

The C.J.E.U. Case Law Relevant to the General Anti-Avoidance Rule (G.A.A.R.) Under the Anti-Tax Avoidance Directive (A.T.A.D.)

BLAŻEJ KUŹNIACKI[†]

TABLE OF CONTENTS: 1. Introduction; 1.1. General Remarks on the A.T.A.D.'s G.A.A.R.; 1.2. The Pivotal Importance of Cross-Border Situations for the Relevance of the C.J.E.U.'s Case Law; 1.3. The Scope and the Purpose of This Study; 2. The Origin of Abuse; 3. The Two-Pronged Test, the Objectified Intention, and the Essential Purpose; 4. The Sole, the Essential, the Predominant, the Main, and One of the Main Purposes' Standard of Abuse under E.U. Secondary Law; 5. From the Sole to one of the Principal Purposes' Standard of Abuse under E.U. Primary Law between M.S.s and Between M.S.s and Third Countries; 6. Synthesis and Conclusions.

ABSTRACT: This study concentrates on the Court of Justice of the European Union (C.J.E.U.) case law in order to reconstruct from it an interpretative guidance for the proper understanding and thus the application of the general anti-abuse rule included in Article 6 A.T.A.D. (the A.T.A.D.'s G.A.A.R.). Although Article 6 aims to harmonise general anti-abuse rules in the domain of tax law among all M.S.s, its wide scope and its phraseology raises a plethora of issues, in particular in respect of its proper – E.U. compatible – understating and thus application. The analysis of the relevant C.J.E.U. case law, as undertaken in this paper, will set a scene for the question of compatibility of the A.T.A.D.'s G.A.A.R. with the concept of abuse developed by the C.J.E.U. in cases regarding abusive practices of taxpayers. This piece aims to contribute in determining the reasonable understanding of the core elements of the A.T.A.D.'s G.A.A.R. in accordance with E.U. primary law, as interpreted by the C.J.E.U.. This may provide the readers with a useful interpretative guideline to the A.T.A.D.'s G.A.A.R., which could be of assistance not only for tax authorities, but for all stakeholders, including taxpayers, courts, and M.S.s' legislative bodies.

KEYWORDS: *G.A.A.R., A.T.A.D., B.E.P.S., C.J.E.U., tax avoidance*

JEL CODES: *K34, H26, H21*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

This article is released under the terms of Creative Commons Attribution 4.0 International License (CC-BY)

1. INTRODUCTION

1.1. GENERAL REMARKS ON THE A.T.A.D.'S G.A.A.R.

The general anti-abuse rule embodied in Article 6 A.T.A.D. (the A.T.A.D.'s G.A.A.R.) is a unique European Union (hereinafter E.U.) provision, not least because it is the first provision under the E.U. law, which aims at preventing the abuse of tax law¹ by Member States (hereinafter M.S.s),² but also due to its challenging structure and wording which is supposed to fit all M.S.s in prevention of abuse of tax law. It reads as follows:

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

[†] PhD University of Oslo (Norway), Post-doctorate research at Singapore Management University (Singapore), Attorney-at-Law, Visiting Senior Research Fellow at the Amsterdam Centre for Tax Law, University of Amsterdam (The Netherlands).

¹ More generally, even if one accepts that E.U. or international law prohibits the abuse of law (abuse of rights), it is still debatable whether or not the concept of "abuse of law" constitutes a general principle of international law or a general principle of E.U. law. For E.U. law see, e.g., PAUL FARMER ET AL., *PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF E.U.?* (Rita de la Feria & Stefan Vogenauer eds., 2011); Paolo Piantavigna, *Conference Report: Prohibition of Abuse of Law: A New General Principle of E.U. Law?*, 37 *INTERTAX* 166 (2009); ALEXANDRE SAYDÉ, *ABUSE OF E.U. LAW AND REGULATION OF THE INTERNAL MARKET* (2014). Although some recent Court of Justice of the European Union's (hereinafter C.J.E.U.) case law implies that the prohibition of abuse of tax law stems from or is identified with general principle of E.U., such implication has a weak doctrinal foundation and seems to be at odds with its settled case law (*see infra* sec. 4). For international public law see 1 GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* (1986); Alexandre Kiss, *Abuse of Rights*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (R. Bernhardt ed., 1992); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6th ed. 2003); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 *MCGILL L. J.* 389 (2002). *See also* Free Zone of Upper Savoy and Gex (Fr. v. Swaz.), Judgment, 1932 P.C.I.J. (ser. A/B,) No. 46, at 167 (June 7) and Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, ¶ 212 (Aug. 27).

² Before its entry into force, i.e. 1 January 2019, several G.A.A.R.s have been contained in partially harmonised areas of direct tax law in order to prevent the abuse of the E.U. directives. *See* Council Directive 2011/96, art. 1(2)-(4), 2011 O.J. (L 345), 8, as amended by Council Directive 2013/13, 2013 O.J. (L 141), 30, Council Directive 2014/86, 2014 O.J. (L 219/40), and Council Directive 2015/121, 2015 O.J. (L 21/1); Council Directive 2003/49, art. 5, 2003 O.J. (L 157)(EC), 49, as amended by Council Directive 2006/98, 2006 O.J. (L 157)(EC), 203, and Council Directive 2013/13, 2013 O.J. (L 141), 30; Council Directive 2009/133, art. 15(1)(a), 2009 O.J. (L 310/34), as amended by Council Directive 2013/13, 2013 O.J. (L 141), 30.

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 paragraph 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 paragraph 1, the tax liability shall be calculated in accordance with national law.

The crucial outcome of Article 6 is that it harmonises a general anti-abuse rule in the domain of tax law among all M.S.s. Hence, it has a wide scope and its phraseology is not too precise, including expressions such as “the main purpose or one of the main purposes”, “defeats the object or purpose of the applicable tax law”, and “not genuine [arrangement]”.

