Aitor Navarro

The General Anti-Avoidance Rule of the EU Anti-Tax Avoidance Directive (ATAD GAAR): Interpretation and Implementation

Max Planck Institute for Tax Law and
Public Finance Working Paper 2024–08

September 2024

Max Planck Institute for
Tax Law and Public Finance

Department of Business and Tax Law
Department of Public Economics

http://www.tax.mpg.de

Max Planck Institute for Tax Law and Public Finance
Marstallplatz 1
D-80539 Munich
Tel: +49 89 24246 – 0
Fax: +49 89 24246 – 501
E-mail: ssrn@tax.mpg.de
http://www.tax.mpg.de

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Aitor Navarro[1]
Max Planck Institute for Tax Law and Public Finance

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[1] The author is a Senior Research Fellow at the Max Planck Institute for Tax Law and Public Finance (Munich, Germany). He would like to thank Andrés Báez Moreno, Savvas Kostikidis, and Florian Striefler for their invaluable comments, which have helped significantly in improving the final version of this contribution. The feedback provided by the participants of the conference on "Abuse of Law in European Taxation", organized by the PwC Chair in Tax Law of the Catholic University of Louvain, the Max Planck Institute of Tax Law and Public Finance, and the Tax Institute of the University of Liege, in Brussels (Belgium) on November 21st–22nd, 2023, is also much appreciated.

Abstract
This contribution examines the general anti-avoidance rule of the Anti-Tax Avoidance Directive (ATAD GAAR) regarding the definition of its aim, reach and outcome (interpretation) and the way the Member States have implemented it into their national law, as well as issues of EU Law compatibility (implementation).

Keywords
European Union, corporate taxation, anti-tax avoidance directive, ATAD, general anti-avoidance rule, GAAR, tax abuse, tax avoidance

1. Introduction

On July 12th, 2016, the European Union Council adopted the Anti-Tax Avoidance Directive (ATAD or the Directive hereinafter)[2]. The declared aim of the Directive was to create a minimum level of protection across the Union for national corporate tax systems against tax avoidance practices[3]. Differently from the previous Directives on corporate taxation, adopted to further the internal market[4], the ATAD put forward the protection of the Member States' national revenue collection[5], which becomes an EU regulatory goal in its own right[6]. Among other measures, it includes a general anti-avoidance rule (GAAR) tackling arrangements that achieve tax savings by defeating the purpose of applicable tax law and are not put into place for valid commercial reasons which reflect economic reality. The Directive entails minimum harmonisation, hence not precluding the application of domestic or agreement-based GAARs aimed at safeguarding a higher level of protection for domestic corporate tax bases[7]. EU Member States had the obligation to transpose such rule into their domestic law by January 1st, 2019.

GAARs are a relevant component of any tax system because of their link with fundamental principles and because they offer a basic definition of what should be considered tax abuse. The topic is one of the most explored in tax law literature and has been explored from any possible angle[8]. Hence, when inquiring about this subject, a careful delineation of the scope

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[2] Council Directive 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. The ATAD was adopted less than 6 months after the proposal was made by the Commission: Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016)026 final (the ATAD Directive Proposal hereinafter). This proposal was issued in the context of the so-called Anti-Tax Avoidance Package, posed in the Communication from the Commission to the European Parliament and the Council on anti-tax avoidance package: Next steps towards delivering effective taxation and greater tax transparency in the EU, COM(2016)023 final. As Cédelle (2016), p. 492 highlights, "the differences between the original and final text, as well as a number of documents prepared by the Presidency of the Council and other political actors involved, shed light on the main points of disagreement and the political compromises that have been made". See also Cordewener (2017), p. 65.

[3] ATAD preamble, recital 3.

[4] One finds rules directed at removing barriers to cross-border trade in order to further the single market in the 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 (PSD), the 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 (IRD), the 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 (MD) and the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (DRMD).

[5] Both anti-tax avoidance Directives, namely ATAD and the Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD II), as well as the Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, follow this rationale. For a critical stance, see Vanistendael (2016), p. 145; Haslehner (2020), p. 40; Geringer (2023), p. 147.

[6] See Hey (2017), p. 249.

