof of genuineness (which would be on the side of taxpayers) but 'proof of an abusive practice'[152] or 'examination of a set of facts (…) needed to establish whether the constituent elements of an abusive practice are present'[153]. The taxpayer appears to be given a secondary role, reduced to 'the opportunity to adduce evidence to the contrary'[154]. The CJEU also recognises that it is for the tax authority to 'establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors'.[155]

The burden faced by tax authorities has limits. They solely have to provide evidence of abuse, not of the underlying transaction or reality that the taxpayer has avoided.[156] Accordingly, applying the EU general principle does not require taxation in accordance with the 'avoided' conduct but merely the denial of the EU law entitlements[157] that were claimed based on abusive behaviour.

Regarding the unwritten principle, EU law governs both the object of the proof (i.e., what has to be proved, which is abuse containing a subjective and an objective element) and the subject that has to prove (i.e., national authorities/tax authorities). However, when it comes to the standard of proof, i.e., the intensity of the proof that has to be provided, VAT case law – which appears applicable to direct taxation - defers some discretion to the Member States, acknowledging that '[i]t is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of [Union] law is not undermined, whether action constituting such an abusive practice has taken place in the case before it'.[158]

The CJEU allows tax authorities to request 'evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse [the EU law entitlement] if that evidence is not supplied'.[159] This needs to be read carefully and should not be understood as allowing tax authorities to shift the burden of proof of abuse to the taxpayers. Most domestic direct tax systems are currently built on self-

assessment returns submitted by taxpayers. In the (rare) occasions where an audit occurs, taxpayers have to provide evidence of the facts reported on those returns. In the author's view, the above citation must be interpreted in this context: acknowledging that the taxpayer has the burden of providing evidence of the facts that he reports on its tax return. However, abuse requires a challenge to those facts, and the burden of said challenge falls on the side of tax authorities, as recognised by the CJEU in the instances mentioned above.

One should distinguish between the burden of proof of abuse and the intertwined question of proof of the material conditions on which an EU law right (whose exercise may be abused) is based. Following the VAT case law, nothing prevents Member States, within the discretion that is granted to them by EU law, to design domestic provisions implementing EU law requiring the taxpayer to provide evidence of the 'material condition' that triggers its EU law entitlement.[160] That can require some effort by the taxpayer, and whenever it is not able to provide evidence of the fulfilment of those 'material conditions', the EU law benefit may be denied. However, if the taxpayer provides that evidence, the burden of proof falls exclusively on the side of tax authorities.

The above reflects the (civil law) understanding that the burden of proof lies with the person that wants to exercise a certain right or entitlement. As abuse grants tax authorities a faculty of action, it is upon them to provide evidence that the material conditions to exercise that faculty are met.

5. Conclusions

The CJEU has issued a vast number of decisions in direct taxation, in which it appears to deal with issues concerning evidence and the burden of proof. However, the issue is not discussed directly and one has to take into consideration the context to understand the real guidance that can be extracted from the case law.

Most CJEU cases on abuse deal with the admissibility of a *prima facie* discriminatory domestic measure with (primary) EU law. Abuse (i.e., the fight against abuse or its alternative wordings) appears as a justification put forward by national governments to justify such *prima facie* discriminatory measures. In this context, references to the burden are normally a product of the proportionality analysis, i.e., the extent of the difference in treatment that the non-residence may face due to the underlying domestic interest of fighting against abuse.

Those cases end up limiting Member States in their design of anti-abuse provisions. However, said limitation only applies in cases in which there is a link with EU law, i.e., in cases of *prima facie* discriminatory or restrictive provisions. Member States are free to set aside all those judicial constraints by simply extending the regime applicable to non-residents to residents (or vice versa). Insofar as the domestic provision is non-discriminatory, such case law appears to be irrelevant.

The situation changes in cases of abuse of EU law. In this field, one has to distinguish between domestic rules against abuse of a (primary or secondary) EU law entitlement and the application of the unwritten EU general principle.