Structurally, Article 6 is composed of three core elements: (i) an arrangement; (ii) a tax advantage; and (iii) abuse. All three must exist for Article 6 to be triggered. The structure of Article 6 is designed so that it initially opens its gate broadly by setting low thresholds for identifying “an arrangement” and “a tax advantage”, but then narrows it down to what should be considered as “abusive”.³ However, the abusive part of Article 6 (at least linguistically) does not seem to be narrow enough (or high enough) to be in line with the standard of abuse developed by the C.J.E.U.⁴ and it does not define the border between abusive and non-abusive arrangements with the clarity that is required to comply with the legal certainty and foreseeability principles. This puts Article 6 at odds with its balancing function, which is clearly articulated in the recital 11 of the preamble to the A.T.A.D.: “GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have

³ Cf. to the U.K. G.A.A.R. at Anna Burchner, Jeremy Cape & Matthew Hodkin, *United Kingdom: Anti-Avoidance Measures of General Nature and Scope – G.A.A.R. and Other Rules*, 103A IFA CAHIERS 805, 810 (2018).

⁴ See *infra* sec. 2-5.

the right to choose the most tax efficient structure for its commercial affairs.”⁵

The approach of the E.U. Council follows from the essential nature of the G.A.A.R. which is to cover and prevent the widest possible range of tax abuse cases. It is also needed to achieve its purpose: to “tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions”, such as transfer pricing or C.F.C. rules.⁶ That is to say, the drafters of Article 6 seem to have been motivated by a desire to design a vague and broad anti-abuse rule, which will function as a deterrent for taxpayers. To a certain extent the drafters also seem also to be inclined by a desire to undo what the C.J.E.U. had already achieved, i.e. to lower the standard of abuse in tax cases under E.U. law.

1.2. THE PIVOTAL IMPORTANCE OF CROSS-BORDER SITUATIONS FOR THE RELEVANCE OF THE C.J.E.U.’S CASE LAW

Article 6 aims to cover cross border situations (between M.S.s and between M.S.s and third countries) as well as domestic ones. In fact, recital 11 of the preamble to the A.T.A.D. emphasises that Article 6 should be applied in cross-border and domestic situations in a uniform manner. This a very important feature of the Article, which seeks to prevent the discriminatory application of E.U. harmonised G.A.A.R.s by requiring that the scope and results of their application in domestic and cross-border situations do not differ.⁷ Moreover, this feature suggests that the

⁵ Cf. Andrés Báez Moreno & Juan José Zornoza Pérez, *The General Anti-abuse Rule of the Anti-tax Avoidance Directive*, in *COMBATING TAX AVOIDANCE IN THE E.U.: HARMONIZATION AND COOPERATION IN DIRECT TAXATION* 118, 126-30 (José Manuel Almudí Cid, Jorge A. Ferreras Gutiérrez, Pablo A. Hernández González-Barreda eds., 2019); Maarten. Floris de Wilde, *Is The A.T.A.D.’s G.A.A.R. a Pandora’s Box?*, in *THE IMPLEMENTATION OF ANTI-BEPS RULES IN THE E.U.: A COMPREHENSIVE STUDY* 301, 308-14 (Pasquale Pistone & Dennis Weber eds., 2018).

⁶ See recital 11 of the preamble to the A.T.A.D.. One could argue in accordance with recital 1 of the preamble to the A.T.A.D. that the broadest purpose of the G.A.A.R. is “the need for ensuring that tax is paid where profits and value are generated”. This is, however, highly debatable and questionable. Cf. Wilde, *supra* note 5, at 319.

⁷ See Adam Zalasiński & Agnieszka Olesińska, *Poland: Anti-Avoidance Measures of General Nature and Scope – G.A.A.R. and Other Rules*, 103A IFA CAHIERS 607, 620 (2018). See generally Andrés Báez Moreno, *A PAN-European G.A.A.R.? Some (Un)Expected Consequences*

practical impact of Article 6 is much wider than the one of international arrangements, since the rule covers the entire spectrum of corporate income tax, whereas many tax avoidance arrangements are purely domestic.

This feature of Article 6 should not be seen as a way to circumvent a possible scrutiny of the C.J.E.U. because of the lack of discrimination or restriction of cross-border situations compared to domestic ones.⁸ Fundamentally, the A.T.A.D. is secondary E.U. law and given its inferiority to the primary law, all provisions of that Directive must be compatible with E.U. Treaties and the relevant C.J.E.U. case law, in particular in cases regarding abuse of tax law under fundamental freedoms.⁹ Indeed, the E.U. Commission in the proposal of the A.T.A.D. pointed out that in “compliance with the *acquis*, the proposed G.A.A.R. is designed to reflect the artificiality tests of the C.J.E.U. where this is applied within the Union.”

Moreover, as implied by the C.J.E.U. case law,¹⁰ the consequences of evaluating whether domestic provisions are compatible with E.U. law should be drawn not only from their *formal* (*ipso iure*) scope of application, but also from their *actual* (*ipso facto*) scope of application. In that regards, it should be remembered that G.A.A.R.s target tax avoidance. This phenomenon, due to difference in levels of taxation on income among countries and disparities existing in their tax systems, typically occurs in cross border situations. Consequently, there is a risk that G.A.A.R.s’ *actual* scope of application will cover resident taxpayers which are engaged in cross border arrangements more often than resident taxpayers involved in purely domestic arrangements. It means that the

of the Proposed E.U. Tax Avoidance Directive Combined with the Dzodzi Line of Cases, BRIT. TAX REV. 143 (2016).

⁸ Such attempt was made by the O.E.C.D. in respect of C.F.C. rules, see Organization for Economic Cooperation and Development [O.E.C.D.], *Designing Effective Controlled Foreign Company Rules*, Action 3 – Final Report, at 22 (October 5, 2015).

⁹ See further sec. D.

¹⁰ See A.G. Léger’s Opinion of 20 May 1999 and the corresponding judgment of Case C-439/97, *Sandoz v. GmbH v Finanzlandesdirektion für Wien*, 1999 E.C.R. I-07041 ¶ 19, 31-48. See also Case C-254/97, *Baxter*, 1999 E.C.R. I-04809 ¶ 12-13.

G.A.A.R.s of M.S.s would not – in the C.J.E.U.’s eyes – be immune to analysis of their ipso facto (indirect) restrictive effect on fundamental freedoms even though there is case law confirming that, ipso iure, not treating domestic and foreign investments differently is enough to avoid a restriction. Only if their *actual* application to cross border and domestic situations were to be alike, no restrictions would arise.