[7] See Article 3 ATAD. A similar approach was discussed in the context of the introduction of the PSD GAAR in 2015, yet not reflected in the wording of that Directive. See an assessment in Weber (2016), p. 102-103.

[8] Note that the references quoted in this contribution are by no means exhaustive of the existing scholarship on GAARs.

premises adopted is necessary. Specifically, this contribution focuses on the examination of the components of the ATAD GAAR in regard to the definition of its reach and legal consequence (interpretation) and the way the Member States have implemented it into their national law, as well as issues of review against EU Law (implementation). Therefore, it leaves out a thorough examination of matters such as its origin, policy considerations on the convenience of its adoption, or the comparison of the abuse standard it adopts vis-à-vis other anti-abuse standards present in ATAD or in domestic, EU or non-EU sources[9]. These aspects will be addressed only insofar as they affect the interpretation or implementation of the ATAD GAAR as an instrument that is assumed to be valid and enforceable.

It is relevant to acknowledge from the outset that the interpretation of the ATAD GAAR as such –namely, the scope of the rule as defined in article 6 of the Directive– is very much entrenched with its implementation in the domestic systems of the EU Member States. The ATAD GAAR, like any other existing GAAR, is an open-ended rule with a scope that is difficult to determine. Its reach will have to be concretized by Member States' courts of law and, ultimately, by the ECJ. Therefore, the interpretation these courts adopt will affect the compliance of Member States with secondary law in the implementation and enforcement the rule.

The structure of the chapter is as follows. Section 2 refers to the interpretation of the ATAD GAAR. After analysing its aim (2.1), the components of the rule will be examined in detail (2.2), as well as its context, especially on what regards its interaction with other anti-abuse rules (2.3). Section 3 delves into the implementation of the ATAD GAAR into the national law of the Member States (3.1) and its review against EU primary and secondary law (3.2 and 3.3). Section 4 concludes.

2. Interpretation: aim, wording, and context of the ATAD GAAR

2.1. Aim: fighting abuse beyond interpretation

To properly understand the aim of the ATAD GAAR, one must first refer to fundamental aspects of general anti-avoidance rules, a category that is relevant at a comparative domestic and tax treaty level. GAARs fulfil multiple aims, which will be addressed in this section. First and foremost, they provide a basic definition of what constitutes tax abuse. This is relevant because there is no natural concept of abuse in the field of taxation, and definitions provided in each legal system may differ[10]. In fact, GAARs do not even provide an ultimate definition of what abuse is, as special anti-avoidance rules (SAAR) may regard abusive arrangements not captured by it[11].

[9] Notwithstanding, virtually all of the quoted scholarly literature also contains considerations referred to the said matters.

[10] See Schön (2022), sec. 12.2.1.

[11] See an in-depth analysis of the relationship between the ATAD GAAR and SAARs *infra* in section 2.3.

From the perspective of material tax principles, GAARs are considered a tool to pursue equal treatment of identical economic events, an ideal often encapsulated in notions such as ability to pay[12], neutrality, or efficiency[13]. They would allow tax authorities to go beyond the reach of applicable tax rules in cases in which their outcome does not match the aim of the avoided or captured rules, given that the criteria established in the relevant GAAR are fulfilled. In other words, GAARs are an authorization to surpass the wording of applicable tax rules to capture an economic event that remained unaffected by such rules –analogy– or by disapplying favourable rules the application of which the taxpayer forced –teleological reduction– due to the existence of abuse. Therefore, the legislator recognizes that abuse instances cannot be solved exclusively through interpretation because, otherwise, the adoption of a GAAR would be redundant[14]. In a way, the GAAR is an authorization for integration –through analogy or teleological reduction–, which is generally forbidden in tax matters due to the legality principle, as it is the legislator who should define the taxable events and the way they should be taxed[15]. It entails an expansion or a contraction of rules in order to prevent undue tax advantages from arising. As expressed by Schön, GAARs remove the protections afforded to the taxpayer by the rule of law[16], yet only under the specific conditions defined by such rules[17]. Hence, there is a need for a rigorous assessment of the reach and legal consequences of the ATAD GAAR[18].