In what concerns the first, the domestically adopted anti-abuse provision is an implementation of EU law and, as such, has to face the limitations set by the CJEU in what concerns legislating against abuse. Notwithstanding, the CJEU continues to provide a wide margin of action to the legislator, allowing it to design rules in a way that require the taxpayer to provide *prima facie* evidence of the legal requirements on which the application of the rule depends.

In applying the EU general principle, Member States have no such margin of appreciation. The CJEU has a more stringent approach by (i) considering the fight against abuse as an obligation of Member States and, (ii) placing the burden of the proof of abuse on the side of tax authorities. Accordingly, any domestic provision or administrative regulation aimed at shifting the burden back to the taxpayer in this realm appears to be inadmissible. Of course, Member States are free to determine – within the constraints eventually created by EU law –how taxpayers have to provide evidence of the material conditions on which their EU law entitlement depends.

With this paper, we hope to provide useful guidance in the (not always clear) reading of the CJEU's case law on abuse and to shed some light on the constraints it creates in what concerns burden of proof of abuse. The author believes that, among others, this research may be useful for Member States that will soon be confronted with the task of implementing the ATAD III – Unshell initiative[161] into domestic law. For the future, there is still a broad research effort to be done, namely in what concerns assessing the applicability of the CJEU's decisions in other areas on evidence and the burden of proof - and particularly those in tax areas such as custom duties and VAT - to the area of direct taxation.

Footnotes

1. Deputy Academic Chairman at IBFD – International Bureau of Fiscal Documentation (The Netherlands), Professor at the Universidade Católica Portuguesa (Portugal), Honorary Associate Professor at Cape Town University (South Africa), member of the research centre CEID -CRCFL – Católica Research Centre for the Future of Law. ↩
2. For a revision of the discussion see J.F.P. Nogueira, Abuso de Direito em Fiscalidade Directa - A emergência de um "novo" operador jurisprudencial comunitário [Abuse in European Tax Law - The emergence of a new european concept], Revista da Faculdade de Direito da Universidade do Porto, Ano VI, Coimbra Editora 2009, pp. 233-299. See, merely as illustration of those discussions in EU direct taxation, A. Zalasiński, The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case, 52 Eur. Taxn. 9 (2012); D. Weber, Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 1, 53 Eur. Taxn. 6 (2013); I. Mitroyanni, Chapter 2: European Union in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World (M. Lang et al. eds., IBFD 2016); P. Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in

International Tax Law, despite Linguistic Discrepancies, 9 World Tax J. (2017); L. Romanelli, The French Anti-Abuse Rule Implementing the EU Parent-Subsidiary Directive (90/435) is Contrary to EU Law, 58 Eur. Taxn. 1 (2018), sec. 2. O.C.R. Marres & I.M. de Groot, Combatting Abuse by Conduit Companies: The Doctrine of Abuse under EU Law and Its Influence on Tax Treaties, 61 Eur. Taxn. 8 (2021); and, L. De Broe. & S. Gommers, Article 29: Entitlement to Benefits (European Union) – Global Tax Treaty Commentaries. ↩

3. See, in the framework of the principal purpose test of the OECD MC, S. Landsiedel, The Principal Purpose Test's Burden of Proof: Should the OECD Commentary on Article 29(9) Specify Which Party Bears the Onus?, 13 World Tax J. 1 (2021). ↩

4. Even though, also on direct taxation, there is an important stream of case law of the Court dealing with the burden of proof of the requirements laid down by *prima facie* discriminatory domestic tax legislation. See R. Seer & I. Gabert, European and International Tax Cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements, 65 Bull. Intl. Taxn. 2 (2011). ↩

5. K. Drüen, and D. Drissen, Burden of proof and anti-abuse provisions in: G. Meussen, The Burden of proof in tax law, EATLP series, IBFD, 2013, p. 27. ↩

6. See Nogueira, supra n. 486 and the reconstitution of the case law on the subjective and objective element. See also A.J. Martín Jiménez, Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law, 66 Bull. Intl. Taxn. 4/5 (2012) and C. Valério, Applying the OECD Principal Purpose Test in Accordance with EU Law: An Analysis of the Scope, Burden of Proof and Effects, 61 Eur. Taxn. 11 (2021). ↩