This shows that the proper understanding of the relevant C.J.E.U.’s case law may prove to be invaluable for determining the appropriate implementation and application of the A.T.A.D.’s G.A.A.R. by M.S.s. This, naturally, pertains to cross border situations, as purely domestic situations are not within the purview of the C.J.E.U.. Hence, this study will focus on potential cross-border use of the A.T.A.D.’s G.A.A.R., although its application reaches not only cross-border, but also domestic arrangements and transactions.

1.3. THE SCOPE AND THE PURPOSE OF THIS STUDY

The C.J.E.U.’s case law in the field of abuse law (the relevant C.J.E.U.’s case law) plays a prominent role in an appropriate implementation and application of the A.T.A.D.’s G.A.A.R.. First, it delineates the compatibility range for the A.T.A.D.’s G.A.A.R. with E.U. fundamental freedoms. Second, it helps to understand the key concepts under the A.T.A.D.’s G.A.A.R., which aim to cover the notion of abuse of tax law. The importance of the C.J.E.U. case law for drafting the A.T.A.D.’s G.A.A.R. was duly noticed by the European Commission, which stated in the proposal to the A.T.A.D. that “[i]n compliance with the *acquis*, the proposed G.A.A.R. is designed to reflect the artificiality tests of the C.J.E.U. where this is applied within the Union.”¹¹

The analysis of the relevant C.J.E.U. case law in sections 2-5 below will set a scene for the question of compatibility of the A.T.A.D.’s G.A.A.R.

¹¹ *Commission Proposal for a Council Directive Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market*, at 9, COM (2016) 026 final (Jan. 1, 2016).

with the concept of abuse developed by the C.J.E.U. in cases regarding abusive practices of taxpayers.¹² Attention is given to the structural elements of the concept of abuse under the C.J.E.U. case law and this Court's perception of threshold of abuse concerning the taxpayer's intention to obtain a tax advantage. The analysis will be followed by its synthesis and a conclusion in section 6.

This piece aims to contribute in determining the reasonable understanding of the core elements of the A.T.A.D.'s G.A.A.R. in accordance with E.U. primary law, as interpreted by the C.J.E.U.. This may provide the readers with a useful interpretative guideline to the A.T.A.D.'s G.A.A.R., which could be of assistance not only to tax authorities, but to all stakeholders, including taxpayers, courts, and M.S.s legislative bodies.

2. THE ORIGIN OF ABUSE

The C.J.E.U.'s concept of abuse of law has its origins in the 1970 judgment *Van Binsbergen*. In that case, the C.J.E.U. for the first time pointed out that a M.S. may restrict the fundamental freedom (here: the freedom to provide services) to prevent the circumvention of domestic rules insofar as E.U. law does not protect an activity that is “*entirely or principally directed toward its territory . . . for the purpose of avoiding [its domestic rules] (emphasis added)*”.¹³ This implies that for the C.J.E.U. the

¹² The present analysis focuses only on the milestones in the C.J.E.U. case law on abuse of law and it does not necessarily follow a chronological order of the judgments. The aim is to succinctly and effectively compose the historical and current state of art in the area of abuse of tax law as developed by the C.J.E.U. case law.

¹³ Case C-33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging*, 1974 E.C.R. 01299 ¶ 13. The quoted findings stemming from this landmark judgment has been used by the C.J.E.U. in many other cases regarding the fundamental freedoms, i.e. freedom to provide services (the freedom of establishment, the free movement of goods and the free movement of workers). *Accord* Case C-52/79, *Procureur du roi v. Debauve*, 1980 E.C.R. 883; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, 1991 E.C.R. I-4007; Case C-211/91, *Commission v. Belgium*, 1992 E.C.R. I-6757; Case C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media*, 1993 E.C.R. I-00487; Case C-11/95, *Commission v. Belgium*, 1996 E.C.R. I-04115; Case C-222/94, *Commission v. United Kingdom*, 1996 E.C.R. I-4025; Case C-

circumvention of domestic rules in certain circumstances equals an abusive practice that is not protected by E.U. law. This in particular, is pertinent to U-turn schemes. Although U-turn schemes have been usually identified as a source of abusive practices in V.A.T. cases,¹⁴ they have been also identified in blatant tax avoidance cases regarding direct taxation.¹⁵ This shows that the reasoning of the C.J.E.U. used to initiate the concept of the abuse of law in respect of the freedom to provide services was from the very beginning relevant to some types of abuse in the field of tax law. Until 2000, however, not much guidance was given by the C.J.E.U. on the way to determine the abuse.

3. THE TWO-PRONGED TEST, THE OBJECTIFIED INTENTION, AND THE ESSENTIAL PURPOSE

The C.J.E.U. gave more clarity to the concept of abuse of law in its judgment of 14 December 2000 in the *Emsland-Stärke* case by introducing a two-pronged test to determine abuse: (i) a combination of objective circumstances in which, despite formal observance of the conditions laid down by the E.U. rules, the purpose of those rules has not been achieved;

56/96, *VT4 Ltd. v. Vlaamse*, 1997 E.C.R. I-3143 and Case C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen v. De Agostini and TV-Shop*, 1997 E.C.R. I-03843; Case C-115/78, *Knoors v. Secretary of State*, 1979 E.C.R. 399; Case C-246/80, *Broekmeulen v Huisarts Registratie Commissie*, 1981 E.C.R. 2311; Case C-271/82, *Auer*, 1983 E.C.R. 2727; Case C-292/86, *Gullung v. Conseil de l'ordre des avocats*, 1988 E.C.R. 00111; Case C-81/87, *Daily Mail*, 1988 E.C.R. 05483; Case C-130/88, *Van de Bijl*, 1989 E.C.R. 3039; Case C-61/89, *Bouchoucha*, 1990 E.C.R. I-03551; Case C-212/97, *Centros v Erhvervs*, 1999 E.C.R. I-01459 and Case C-167/01, *Kamer van v. Inspire Art*, 2003 E.C.R. I-10155; Case C-229/83, *Leclerc*, 1995 E.C.R. I-00179; Case C-53/81, *Levin*, 1982 E.C.R. 01035; Case C-249/83, *Hoeckx*, 1985 E.C.R. 973; Case C-139/85, *Kempf*, 1986 E.C.R. 01741; Case C-39/86, *Lair*, 1988 E.C.R. 03161; Case C-292/89, *Antonissen*, 1991 E.C.R. I-00745. The case law cited after: A. G. Prats et al., *E.U. Report: Anti-avoidance measures of general nature and scope – G.A.A.R. and other rules*, IFA Cashiers 2018, Vol. 103A, p. 7 at footnotes 7-10.