At a functional level, GAARs may act as a deterrent for tax abuse through uncertainty[19]. When measuring the viability of a structure according to the expected returns it may generate, risk is an important component in this calculation. The more uncertainty on whether a GAAR would apply to an arrangement, the more distortive it will be to the said calculation. Plus, GAARs may be designed with a disproportionately wide concept of abuse so that tax authorities have a high chance to prevail in litigation due to, e.g. an imbalanced burden of the proof[20].

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[12] See, e.g., in the context of GAARs, Piantavigna (2018), p. 20. Báez Moreno and Zornoza Pérez (2019), p. 129. On the concept of ability to pay and its relevance in EU Law, see Englisch (2014). Bizioli and Reimer (2020). Kokott (2022), p. 131-143.

[13] See Piantavigna (2017), p. 48-55. See also Zimmer (2019), p. 220. Schön (2022), sec. 12.2.3.3.

[14] This logic goes against scholarship that considers GAARs as superfluous, given the possibility to combat abuse simply by referring to the purpose of the avoided or captured rule. See, e.g. in the context of the PPT, Lang (2020), p. 266. For a critique, see Schön (2022), sec. 12.2.2. with further references.

[15] This principle has even been acknowledged by the ECJ as a general principle common to the laws of the Member States. See Joined Cases C-885/19 P & C-898/19 P, *Fiat*, EU:C:2022:859, para. 97. The literature on the legality principle as a constitutional law device is abundant; specifically referring to its EU Law relevance, see Monsenego (2021), sec. 2.2.1.; Kokott (2022), p. 22-23. Dourado (2023).

[16] See Freedman (2005), p. 354. Zimmer (2019), p. 222. Schön (2022), sec. 12.2.3.2.

[17] See a discussion –although in the context of the PPT– in de Broe and Luts (2015), p. 144. Danon et al. (2021). Elliffe (2019), p. 54.

[18] Such analysis is conducted *infra* in section 2.2.

[19] See Prebble and Prebble (2010), p. 38-40. Cfr. Avi-Yonah and Halabi (2012), p. 242, who claim that evidence from certain countries suggest that with appropriate safeguards, a GAAR is not a significant disincentive in respect of legitimate transactions. See also Freedman (2019), p. 468. On uncertainty in the context of the ATAD GAAR, section 2.2 *infra* will show that its construction is certainly deficient and leads to severe uncertainty.

[20] The Principal Purpose Test (PPT) rule enshrined in Article 29.9 of the 2017 OECD Model Tax Convention and Article 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS is a clear example of an anti-abuse rule in which the burden of the argumentation to prove that abuse exists

Therefore, in certain scenarios, given the level of existing uncertainty, often accompanied by the applicability of disclosure requirements[21], as well as potential penalties[22], a tax-driven arrangement may turn unviable. However, interestingly, the opposite might be true because tax authorities of "taxpayer-friendly" countries might decide not to apply a GAAR or to do so only in blatant cases[23], as GAARs are not self-enforcing rules, i.e., their enforcement depends entirely on the tax authorities[24].

At an institutional level, the adoption of a GAAR signals that the legislator ultimately delegates in Courts of law the definition of what ultimately constitutes abuse in a given tax system, as their configuration, by definition, entails the use of open-ended concepts[25]. Certainly, Courts should abide by the terms under which a GAAR was framed, but there will always be leeway to modulate its reach. The ATAD GAAR is no exception, and one may, in fact, hypothesize that until case law is built around it, its reach is still unknown[26].

These features are relevant for any GAAR and, therefore, impact the understanding of the ATAD GAAR. Yet one should also examine the aims expressed by the EU legislator as the precursor of the rule, expressed in the preamble of the Directive[27], even when the statements posed therein are not as meaningful as one would expect to determine the aim of the rule. The preamble indicates that GAARs "tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions" and, therefore, have "a function aimed at filling in gaps"[28]. This statement might have some value in defining the relationship between SAARs (special anti-avoidance rules) and GAARs, but it does not add much value considering that it does not address rule preference or the specific effect of complying with a SAAR in terms of assessing the components of the GAAR[29].

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disproportionately benefits the tax authorities. See de Broe and Luts (2015), 132; Báez Moreno (2017), p. 435; Kuźniacki (2020), p. 129.