7. However, noting that such case law may provide important guidance for the area of direct taxation. ↩

8. From a conceptual perspective, the author considers important to distinguish between the concepts of planning, avoidance and evasion following the categorization already provided in a prior article. See P. Pistone, et al., Abuse through the Use of Shell Companies and Arrangements for Tax Purposes in the European Union: Feedback on the EU Consultation by the IBFD Task Force on EU Law, 4 Intl. Tax Stud. 7 (2021), section 2 entitled "[c]onceptual issues". ↩

9. CJEU 20 January 2021, C-484/19 (Lexel), ECLI:EU:C:2021:34, para. 48. ↩

10. CJEU 13 March 2007, C-524/04 (Test Claimants in the Thin Cap Group Litigation), ECLI:EU:C:2007:161, para. 71. ↩

11. CJEU 16 July 1998, C-264/96 (Imperial Chemical Industries / Colmer), ECLI:EU:C:1998:370, para. 26; and, CJEU 21 December 2016, C-593/14 (Masco Denmark and Damixa), ECLI:EU:C:2016:984, para. 44. ↩

12. CJEU 4 December 2008, C-330/07 (Jobra), ECLI:EU:C:2008:685, para. 35. ↩

13. Thin Cap Group Litigation, supra n. 10, para. 71; CJEU 17 January 2008, C-105/07 (Lammers & Van Cleeff), ECLI:EU:C:2008:24, para. 28; and, CJEU 23 April 2008, C-201/05 (Test Claimants in the CFC and Dividend Group Litigation), ECLI:EU:C:2008:239, para. 77. ↩
14. CJEU 3 October 2013, C-282/12 (Itelcar), ECLI:EU:C:2013:629, para 35; CJEU 13 November 2014, C-112/14 (Commission/United Kingdom), ECLI:EU:C:2014:2369, para. 24; and, CJEU 26 February 2019, C-135/17 (X (Controlled companies established in third countries)), ECLI:EU:C:2019:136, para. 73. ↩
15. CJEU 7 September 2017, C-6/16 (Eqiom and Enka), ECLI:EU:C:2017:641, para. 30. ↩
16. CJEU 12 December 2002, C-324/00 (Lankhorst-Hohorst), ECLI:EU:C:2002:749, para. 34 and 37; CJEU 11 October 2007, C451/05 (ELISA), ECLI:EU:C:2007:594, para. 80 and 83; CJEU 5 July 2012, C-318/10 (SIAT), ECLI:EU:C:2012:415, para. 36; CJEU 24 November 2016, C-464/14 (SECIL), ECLI:EU:C:2016:896, para. 58; and, CJEU 30 January 2020, C-725/18 (Anton van Zantbeek), ECLI:EU:C:2020:54, para. 32. ↩
17. Eqiom, supra n. 15, para. 63. ↩
18. CJEU 20 December 2017, C-504/16 (Deister Holding), ECLI:EU:C:2017:1009, para. 56. ↩
19. See A.W. Ravelli & F. Franconi, Numerous EU Member States are in Breach of EU Law by Requiring Taxpayers to Demonstrate Absence of Abuse, 61 Eur. Taxn. 10 (2021) and Martín Jimenez, supra n.6, section 2.2. ↩
20. To ensure a more comprehensive analysis, the revision will cover excerpts that may go beyond what could technically be effectively linked with the burden of proof. ↩
21. CJEU 21 January 2010, C-311/08 (SGI), ECLI:EU:C:2010:26. ↩
22. SGI, supra n.21, para. 73. ↩
23. SGI, supra n. 21, para. 75. ↩
24. Deister Holding, supra n. 18, para. 62. See also Eqiom, supra n. 15, para. 32. ↩
25. ICI, supra n. 15. ↩
26. Lexel, supra n.9, para. 49. ↩
27. X, supra. n. 14, para. 82. ↩
28. Lankhorst-Hohorst, supra n. 16, para. 37. ↩