¹⁴ For that see DENNIS WEBER, *TAX AVOIDANCE AND THE EC TREATY FREEDOMS A STUDY OF THE LIMITATIONS UNDER EUROPEAN LAW TO THE PREVENTION OF TAX AVOIDANCE 196-208* (2005).

¹⁵ See B. Kuźniacki, *Tax Avoidance through Controlled Foreign Companies under European Union Law with Specific Reference to Poland*, in *Accounting, Economics, and Law: A Concivium*, sec. 3.4.2 (R. S. Avi-Yonah, Y. Biondi, S. Sunder (eds.), 1st edn., 2017).

(ii) a subjective element consisting in the intention to obtain an advantage from the E.U. rules by artificially creating the conditions laid down for obtaining it.¹⁶ This test turns out to be the role model for determining abuse in E.U.. It became useful for that purpose across all areas of the C.J.E.U.'s juridical purview and was integrated into several anti-abuse rules in E.U. secondary law which partly harmonises the area of taxation.¹⁷

The two-pronged test for the first time was applied by the C.J.E.U. in tax matters on 21 February 2006 in the *Halifax* case regarding V.A.T., i.e. fully harmonised area of taxation at the E.U. level. In this landmark case, the C.J.E.U. objectified the second prong of the abuse test by saying that in order to determine the abuse of V.A.T. Directive,¹⁸ it must be “apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage (emphasis added)”.¹⁹ This finding of the C.J.E.U. showed that a determination of the taxpayers’ tax avoidance intention must not be based on the subjective, but solely on the objective elements of the taxpayers’ arrangement (the objectified purpose/intention),²⁰ and that the *essential* rather than the *sole* purpose to avoid taxation is enough to pass the subjective part of the abusive test in the domain of V.A.T..

¹⁶ Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, 2000 E.C.R. I-11569 ¶ 52-53.

¹⁷ See Prats et al., *supra* note 13, at 8.

¹⁸ Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment, 1977 O.J. (L 145) 1-40.

¹⁹ Case C-255/02, *Halifax plc et al. v. Commissioners of Customs & Excise*, 2006 E.C.R. I-01609 ¶ 75.

²⁰ Cf. A.G. Maduro’s Opinion of 7 April 2005 in Case C-255/02, *Halifax plc*, 2006 E.C.R. I-01609 ¶ 70. See also P. Tran, *Cadbury Schweppes plc v. Commissioners of Inland Revenue: Eliminating a Harmful Tax Practice or Encouraging Multinationals to Shop around the Bloc*, *The Loyola of Los Angeles International & Comparative Law Review* 2008, Vol. 30, No. 77, p. 86; 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 C.J.E.U. – Part 1”, *European Taxation* 2013, No.6, p. 252 (on the objectified intention in tax avoidance cases).

4. THE SOLE, THE ESSENTIAL, THE PREDOMINANT, THE MAIN, AND ONE OF THE MAIN PURPOSES' STANDARD OF ABUSE UNDER E.U. SECONDARY LAW

Historically, the C.J.E.U. used the threshold of abuse in line with the standard of sole/essential/predominant/main intention to obtain a tax advantage by a taxpayer under E.U. directives to identify the abuse of law. Interestingly, it was done so irrespective of the fact that the wording of the anti-abuse rules under the directives reflected the standard of one of the principal/primary intentions/motives. For instance, in the *Kofoed* case of 5 July 2007,²¹ the C.J.E.U. dealt with the question of abuse which, the Merger Directive (hereinafter M.D.), identified according to the taxpayer's intention. Following the provision, "the principal objective" or "one of its principal objectives" has to be tax evasion or tax avoidance.²² Despite this wording, the C.J.E.U. implied in paragraph thirty-eight of its judgement that the abusive practices in light of the M.D. exists only if transactions are carried out not in the context of normal commercial operations, but "*solely for the purpose of wrongfully obtaining advantages provided for by Community [now: E.U.] law (emphasis added).*"

This passage was repeated by the C.J.E.U. in paragraph 50 of its judgment of 10 November 2011 in the *Foggia* case.²³ Although in paragraph 35 of this judgment, the C.J.E.U. considered the lower threshold of abuse than the sole purpose by saying that "tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not *predominant* in the context of the proposed transaction (emphasis added).", the abuse threshold was still more demanding for the tax authorities than under the M.D., i.e. *predominant* purpose according to the C.J.E.U.'s interpretation vs *one of the principal purposes* according to the wording of the M.D.. One can also infer from this juxtaposition that according to the C.J.E.U. the phrase "one of the

²¹ Case C-321/05, *Kofoed v. Skatteministeriet*, 2007 E.C.R. I-05795.

²² Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States, art. 11 (1)(a), 1990 O.J. (L 225).

²³ Case C-126/10, *Foggia v. Secretário de Estado dos Assuntos Fiscais*, 2011 E.C.R. I-10923.

principal purposes” should be understood as “the predominant purpose”. That is to say, the taxpayer’s tax intention cannot be any less than *predominant* to meet the standard of abuse under E.U. secondary law.