[21] In the EU, see the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, also knowns as DAC6. For an in-depth analysis, see Castro Bosque (2024). This Directive positivized recommendations by the OECD on BEPS Action 12. See OECD, *Mandatory Disclosure Rules. BEPS Action 12: 2015 Final Report*, 2015. For a comparison of the reach of DAC6 and the ATAD GAAR, see Purpura (2023).

[22] ATAD preamble, recital 11: "Member States should not be prevented from applying penalties where the GAAR is applicable".

[23] In the context of the PPT, Kuźniacki (2018), p. 289, refers to Singapore as an example of a jurisdiction that likely will apply this GAAR leniently considering its "tax friendly environment".

[24] Compare this with SAARs such as the limitation on benefits clauses in tax treaties, or controlled foreign companies regulations, which are rules that must be applied by the taxpayer in the first place when filing their corporate tax return.

[25] See Hey (2017), p. 258. See also Osterloh-Konrad (2020), p. 687-691.

[26] This aspect will be crucial when defining the reach of the ATAD GAAR. See *infra* section 2.2.4.

[27] See ATAD preamble, recital 11.

[28] Such statement probably derives from the 2012 European Commission's recommendation on aggressive tax planning, which advised Member States to adopt a GAAR to counteract avoidance that falls outside the scope of SAARs, "adapted to domestic and cross-border situations confined to the Union and situations involving third countries". See Commission Recommendation of 6 December 2012 on Aggressive Tax Planning (2012/772/EU), para. 4.1. See also De la Feria (2020), p. 177.

[29] In section 2.3, these issues will be dealt with in depth.

Further, the preamble states that "Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax-efficient structure for its commercial affairs"[30]. Mentioning the lack of genuineness as a pointer of abuse is not useful either, because this is a requisite embedded in the rule itself and in any case, genuineness is an open concept that must be concretized[31]. Therefore, its inclusion in the preamble is not helpful. Plus, to state that "otherwise" the taxpayer can choose the most tax-efficient structure for its commercial affairs is somehow tautological, as it is equivalent to saying that whenever there is no abuse, the taxpayer can arrange its affairs as they see fit. Yet, such a statement does not add value to delineate the purpose of the ATAD GAAR.

Plus, when the preamble notes that "it is important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner", the reference is to the scope of the rule once again–and not to the purpose of the rule–, to reiterate that the EU legislator wants to prevent discriminatory treatment from arising.

Lastly, the preamble notes that "all valid economic reasons, including financial activities" shall be considered, which may seem meaningful in terms of the non-restriction of the burden of the proof[32]. Yet, one must not forget that the Directive sets a standard of minimum harmonisation, as it shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases[33]. Therefore, the possibility of evaluating "all valid economic reasons" should be relativised because it may well be that a domestic GAAR is configured in a way in which the proof for the existence of genuine transactions is limited.

All things considered, one could rephrase the aim of the ATAD GAAR –in combination with the minimum harmonization requirement of Article 3 ATAD– as actually establishing a minimum definition of what constitutes abuse in corporate taxation within EU Member States[34], yet without offering an ultimate definition of what constitutes tax abuse in this field.

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[30] Ibid. The same rationale has been recognised by the ECJ in VAT-related abuse cases, where it was established that arranging economic affairs to mitigate the tax burden in a non-abusive manner is legitimate. Joined cases C-487/01 y C-7/02, *Gemeente Leusden and Holin Groep*, EU:C:2004:263, para. 79. Case C-255/02, *Halifax*, EU:C:2006:121, para. 73. Case C-425/06, *Part Service*, EU:C:2008:108, para. 47. Case C-103/09, *Weald Leasing*, EU:C:2010:633, para. 27. Case C-277/09 *RBS Deutschland Holdings*, EU:C:2010:810, para. 54. Case C-388/11, *Le Crédit Lyonnais*, EU:C:2013:541, para. 48. Case C-589/12, *GMAC UK*, EU:C:2014:2131, para. 48. Case C-419/14, *WebMindLicenses*, EU:C:2015:832, para. 42. Case C–661/18, *CTT — Correios de Portugal*, EU:C:2020:335, para. 40. Case C-276/18, *KrakVet*, EU:C:2020:485, para. 90. Order C-289/22, *A.T.S. 2003*, EU:C:2023:26, para. 40. Case C-114/22, *W*, EU:C:2023:430, para. 45.