29. CJEU 12 September 2006, C-196/04 (Cadbury Schweppes and Cadbury Schweppes Overseas), ECLI:EU:C:2006:544, para. 51 et seq. ↩
30. CJEU 17 September 2009, C-182/08 (Glaxo Wellcome), ECLI:EU:C:2009:559, para. 81 and 99-101. ↩
31. Lammers & Van Cleeff, supra n. 13, para. 26 and 28. ↩
32. Jobra, supra n. 12, para. 39. ↩
33. Masco Denmark, supra n. 11, para. 44-46. ↩
34. Commission vs UK, supra n. 14, para. 25 and 28. ↩
35. Itelcar, supra n. 14, para. 37. ↩
36. SIAT, supra n. 16, para. 40. ↩
37. SECIL, supra n. 16, para. 59-61, 199 and 146. ↩
38. Deister Holding, supra n. 18, para. 60 and 64-65. ↩
39. X, supra n. 14, para. 73 and 82. ↩
40. Lexel, supra n. 9, para. 49. ↩
41. See ICI, supra n. 15, para. 26. ↩
42. CJEU 26 September 2000, C-478/98 (Commission/Belgium), ECLI:EU:C:2000:497, para. 45. ↩
43. CJEU 21 November 2002, C-436/00 (X and Y), ECLI:EU:C:2002:704, para. 62. ↩
44. CJEU 4 March 2004, C-334/02 (Commission/France), ECLI:EU:C:2004:129, para. 27. ↩
45. Cadbury Schweppes, supra n. 29, para. 50. ↩
46. Thin Cap Group Litigation, supra n. 10, para. 73. ↩
47. Jobra, supra n. 12, para. 37. ↩
48. Elisa, supra n. 16, para. 91. ↩
49. Lammers & Van Cleeff, supra n. 13, para. 27. ↩
50. CJEU 10 November 2011, C-126/10 (Foggia – SGPS), ECLI:EU:C:2011:718, para. 37. ↩
51. CJEU 28 October 2010, C-72/09 (Établissements Rimbaud), ECLI:EU:C:2010:645, para. 34. ↩

52. Jobra, supra n. 12, para. 37. ↩
53. SIAT, supra n. 16, para. 38. ↩
54. Eqiom, supra n. 15, para. 33-34. ↩
55. X, supra n. 14, para. 80. ↩
56. Eqiom, supra n. 15, para. 31. See also Deister Holding, supra n. 18, para. 61. ↩
57. CJEU 17 July 1997, C-28/95 (Leur-Bloem / Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2), ECLI:EU:C:1997:369, para. 41. ↩
58. Leur-Bloem, supra n. 57, para. 44. ↩
59. X, supra n. 14, para. 86. ↩
60. Eqiom, supra n. 15, para. 32. See also Deister Holding, supra n. 18, para. 62. ↩
61. Leur-Bloem, supra n. 57, para. 41. ↩
62. Deister Holding, supra n. 18, para. 62. ↩
63. Glaxo Wellcome, supra n. 30, para. 99. ↩
64. Eqiom, supra n. 15, para. 32. ↩
65. Cadbury Schweppes, supra n. 19, para. 67. ↩
66. Thin Cap Group Litigation, supra n. 10, para. 82; or Itelcar, supra n. 14, para. 37. ↩
67. CFC and Dividend Group Litigation, supra n. 13, para. 19. ↩
68. Cadbury Schweppes, supra n. 29, para. 68. ↩
69. Thin Cap Group Litigation, supra n. 10, para. 82. ↩
70. CFC and Dividend Group Litigation, supra n. 13, para. 19. ↩
71. Commission vs UK, supra n. 14, para. 27. ↩
72. CJEU 8 October 2020, C-558/19 (Impresa Pizzarotti), ECLI:EU:C:2020:806, para. 36. ↩
73. Cadbury Schweppes, supra n. 29. ↩
74. Cadbury Schweppes, supra n. 29, para. 71. ↩