More recently, in *Eqiom* (7 September 2017)²⁴ and in the joint cases *Deister Holding* and *Juhler Holding* (20 December 2017)²⁵ the C.J.E.U. further clarified that the objective of combating abuse under E.U. secondary law has the same scope as under E.U. primary law and therefore must be justified in the same way, i.e. by the need to exclusively target wholly artificial arrangements which do not reflect economic reality, the purpose of which is to unduly obtain a tax advantage.²⁶ Although the C.J.E.U. has not made any explicit reference to the degree of the taxpayer’s intention to obtain a tax advantage, the use of the wholly artificial arrangement’s mantra from the *Cadbury Schweppes*²⁷ implies that the Court had in mind the *sole* purpose rather than the *principal or one of the principal purposes*. This deviation from the wording of the anti-abuse rule under E.U. secondary law was implicitly justified by the C.J.E.U. by saying that the derogation from providing tax advantage under P.S.D. must be interpreted strictly. Otherwise the overarching purpose of this Directive, which is to ensure fiscal neutrality for distribution of profits from subsidiaries to their parent companies, may be frustrated.²⁸

This settled case law of the C.J.E.U. indeed provided a far-reaching protection to taxpayers who optimize their taxation, including the use of

²⁴ Case C-6/16, *Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics*, 2017 E.C.R. I-5795.

²⁵ Joined Cases C-504 & 613/16, *Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern*, 2017 E.C.R. 1009.

²⁶ See Case C-6/16, *Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics*, 2017 E.C.R. 641 ¶ 30; see also Joined Cases C-504 & 613/16, *Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern*, 2017 E.C.R. 1009 ¶ 60.

²⁷ Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue*, 2006 E.C.R. I-7995 (Indeed, the C.J.E.U. in *Eqiom* directly referred to the *Cadbury Schweppes* in ¶ 30 and indirectly did so in the *Deister Holding and Juhler Holding* by referring in ¶ 60 to ¶ 30 of the *Eqiom* in the case law cited there, i.e. also *Cadbury Schweppes*).

²⁸ See Case C-6/16, *Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics*, 2017 E.C.R. 641 ¶ 26 and Joined Cases C-504 & 613/16, *Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern*, 2017 E.C.R. 1009 ¶ 49-50. See also Case C-58/01, *Océ van der Grinten NV v. Commissioners of Inland Revenue*, 2003 E.C.R. I-9827 ¶ 86.

pure holding companies or pure management companies in the E.U. with ultimate shareholders in third countries.²⁹

In the Danish Beneficial Ownership cases of 26 February 2019 regarding the abuse of I.R.D. and P.S.D., the C.J.E.U. seems to interpret the concept of abuse under E.U. secondary law by referring to the *principal objective or one of the principal objectives* to obtain a tax advantage, i.e. by sticking to the wording of anti-abuse rules under I.R.D. and P.S.D., rather than to the *sole* or the *essential* or the *predominant* objective of doing so. However, a closer look at the entire sentence of the C.J.E.U. in which the abovementioned phrase was used, implies that the standard of abuse under E.U. secondary law does not appear to be lowered at all, at most, it seems it was lowered only in respect of the taxpayer's intention to obtain a tax advantage.

A group of companies may be regarded as being an artificial arrangement where it is *not set up for reasons that reflect economic reality*, its structure is *purely one of form* and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law (emphasis added).³⁰

In the author's opinion, if an arrangement is not set up for reasons that reflect economic reality and its structure is purely one of form, it is inconceivable that only one of its principal objectives is to obtain a tax advantage. The sole, or at least the essential/predominant/main objective that outranks all other objectives, seems to be associated to this artificial arrangement. Accordingly, the use of the phrase "one of the primary objectives" by the C.J.E.U. does not seem to change much (if anything at all) in relation to determining the standard of abuse of E.U. secondary law.

²⁹ See also B. Kuźniacki, *The C.J.E.U. as a Protector of Tax Optimization via Holding Companies*, 47 Intertax 2019, No. 3, pp. 312–323.

³⁰ Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1, X Denmark A/S, C Danmark I, Z Denmark ApS v. Skatteministeriet, ECLI:EU:C:2019:134 ¶ 127 and Joined Cases C-116/16 and C-117/16, Skatteministeriet v. T Danmark, Y Denmark Aps, 2019 ECLI:EU:C:2019:134 ¶ 100.

It is also worth mentioning that the C.J.E.U. with the Danish Beneficial Ownership cases has introduced the obligation for the M.S.s' tax authorities to deny a tax advantage in the area of partly harmonised direct taxation by relying on an unwritten, general E.U. principle to prevent abuse, even in the absence of domestic or agreement-based anti-abuse provisions.³¹ Despite a weak doctrinal foundation of this conclusion of the C.J.E.U.,³² being at odds with its settled case law,³³ which may only be explained on account of the specificities of Danish legislation and socio-political after-B.E.P.S. (Base erosion and profit shifting) pressure, this finding of the Court is of little practical relevance at the present and in the future due to the implementation of A.T.A.D.'s G.A.A.R. by M.S.s. Since that rule embodies the general principle of prevention of abuse in the area of taxation, M.S.s will always have in force a written rule to deny

³¹ In relation to the fully harmonised indirect taxation, see Joined Cases C-131/13, C-163/13 and C-164/13, *Staatssecretaris van Financiën v. Schoenimport 'Italmoda' Mariano Previti vof, Turbu.com BV, Turbu.com Mobile Phone's BV and Staatssecretaris van Financiën*, 2014 ECLI:EU:C:2014:2455 ¶ 62, Case C-251/16, *Edward Cussens et al. v. T. G. Brosman*, 2017 ECLI:EU:C:2017:881 ¶ 33. See Case C-115/16, *N Luxembourg et al. v. Skatteministeriet*, 2016 ECLI:EU:C:2016:134 ¶ 117-118 and Case C-115/16, *N Luxembourg et al. v. Skatteministeriet*, 2019 ECLI:EU:C:2019:134 ¶ 89-90.

³² See W. Haslehner & G. Kofler, *Three Observations on the Danish Beneficial Ownership Cases*, KLUWER INTERNATIONAL TAX BLOG (Mar. 13, 2019), <http://kluwertaxblog.com/2019/03/13/three-observations-on-the-danish-beneficial-ownership-cases>. Cf. A. Zalasinski, *The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case*, 52 *European Taxation* 2012, No. 9, Published online: 27 July 2012, sec. 5. See generally D. Weber, *Tax Avoidance and the EC Treaty Freedoms: A Study of the Limitations under European Law for the Prevention of Tax Avoidance* (Kluwer Law International, 2005); R. de la Feria and S. Vogenauer (eds.), *Prohibition of Abuse of Law – A New General Principle of EU Law?*, Hart Publishing, 2011; A. P. Dourado (ed.), *Tax Avoidance Revisited in the E.U. BEPS Context*, European Association of Tax Law Professors International Tax Series Vol. 15, Amsterdam: IBFD, 2017.