[31] See the examination of the genuieness component undertaken in section 2.2.4.

[32] The specificities of the ATAD GAAR's components are dealt with *infra* in section 2.2.

[33] Article 3 ATAD: "This Directive shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases".

[34] Cfr. the very confusing statement posed in European Commission, *Room Document #4 Working Party on Tax Questions – Direct Taxation Anti-Tax Avoidance* (2016), p.3: "Rule not drafted as a minimum standard: the definition of a 'non-genuine arrangement' in paragraph 2 does not set a minimum. It is an absolute rule and should be complied with as such where EU law prescribes that the impact of the GAAR be limited to 'nongenuine' arrangements. Where there are no EU law constraints, Member States could enlarge the scope of the GAAR beyond what is 'non-genuine'. Yet, even then, the definition of 'non-genuine' remains unchanged"

In any case, the mentioned aspects will have an impact both in the analysis of the interpretation of the ATAD GAAR components and its implementation, as it will be shown in the coming sections.

2.2. Wording: the components of the ATAD GAAR as such

The ATAD GAAR is formulated as follows:

> 1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
> 2. 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.

Two aspects must be highlighted from the outset. First, the wording of the ATAD GAAR is manifestly deficient, mainly due to overlapping concepts and the use of redundant, empty criteria. A plausible explanation refers to the need to adopt a content that makes the rule suitable for 27 Member States with their own legal (tax) traditions[35], as recognized in the very preamble of the Directive[36], and due to the need to achieve unanimity in the adoption of the Directive[37]. In the present section, an exercise of simplification will be undertaken to better understand the relevant content of this rule.

Second, the exercise of interpreting article 6 ATAD will have an impact on the definition of the minimum level of protection required by the Directive as regards the adoption of domestic GAARs, meaning that the Member States cannot adopt less protective GAARs –this is, GAARs with a narrower scope– than that of article 6 ATAD, although they can go beyond such level of protection. This caveat is mentioned to highlight that the components of the ATAD GAAR examined in this section do not necessarily match the content of the domestic GAARs adopted

[35] See Báez Moreno (2016), p. 147. See also Perdelwitz (2018), sec. 15.2.
[36] See ATAD preamble, recital 3: "As these rules would have to fit in 28 separate corporate tax systems, they should be limited to general provisions and leave the implementation to Member States as they are better placed to shape the specific elements of those rules in a way that fits best their corporate tax systems. This objective could be achieved by creating a minimum level of protection for national corporate tax systems against tax avoidance practices across the Union".
[37] In fact, the text is identical to that of the anti-abuse rule incorporated in the Parent-Subsidiary Directive in 2015 through Article 1 of the Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. See Rigaut (2016), p. 499, 502. For a critical assessment of such rule, see Debelva and Luts (2015); Weber (2016). Other discarded drafting possibilities are those of the GAAR included in Article 58 of the Proposal for a Council Directive on a Common Corporate Tax Base (COM(2016) 685 final) or that of the 2012 Commission Recommendation on Aggressive Tax Planning, *supra* note 28, para. 4.2.

by the Member States, as there is no uniformity requirement imposed by the Directive, but instead one of minimum harmonisation. Issues related to domestic law implementation will be explored afterwards in section 3.

Subsections 2.2.1. to 2.2.4. examine the components of the GAAR's scope separately, corresponding to paragraphs 1 and 2 of article 6 ATAD. Subsection 2.2.5. refers to the legal consequence of the GAAR, posed in paragraph 3. Note that the title of the subsections follows the rule's wording

2.2.1. To calculate "the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements"

The mention of the calculation of the corporate tax liability is in line with the overall scope of the ATAD[38], which applies "to all taxpayers that are subject to corporate tax in one or more Member States"[39]. Nonetheless, the Directive does not provide a definition of the concepts of "taxpayers" or "corporate tax"[40], nor does it refer the definition of these expressions to domestic law, which leads to wondering whether one should infer an autonomous definition of the concept[41], and the leeway Member States have when adopting taxes affecting corporations as regards the reach of the ATAD measures[42]. What seems clear is that income taxes affecting resident corporations, as well as non-resident corporations obtaining income sourced in EU Member States –either through a permanent establishment or without one–, would be covered by the ATAD[43]. Nonetheless, it was reported that some Member States requested to make an explicit reference to withholding taxes, as these would be considered part of the corporate tax in certain countries but not in others. Yet in the final version of the Directive, such mention was not included[44].