75. Elisa, supra n. 16, para, 86. ↩
76. Elisa, supra n. 16, para. 95. ↩
77. CJEU 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16 (N Luxembourg 1), ECLI:EU:C:2019:134, para. 142. ↩
78. Or, more precisely, “it is incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends” – N Luxembourg 1, supra n. 77, para. 110. ↩
79. *N Luxembourg 1*, supra n. 77,para. 141. ↩
80. CJEU 30 June 2011, C-262/09 (Meilicke and others), ECLI:EU:C:2011:438, para. 45. See also, *inter alia*, CJEU 3 October 2002, C-136/00 (Danner), ECLI:EU:C:2002:558, para. 50; CJEU 26 June 2003, C-422/01 (Skandia and Ramstedt), ECLI:EU:C:2003:380, para. 43; CJEU 27 January 2009, C-318/07 (Persche), ECLI:EU:C:2009:33, para. 54 and 59; CJEU 10 February 2011, C-436/08 and C-437/08 (Haribo Lakritzen Hans Riegel), ECLI:EU:C:2011:61, para. 95. ↩
81. SIAT, supra n. 16, para. 53. ↩
82. SIAT, supra n. 16, para. 58. For a broader analysis of the application of this principle in direct taxation see: Nogueira, Segurança Jurídica e Proporcionalidade em Direito Tributário (Proportionality and Legal Certainty in domestic and EU Tax Law), in: M. Pires and R. Pires, Segurança e Confiança Legítima do Contribuinte, Universidade Lusíada 2013, pp. 161-186; and, A.M.P. Ferreira, Segurança jurídica: um travão europeu ao legislador fiscal?, UCP, 2015. ↩
83. For instance, and by reference to SIAT, this would be the case of domestic law ’providing that payments made to non-resident providers are not to be regarded as business expenses unless the taxpayer demonstrates that they relate to genuine and proper transactions and do not exceed the normal limits’. See SIAT, supra n. 16, para. 42. ↩
84. Thin Cap Group Litigation, supra n. 10, para. 82. ↩
85. X, supra n. 14, para. 91. ↩
86. Cadbury Schweppes, supra n. 29. ↩
87. Cadbury Schweppes, supra n. 29, para. 70. ↩
88. Elisa, supra n. 16, para. 96. ↩
89. Thin Cap Group Litigation, supra n. 10, para. 82-86. ↩

90. CFC and Dividend Group Litigation, supra n. 13, para. 84. ↩
91. SGI, supra n. 21. ↩
92. Établissements Rimbaud, supra, n. 55, para. 37-38 and 45-46. ↩
93. SIAT, supra n. 16, para. 50. ↩
94. Itelcar, supra n. 14, para. 37. ↩
95. CJEU 10 April 2014, C-190/12 (Emerging Markets Series of DFA Investment Trust Company), ECLI:EU:C:2014:249, para. 85. ↩
96. CJEU 31 May 2018, C-382/16 (Hornbach-Baumarkt), ECLI:EU:C:2018:366, para. 49-53. ↩
97. X, n. 14, para. 87. ↩
98. Impresa Pizzarotti, supra n. 72, para. 36. ↩
99. Lexel, supra n.9, para. 50. ↩
100. Ravelli, supra n. 19, p. 442. ↩
101. For a comprehensive assessment of the *modus operandi* of proportionality in EU direct taxation see J.F.P. Nogueira, Direito Fiscal Europeu - O Paradigma da Proporcionalidade: A proporcionalidade como critério central da Compatibilidade de normas tributárias internas com as liberdades fundamentais (The Proportionality Paradigm in European Tax Law - Proportionality as a Criterion in the question of the compatibility of internal tax rules with Fundamental Freedoms), Wolter Kluwer & Coimbra Editora, 2010. ↩
102. And the EU internal market, which requires as little disturbance as possible by domestic measures. ↩
103. Since, even in the context of the EU internal market, direct taxation is not yet harmonised and the revenues are still Member States' revenues. ↩
104. For a more comprehensive review of the balancing between the EU interest and the domestic interest when assessing justifications, see: J.F.P. Nogueira, Justificaciones y Proporcionalidad - Los últimos dos tramos en la Jurisprudencia del TJUE en materia de compatibilidad de normas tributarias internas sobre la en fiscalidad directa con las libertades comunitarias, in: A.J. Martín Jimenez and F. Carrasco, Impuestos directos y libertades fundamentales del tratado de funcionamiento de la Unión Europea : cuestiones fundamentales en la jurisprudencia del Tribunal de Justicia de la Unión Europea, Thomson Reuters Aranzadi 2016 , pp. 257-294. ↩