³³ See Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, 2007 E.C.R. I-5818 ¶ 42 (where the C.J.E.U. stated that: “[t]he principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals”). See also the opinion of AG Kokott, who clarified that recourse to “any existing general principle of [E.U.] law prohibiting the misuse of law” would be barred, as the anti-abuse rule under E.U. secondary law is a concrete expression of such principle. See also A.G. Kokott's Opinions in Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, 2007 E.C.R. I-5798 ¶ 67 and in Case C-352/08, *Modehuis A. Zwijnenburg BV v. Staatssecretaris van Financiën*, 2009 E.C.R. I-04303 ¶ 62 (“[I]t is clear that no general principle exists in European Union law which might entail an obligation of the member states to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European Union law is not involved”, as noted by C.J.E.U. in Case C-417/10, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. 3M Italia SpA*, 2012 ECLI:EU:C:2012:184 ¶ 32).

a tax advantage. The retrospective effect of that C.J.E.U. judgment, in turn, appears to be very doubtful under the principles of rule of law and legal certainty.

5. FROM THE SOLE TO ONE OF THE PRINCIPAL PURPOSES' STANDARD OF ABUSE UNDER E.U. PRIMARY LAW BETWEEN M.S.S AND BETWEEN M.S.S AND THIRD COUNTRIES

After the analysis of cases in the field of indirect taxes fully harmonised under E.U. secondary law and direct taxes partly harmonized under E.U. secondary law, it is now wise to turn the attention to C.J.E.U. case law in the area of direct taxes, which is not fully or even largely harmonised under E.U. secondary law. Although the A.T.A.D.'s G.A.A.R. sets the general standard of abuse, thus applicable to both harmonised and not harmonised areas of taxation, it appears reasonable to argue that the G.A.A.R.s under Directives (E.U. secondary law) should trump the A.T.A.D.'s G.A.A.R. Consequently, C.J.E.U. case law analysed below seems to be of outmost relevance and importance in completing the scene for a proper understanding of the abuse standard under the A.T.A.D.'s G.A.A.R..

Already in 1986 with *Avoir Fiscal* The C.J.E.U. acknowledged that a taxpayer may rely on E.U. law to choose and enforce the most favourable tax route in their affairs.³⁴ Since then such finding constituted a point of departure in the C.J.E.U.'s reasoning in all tax avoidance cases.³⁵ This is why recital 11 of the preamble to A.T.A.D. says that the taxpayer should have the right to choose the most tax efficient structure for its

³⁴ Case 270/83, *Commission v. France*, 1986 E.C.R. 00273 ¶ 25; see also Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, 1999 E.C.R. I-07447 ¶ 44 et seq.; Case C-364/01, *The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*, 2003 E.C.R. I-15013 ¶ 71.

³⁵ See, e.g., Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, 1999 E.C.R. I-07447 ¶ 44 et seq.; Case C-364/01, *The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*, 2003 E.C.R. I-15013 ¶ 71.

commercial affairs. That is also why simply counteracting a tax avoidance does not amount to abuse of E.U. primary law.³⁶ Such abuse, in turn, constitutes only the qualified tax avoidance, i.e. through the use of wholly artificial arrangements intended solely to escape taxation.

The C.J.E.U. for the first time coined the phrase “wholly artificial arrangement” for the first time in *Imperial Chemical Industries*, a 1998 judgment.³⁷ Since then the expression has been repeated in nearly all cases on tax avoidance,³⁸ including the landmark case *Cadbury Schweppes* of 12 September 2006.³⁹

In paragraph 64 of the judgement in the *Cadbury Schweppes* case, the C.J.E.U. stated that the two-pronged test applies to determine the existence of a wholly artificial arrangement. In that respect, the references were made to paragraphs 52-53 of the judgements in the *Emsland-Stärke* and *Halifax* cases,⁴⁰ even though the terms used in those paragraphs were “abuse” and “an abusive practice”, not “wholly artificial arrangement”. This implies that the phrase “a wholly artificial arrangement” could be understood as “an abusive practice” in the area of not harmonised direct taxes,⁴¹ as well in the area of harmonised direct taxes, by analogy.

Also, from the *Cadbury Schweppes* it follows that in order to amount to abuse the intention to avoid taxes must be the *sole* one.

³⁶ See Joined Cases C-39/13 to C-41/13, *SCA Group Holding BV (C-39/13), X AG, X1 Holding GmbH, X2 Holding GmbH, X3 Holding GmbH, D1 BV, D2 BV, D3 BV v. Inspecteur van de Belastingdienst Amsterdam and Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam v. MSA International Holdings BV, MSA Nederland BV*, 2014 ECLI:EU:C:2014:1758 ¶ 42 and A.G. Kokott’s Opinion in Case C-231/05, *Oy AA*, 2006 ECLI:EU:C:2002:545 ¶ 62.

³⁷ Case C-264/96, *Imperial Chemical Industries plc v. Kenneth Hall Colmer*, 1998 E.C.R. I-04695 ¶ 26.

³⁸ See, e.g., C-436/00 *X and Y v. Riksskatteverket*, 2000 ECR I-10829 ¶ 61.; see also Case C-324/00, *Lankhorst-Hohorst v. Finanzamt Steinfurt*, 2000 E.C.R. I-11779 ¶ 37 and Case C-446/03, *Marks & Spencer plc v. David Halsey*, 2005 E.C.R. I-10837 ¶ 57.

³⁹ Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue*, 2006 E.C.R. I-8031 ¶ 51, 55-57, 61, 63, 68, 69, 72, 75-76.

⁴⁰ C-110/99 and C-255/02 respectively.

⁴¹ A. Saydé, *Abuse of E.U. Law and Regulation of the Internal Market*, Oxford: Hart Publishing, 2014, p. 92.

It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to *prevent* conduct involving the creation of *wholly artificial arrangements* which do not reflect economic reality, *with a view to escaping the tax normally due* on the profits generated by activities carried out on national territory.