As regards the reference to "an arrangement or a series of arrangements", this formulation should be understood in a broad sense as comprising all possible actions taken by a corporate

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[38] On the reference to "corporate tax liability", see Room document # 2 Working Party on Tax Questions ATAD, 25.4.16.

[39] Article 1 ATAD. The scope includes permanent establishments in one or more Member States of entities resident for tax purposes in a third country. See an analysis in Smit (2023), sec. 19.2.4.

[40] The only meaningful reference is in the ATAD preamble, recital 4: "[…] it is not desirable to extend the scope of this Directive to types of entities which are not subject to corporate tax in a Member State; that is, in particular, transparent entities. Those rules should also apply to permanent establishments of those corporate taxpayers which may be situated in other Member State(s)". On the topic, see Velthoven (2024), p. 118-119.

[41] On the interpretation of EU Law concepts as autonomous concepts vis-à-vis the national law of the Member States, see e.g., Case 327/82, *Ekro*, EU:C:1984:11, para. 11. Case C-287/98, *Linster*, EU:C:2000:468, para. 43. Case Case C-316/05 *Nokia*, EU:C:2006:789, para. 21. Case C-195/06, *Österreichischer Rundfunk (ORF)*, EU:C:2007:613, para. 24. Case C-515/20, *Finanzamt A*, EU:C:2022:73, para. 26. Case C-269/20, *Finanzamt T*, EU:C:2022:944, para. 36. Joined Cases C-207/22, C-267/22 and C-290/22, *Lineas – Concessões de Transportes*, EU:C:2023:810, para. 53. Case C-311/22, *Moesgaard Meat 2012*, EU:C:2024:145, para. 34.

[42] For an in-depth assessment, see Caziero and Lazarov (2021). See also Hey (2017), p. 261 and García Prats et al. (2018), p. 16.

[43] Haslehner (2020), p. 34. Cfr. Docclo (2017), p. 369. Kuźniacki (2020), p. 130. Smit (2023), sec. 19.2.4.

[44] See Rigaut (2016), p. 503. Cfr. Maisto (2021), sec. 25.2.1. Smit (2023), sec. 19.5.3.2.

taxpayer in the form of contractual agreements and the use of entities to pursue tax advantages impacting corporate taxes[45].

2.2.2. Arrangements conducted "for the main purpose or one of the main purposes of obtaining a tax advantage"

To become applicable, the ATAD GAAR requires that the taxpayer conduct arrangements for one of the main purposes of obtaining a tax advantage. The requirement of "obtaining a tax advantage" was defined by literature and the European Commission itself as any reduction in tax liability that stems from a taxpayer's arrangement relative to a genuine arrangement[46]. The present author assumes this definition as valid and logical, considering the construction of the rule as a whole, and therefore this aspect does not merit further remarks.

On the other hand, the use of "one of the main purposes" as a threshold is fairly overarching, clearly wider than the formulation proposed in the original EC Directive proposal, which referred to "the essential purpose" [47]. The criterion is also more far-reaching than some of the standards employed by the ECJ in its case law, referring to the "sole", "essential", "principal", and "main" aim in VAT cases[48] and in cases on direct taxation matters[49]. Although in some recent decisions, the Court has adopted the ATAD GAAR's "one of the main purposes" expression[50], it continued to employ more stringent references in others[51], signalling that the Court does not attribute much weight to the specific formulation of such requirement[52].

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[45] See Navarro et al. (2016), p. 124; de Wilde (2018), sec. 14.2.2.1; García Prats et al. (2018), p. 18. Cfr. Kuźniacki (2020), p. 137, who considers that the migration of a holding structure should not count as an "arrangement".