105. This is already clear since the *ICI*, the first case in which the CJEU put forward this notion of wholly artificial arrangements. In the CJEU's words: As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment. See ICI, supra n. 15, para. 41. ↩

106. Persche, supra n. 80, para. 64. ↩

107. Opinion of Advocate General Trstenjak of 13 January 2011, C-262/09 (Meilicke and others), ECLI:EU:C:2011:438, para. 91. ↩

108. Opinion of Advocate General Trstenjak, C-262/09, supra n. 107, para. 90. ↩

109. In the sense that its conduct pursued valid commercial reasons. ↩

110. X, supra n. 14, § 87. ↩

111. Thin Cap Group Litigation, supra n. 10, para. 82. ↩

112. In the *Thin Cap Group Litigation*, supra n. 10, para. 86, the CJEU states: "it is for the national court to determine, should it be established that the claimants in the main proceedings benefited from such a regime, whether that regime gave them an opportunity (…) to provide evidence as to any commercial justification there may have been for the transactions, without being subject to any undue administrative constraints.". And, in the following paragraph "it is for the national court to determine whether those provisions allow taxpayers (…) to produce evidence of the commercial justifications for that transaction". ↩

113. In *Foggia*, the CJEU explicitly stated that "it is for the referring court to determine, in the light of all the circumstances of the dispute on which it is required to rule, whether, on the basis of the criteria set out at paragraphs 39 to 51 above, the constituent elements of the presumption of tax evasion or avoidance, within the meaning of Article 11(1)(a) of Directive 90/434, are present in the context of that dispute." See Foggia, supra n. 50, para. 51. See also Glaxo Welcome, supra n. 30, para. 98. ↩

114. Art. 267 TFEU. ↩

115. Deister Holding, supra n.18, para. 39. ↩

116. Footnote 10 of the opinion of Advocate General Hogan of 25 February 2021, C-478/19 (UBS Real Estate Kapitalanlagegesellschaft mbH v. Agenzia delle Entrate), ECLI:EU:C:2021:148. ↩

117. Again, the assessment of *prima facie* discriminatory domestic direct tax measures with EU law. ↩
118. Of course, excluding the cases in where the domestic provision implements EU Law. ↩
119. Which, in practice, has the same effect. ↩
120. Thin Cap Group Litigation, supra n. 10, para. 82. ↩
121. As occurred in Leur-Bloem, supra n. 57. ↩
122. This has been the option of the EU legislator regarding the implementation of the so-called Pillar II within the EU. See Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, SWD(2021) 580 final, COM(2021) 823 final, 2021/0433 (CNS), 22 December 2021. This solution had already been proposed by the author in: J.F.P. Nogueira and A. Turina, Chapter 10: Pillar Two and EU Law in Global Minimum Taxation?: An Analysis of the Global Anti-Base Erosion Initiative (A. Perdelwitz & A. Turina eds., IBFD 2020); and, J.F.P. Nogueira, GloBE and EU Law: Assessing the Compatibility of the OECD's Pillar II Initiative on a Minimum Effective Tax Rate with EU Law and Implementing It within the Internal Market, 12 World Tax J. (2020). ↩
123. CJEU 3 February 2000, C-228/98 (Dounias), ECLI:EU:C:2000:65, para. 60. ↩
124. Ibid. ↩
125. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, p. 1–14. ↩
126. Cfr. Art. 3 of the ATAD, supra n. 125. ↩
127. The Parent-Subsidiary Directive (Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345, 29.12.2011, p. 8–16), the Interest and Royalty Directive (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, OJ L 157, 26.6.2003, p. 49–54), and the Mergers and Acquisitions Directive (Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, p. 34–46). ↩
128. Which can be a domestic or an agreement-based provision. See Deister Holding, supra n. 18, para.57. ↩
129. As all corporate direct tax provisions allow. ↩