. . . [T]he fact that none of the exceptions provided for by the legislation on CFCs applies and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement *intended solely to escape that tax*.⁴²

A contrario, there is no abuse if a taxpayer shifts its *genuine economic activities* to other M.S.s for the sole purpose to avoid taxation.⁴³ That being said, the abuse exists only if: (i) there is no genuine economic activity being conducted by the taxpayer and (ii) their sole purpose is to conduct that non-genuine activity in order to avoid taxation.

The C.J.E.U. recognized the abuse in the field of direct taxation in a more nuanced way than by referring to wholly artificial arrangements in cases regarding the free transfer of profits in the form of tax deductible expenses/losses at the choice of a taxpayer.⁴⁴ Arrangements or transactions which trigger transfers of expenses/losses, typically covered by domestic transfer pricing or thin capitalisation rules, can be considered abusive (artificial), even if they are conducted by entities engaged in genuine economic activities, *to the extent* that they *exceed* the arm's length "compatible" value.⁴⁵ In such cases, however, the taxpayer should have an opportunity to provide a commercial justification for their

⁴² *Cadbury Schweppes*, ¶ 55. *Id.*, ¶ 63.

⁴³ See Prats et al., *supra* note 13, at 12.

⁴⁴ See Case C-231/05, *Oy AA*, 2007 E.C.R. I-6373 252 ¶ 63; see also Case C-311/08, *Société de Gestion Industrielle SA (SGI) v. État belge*, 2010 E.C.R. I-487 ¶ 66.

⁴⁵ See Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, 2007 E.C.R. I-2107 ¶ 92.

non-arm's length arrangements or transactions, without being subject to undue administrative constraints.⁴⁶

The cross border non-arm's length arrangements or transactions, according to the C.J.E.U., may undermine a balanced allocation of the power to impose taxes between the M.S.s by increasing the taxable base in the low-tax M.S. and reducing it in the high-tax M.S. to the extent that the losses/expenses will be transferred on non-arm's length basis.⁴⁷ Thus, in such cases, safeguarding the balanced allocation of taxing powers between M.S.s can be considered a separate autonomous justification.⁴⁸ In other cases, the balanced allocation of taxing powers between M.S.s may constitute a justification in combination with other reasons, e.g. prevention of tax avoidance or ensuring coherence of the tax system. Therefore, one may observe that M.S.s have more scope to apply domestic anti-avoidance provisions within the E.U. for excluding cross-border offsetting of losses with profits than to apply other types of anti-avoidance provisions,⁴⁹ i.e. they can prevent abuse beyond wholly artificial arrangements.⁵⁰

⁴⁶ See Case C-382/16, Hornbach-Baumarkt-AG v. Finanzamt Landau, 2018 ECLI:EU:C:2018:366 ¶ 49 (according to the C.J.E.U., the concept of "commercial justification" must be interpreted in light of the principle of free competition which, by its nature, rules out acceptance of economic reasons resulting from the position of the shareholder).

⁴⁷ See, e.g., Case C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837 ¶ 46, Case C-231/05, Oy AA., 2007 E.C.R. I-06373 ¶ 54-56 and Case C-337/08, X Holding BV v. Staatssecretaris van Financiën, 2010 ECR I-1215 ¶ 32-33. See also D. Smit, *E.U. freedoms, non E.U.-countries and Company Taxation*, EUCOTAX Series on European Taxation, Alphen aan den Rijn: Wolters Kluwer Law & Business 2012, p. 269; 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 E.C.J. – Part 1*, European Taxation 2013, No.6, pp. 320-322; P. Pistone, *Public Discussion Draft BEPS Action 3: Strengthening CFC Rules Comments by Prof. Dr Pasquale Pistone*, COMMENTS RECEIVED ON PUBLIC DISCUSSION DRAFT BEPS ACTION 3: STRENGTHENING CFC RULES, 5 May 2015 – PART 2, pp. 445-446 (Apr. 23, 2015), <http://www.oecd.org/tax/aggressive/public-comments-beps-action-3-strengthening-cfc-rules-part2.pdf>.

⁴⁸ The prevention of double compensation of losses is an autonomous justification for restricting fundamental freedoms since the C.J.E.U. judgments of 12 June 2018 in *Bevola* case, see Case C-650/16, A/S Bevola and Jens W. Trock ApS v. Skatteministeriet, 2018 ECLI:EU:C:2018:424 ¶ 52-52 and see also Case C-28/17, NNA/S v. Skatteministeriet, 2018 ECLI:EU:C:2018:526 ¶ 42-48.

⁴⁹ Cf. Weber, *supra* note 47, at 320-322. Pistone, *supra* note 47, at 445-446.

⁵⁰ It should be bear in mind, however, that double compensation of losses may not be abusive at all. For instance, a compensation of losses by a foreign P.E. in its state of location and in the residence state of its head office does not constitute an abusive practice, if stemming from an ordinary course of business of the P.E. and its head office.

The C.J.E.U. through the case law discussed above suggest that a balanced allocation of the power to impose taxes between M.S.s would be threatened if tax avoidance via wholly artificial arrangements were to be permitted. In other words, there is a direct causal link between the creation and exploitation of wholly artificial arrangements for the sole purpose of tax avoidance and a risk to the balanced allocation of taxing rights.⁵¹ While preventing the former automatically protects the latter, the causal chain does not work in the opposite direction, showing that the C.J.E.U. did not consider the need to protect the balanced allocation of taxing powers between Member States as a separate justification to apply anti-avoidance provisions in a restrictive manner. Instead the Court regarded that issue as immanently linked with the need to prevent the use of wholly artificial arrangements to avoid tax, or, to put it differently, that the need to safeguard the balanced allocation of taxing powers among M.S.s is part of an economic substance analysis.

A subtle economic substance analysis, i.e. assessing a transfer of the profits rather than the entire arrangement, can also be found in the recent *X GmbH* case of 26 February 2019.⁵² In *X GmbH*, the Court stated that the free movement of capital between Member States and third countries is intended not to frame the conditions under which companies can establish themselves within the internal market. Therefore:

[i]n the context of the free movement of capital, the concept of ‘wholly artificial arrangement’ cannot necessarily be limited to merely the indications, referred to in paragraphs 67 and 68 of the judgment of 12 September 2006 in *Cadbury Schweppes* case, that the establishment of a company does not reflect economic reality That concept is also capable of covering, in the context of the free movement of capital, any scheme which has as *its primary objective or one of its primary objectives the artificial*

⁵¹ See Weber, *supra* note 47, at 258.