[46] See García Prats et al. (2018), p. 19. Perdelwitz (2018), p. 336. Kuźniacki (2020), p. 138. Danon et al. (2021), p. 496-497. The 2012 Commission Recommendation on Aggressive Tax Planning, *supra* note 28, para. 4.7, recommends considering whether one or more of the following situations occur: (a) an amount is not included in the tax base; (b) the taxpayer benefits from a deduction; (c) a loss for tax purposes is incurred; (d) no withholding tax is due; (e) foreign tax is offset. In the context of the PSD, see Weber (2016), p. 111.

[47] Article 7.1 of the ATAD Directive Proposal. Note that the formula "one of the main purposes" was adopted in the principal purpose test rule present in Article 29.9 of the OECD Model Tax Convention in its 2017 version, which constitutes a GAAR for tax treaties. See Rigaut (2016), p. 502.

[48] Case C-255/02, *Halifax*, para. 59, 60, 69, 75, 86. Case C-425/06, *Part Service*, para. 58, 62. Case C-162/07, *Ampliscientifica and Amplifin*, EU:C:2008:301, para. 27-28. Case C-277/09 *RBS Deutschland Holdings*, para. 49, 51. Case C-504/10, *Tanoarch*, EU:C:2011:707, para. 51-52. Case C-326/11 *J.J. Komen en Zonen Beheer Heerhugowaard*, EU:C:2012:461, para. 35. Case C-33/11, *A Oy*, EU:C:2012:482, para. 63-64. Case C-653/11, *Paul Newey*, EU:C:2013:409, para. 46, 52. Case C-419/14, *WebMindLicenses*, EU:C:2015:832, para. 35-36.

[49] See Case C-524/04, *Thin Cap Group Litigation*, EU:C:2007:161, paragraphs 77. Case C-182/08 *Glaxo Wellcome*, EU:C:2009:559, para. 89. Joined Cases C-436/08 and C-437/08, *Haribo*, EU:C:2011:61, para. 165Case C-282/12, *Itelcar*, EU:C:2013:629, para. 34-35. Case C-112/14, Commission v. UK, EU:C:2014:2369, para. 25.

[50] See Joined Cases C-115/16, C-118/16, C-119/16, C-299/16 *N Luxembourg 1*, EU:C:2019:134, para. 127. Joined Cases C-116/16 and C-117/16 *T Danmark*, EU:C:2019:135, para 100. Case C-135/17, *X GmbH*, EU:C:2019:136, para. 84. See critical remarks in Debelva and Luts (2015), p. 225; Traut and Weiss de Resende (2024), p. 229.

[51] See, in VAT cases, references to the "sole aim" in Case C-276/18, *KrakVet*, para. 84-85. Case C-4/20, *ALTI*, EU:C:2021:397, para. 35. Case C-114/22, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT – Fictitious acquisition)*, EU:C:2023:430, para. 46. Case C-341/22, *Feudi di San Gregorio Aziende Agricole*, EU:C:2024:210, para. 35-36. In Lexel, an income tax case, the ECJ refers to the "principal reason", see Case C-484/19, *Lexel*, para. 78.

[52] Overall, the ECJ shows a lack of rigour that renders a closer examination of the specific meaning of each term a futile exercise. Probably the epitome lies in the use of the "essential" and "sole" requirements in the same sentence,

This component of the rule is often referred to as the subjective test, as it purports to focus on the aim of the conducted arrangement, in contrast with the objective test, which would focus on the aim of the applicable rules[53]. In this contribution, such distinction will not be drawn under the subjective-objective axis, as the present test suffers from redundancy and can be obviated. Redundancy stems from a double perspective. First, in the wording chosen, because "main purpose" is already comprised in the expression "one of the main purposes". Second, the threshold chosen is so overarching that if all other requirements posed in the ATAD GAAR are met, this one will automatically be met as well, and abuse will exist. To put it in other words, whenever a transaction is not genuine, i.e., is not put into place for valid commercial reasons which reflect economic reality, this necessarily means that the transaction was put into place for tax reasons, or at least that tax reasons played a relevant part in the structure, i.e., one of the main purposes was to obtain a tax advantage[54]. Due to the impossibility of decoupling both requirements and the fact that the "non-genuine" one is more stringent, the result is redundancy of the "one of the main purposes" criterion. If a transaction is genuine, abuse won't exist, at least not in the definition of abuse encapsulated in the ATAD GAAR[55].