130. Such as the domestic provisions implementing the anti-abuse rules of the Parent-Subsidiary Directive or of the Merger Directive. ↩

131. As in CJEU 5 July 2007, C-321/05 (Kofoed), ECLI:EU:C:2007:408, para. 45. ↩

132. Leur-Bloem, supra n.57. ↩

133. Kofoed, supra n. 131. ↩

134. Foggia, supra n. 50. ↩

135. Eqiom, supra n. 15. ↩

136. Deister Holding, supra n. 18. ↩

137. Eqiom, supra n. 15, para. 64. ↩

138. And, in what concerns current direct tax directives, none of them provide “exhaustive harmonization” that would deem such clauses as compatible with EU law. ↩

139. An excellent synthesis of all of these limitations is already provided by Leur-Bloem, supra n. 57, para. 40 et seq. ↩

140. For instance, in Leur-Bloem the CJEU recognises that [i]n the absence of more detailed ‘[Union] provisions concerning application of the presumption mentioned in Article 11(1)(a), it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision’. See Leur-Bloem, supra n. 57, para. 43. ↩

141. European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1. ↩

142. N Luxembourg 1, supra n. 77, para. 96. In the following paragraph, the CJEU precises that ’the application of EU legislation cannot be extended to cover transactions carried out of the purpose of fraudulently or wrongfully obtaining advantages provided by EU law’. See also CJEU 9 March 1999, C-212/97 (Centros), ECLI:EU:C:1999:126, para. 24; Cadbury Schweppes, supra n. 29, para. 35; CJEU 22 November 2017, C-251/16 (Cussens and others), ECLI:EU:C:2017:881, para. 27; and, CJEU 11 July 2018, C-356/15 (Commission / Belgium), ECLI:EU:C:2018:555, para. 97. ↩

143. N Luxembourg 1, supra n. 77, para. 102, 108 and 120. ↩

144. N Luxembourg 1, supra n. 77, para. 105. ↩

145. N Luxembourg 1, supra n. 77, para. 101. ↩

146. N Luxembourg 1, supra n. 77, para. 104. ↩

147. CJEU 14 December 2000, C-110/99 (Emsland-Stärke), ECLI:EU:C:2000:695. ↩

148. CJEU 21 February 2006, C-255/02 (Halifax and others), ECLI:EU:C:2006:121. ↩

149. N Luxembourg 1, supra n. 77. ↩

150. CJEU 26 February 2019, C-116/16 and C-117/16 (T Danmark), ECLI:EU:C:2019:135. ↩

151. N Luxembourg 1, supra n. 77. para. 119. ↩

152. N Luxembourg 1, supra n. 77. para. 124. ↩

153. N Luxembourg 1, supra n. 77, para. 125. ↩

154. N Luxembourg 1, supra n. 77, para. 126, in fine. ↩

155. The full quotation is the following: ’where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 1(1) of Directive 2003/49 to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner’. ↩

156. N Luxembourg 1, supra n. 77, para. 142-144. ↩

157. Being them a treaty freedom or a right provided by a directive. ↩

158. Halifax, supra n. 148, para. 76. ↩

159. N Luxembourg 1, supra n. 77, para. 141. ↩

160. CJEU 11 November 2021, C-281/20 (Ferimet), ECLI:EU:C:2021:910, para. 41. Here, the CJEU considered important to distinguish between ’on the one hand, establishing a material condition governing the right to deduct VAT and, on the other, determining the existence of VAT fraud’. ↩

161. See Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final, 2021/0434 (CNS), SEC(2021) 565 final, SWD(2021) 577 final} - {SWD(2021) 578 final, SWD(2021) 579 final, of 22 December 2021. ↩