⁵² Case C-135/17, *X-GmbH v. Finanzamt Stuttgart – Körperschaften*, 2019 ECLI:EU:C:2019:136.

*transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.*⁵³

These findings of the C.J.E.U. imply that for the purpose of examining the proportionality of the domestic legislation, which restricts free movement of capital between M.S.s and third countries, the understanding of the concept of the wholly artificial arrangement may be more nuanced than under the *Cadbury Schweppes*. This concept may cover any scheme which has as its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a M.S. to third countries with a low tax rate. In the author's view, there would be no difference in an intra-E.U. situation. The main driver for differentiating the approach in determining the standard of abuse may, however, be the differences among the scope and the substantive requirements protected under different fundamental freedoms. The freedom of establishment will always trigger the need to scrutinize premises, people on the ground, physical offices, while the freedom to provide services or the free movement of capital may require to focus on more subtle constituencies of the arrangements, such as contracts between the companies, or the transfers of profits between companies (their circularity).

6. SYNTHESIS AND CONCLUSIONS

Since the origin of the concept of abuse under C.J.E.U. case law, it was clear that the taxpayers have the right to choose the most efficient way to route their tax affairs and that their intention to obtain a tax advantage has to be the sole or at least the essential/predominant/main reason to enter under the radar of abuse. Identifying the degree of that intention

⁵³ Case C-135/17, *X-GmbH v. Finanzamt Stuttgart - Körperschaften*, 2019 ECLI:EU:C:2019:136 ¶ 84.

matters for the second prong of the two-pronged test in finding the abuse. The first prong, in turn, requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the E.U. rules, the purpose of those rules has not been achieved.

As a result of both social and political (especially in the course of post-B.E.P.S.) changes in company tax landscapes since *Cadbury Schweppes* and the preceding cases, the C.J.E.U. nowadays is more prone to deviate from its settled case law in setting the threshold for abuse. Nevertheless, despite moving from the sole/essential/predominant/principal intention of a taxpayer to obtain a tax advantage to *one of the main purposes*, the C.J.E.U. keeps saying that an abusive (artificial) arrangement is that which is not set up for reasons that reflect economic reality and its structure is purely one of form. In the context of tax cases, it is hard to imagine that such arrangement is designed by a taxpayer for any other purpose than to solely or essentially/predominantly/mainly obtain a tax advantage.

Furthermore, the C.J.E.U. has never in the area of not harmonised direct tax law cases among M.S.s stated that the standard for abuse may rely on the threshold lower than the sole intention to obtain a tax advantage. In the scope of partly harmonised direct tax law or fully harmonised indirect tax law, this threshold was lowered below to the essential, predominant or main intention, but never lower, except for the recent Danish beneficial ownership cases where the phrase “one of the primary objectives” has been used.⁵⁴ Only in *X GmbH*, the C.J.E.U. used the phrase “one of the primary objectives” in not harmonised direct tax law, but that case concerned the artificial transfer of the profits from a M.S. to a low tax third country. Again, it is implausible to consider such transfers are realised by a taxpayer for one of the primary objectives to obtain a tax advantage. Rather they are deliberately designed and conducted to solely or essentially/predominantly/mainly obtain a tax advantage.

⁵⁴ But, as observed before, it does not change much in that respect.

To sum up: (i) there is nothing in the C.J.E.U. relevant case law implying that one of the main purposes to obtain a tax advantage can constitute a threshold of abuse among M.S.s in not harmonised areas of direct tax law; and (ii) beyond that, i.e. partly harmonised direct tax law or not harmonised direct tax law in situations between M.S.s and third countries, coining the phrase “one of the principal/primary purposes/objectives” is of little relevance insofar as the phrase “artificial” in respect to an arrangement or transaction has been always used. In the reality of corporate tax avoidance, artificial arrangements or transactions are not designed by taxpayers to obtain a tax advantage for other than sole or essential, predominant or main purpose. Furthermore, the C.J.E.U. relevant case law implies that different circumstances should be taken into account to identify the existence of abuse, especially when determining the artificiality of the arrangements or transactions, under different fundamental freedoms, different national legislations, and different types of specific arrangements or transactions.⁵⁵ In particular, the relevant circumstances to be taken into account include the geolocations of arrangements or transactions (within or outside the E.U.) and their type and nature (purely passive financial transactions concluded on paper versus active business transactions triggering changes in the physical world).

The overall analysis of the C.J.E.U. relevant case law implies that the phrases “the main purpose” and “one of the main purposes” should be understood alike as “the main purpose”, but more typically as the essential or the predominant purpose. Any lower standard of abuse under the A.T.A.D.’s G.A.A.R. would make this rule either applicable disproportionately (not only to abusive but also to non-abusive practices)

⁵⁵ Cf. Communication from the Commission, *The Application of Anti-Abuse Measures in the Area of Direct Taxation within the E.U. and in Relation to Third Countries*, at 5, COM (2007) 785 final (Dec. 10, 2007). Cf., e.g., Dennis Weber, *The New Common Minimum Anti-Abuse Rule in the E.U. Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44 *INTERTAX* 117 (2016); Koen Lenaerts, *The Concept of ‘Abuse of Law’ in the Case Law of the European Court of Justice on Direct Taxation*, 22 *MAASTRICHT J. EUR. COMP. L.* 329 (2015); Eric Robert & DrissTof, *The Substance Requirement and the Future of Domestic Anti-Abuse Rules within the Internal Market*, 51 *EUR. TAX’N* 436 (2011).

or largely dysfunctional by the lack of compatibility with the second and the third test: it is highly unlikely that the taxpayer's arrangement is to be artificial enough to defeat the object and purpose of the tax law if only one of its main purposes was to obtain a tax advantage. This guidance, as stemming from the C.J.E.U. relevant case law, once followed, may contribute to a reasonable, proportional and E.U. compatible way of reading and applying the A.T.A.D.'s G.A.A.R. by the M.S.s tax authorities.