As a result, the inclusion of the "one of the main purposes" requirement in the text of the ATAD GAAR was utterly unnecessary, as it does not add meaningful content to the analysis.

As a counter-argument, it could be sustained that in line with the *ejusdem generis* interpretation parameter, one should avoid outcomes in which a rule is deprived of any content[56]. Yet, the author submits that a plausible approach would be to regard the inclusion of the "one of the main purposes" test as a result of a political compromise to incorporate language already present in the international tax regime, namely on the principal purpose test, which the EU legislator undoubtedly used as inspiration[57]. Certainly, what cannot be admitted is the reframing of the content of "one of the main purposes" in a way in which the "essential purpose" would be read. This solution was proposed in the context of the anti-abuse rules present in the PSD and the MD[58], but is outright problematic due to an explicit rejection of

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as in case C-589/12, *GMAC UK*, para. 45: "the essential aim of the transactions concerned is solely to obtain that tax advantage". The same formulation may be found in Case C-114/22, *W*, EU:C:2023:430, para. 44 and Case C-227/21, *HA.EN*., EU:C:2022:687, para. 35. See also Order C-289/22, *A.T.S. 2003*, para. 42 "set up with the sole aim or, at the very least, with the essential aim, of obtaining a tax advantage". See Geringer (2023), p. 162-163.

[53] This two-prong construction of anti-abuse standards is rooted in Case C-110/99 *Emsland-Stärke*, EU:C:2000:695, para. 39-42. See an assessment, with further references, in Martín Jiménez (2021), p. 677-681.

[54] Plus, as de Wilde affirms, any intra-firm legal structuring involves a tax aspect: "in a competitive environment, the tax cost is something to be optimized, just like any other business costs". See de Wilde (2018), sec. 14.2.2.2.

[55] See section 3.1. for an analysis of diverging formulations adopted by Member States that elevate the protection, as authorized by article 3 ATAD.

[56] Báez Moreno and Zornoza Pérez (2019), p. 131 put it more bluntly: "it does not make sense to configure a test – a subjective one – according to which every arrangement will be abusive only to later moderate this conclusion through the application of other, less radical, tests. For, in order to reach this result, it would have been better to eliminate the first test in its entirety". Yet in another passage, they posit the absorption of the "one of the main purposes" criterion by the "valid commercial reasons" one: "Ultimately, the valid commercial reasons test removes the practical importance of the subjective test".

[57] See Vanistendael (2020), p. 30-31. See also Martín Jiménez (2021), p. 704-705.

[58] See, respectively, Debelva and Luts (2015), p. 225. De Broe and Beckers (2017), p. 142.

such a formulation by the EU legislator, as the first ATAD draft referred indeed to as "the essential purpose", an expression that was expressly abandoned by the legislator[59]. As a result, the only meaningful way to provide content to the "one of the main purposes" criterion consists in coupling it with the "genuineness" one to sustain that they require balancing tax and commercial reasons to determine whether an arrangement is genuine[60].

2.2.3. "A tax advantage that defeats the object or purpose of the applicable tax law"

The defeat of the purpose of the applicable tax law is one of the most relevant components of the ATAD GAAR. As stated above, the existence of a GAAR implies that there are instances in which the purpose of the applicable tax law has been defeated, and such a scenario cannot be corrected through interpretation means[61]. A declared mismatch between the wording of the rule and its purpose is often the starting point of the analysis demanded by GAARs, and one of the main contention points between the tax authorities claiming the existence of abuse and the taxpayer willing to show that abuse does not exist in a given case[62]. Yet interestingly, and in apparent contradiction to its relevance, the purpose component is often obviated in the outcome of the analysis, as it will be shown in this section.

A critical aspect of the analysis consists of determining what "applicable tax law" should mean. Scholarly literature has emphasized that it is not entirely clear which object and purpose should be assessed: that of the ATAD itself, that of the applicable tax considered as a whole or that of the specific applicable regulations to the case under scrutiny. The first option should be discarded from the outset[63]. The declared aim of the ATAD is to "discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion"[64], yet achieving fairness and discouraging avoidance must be done under the terms laid down in the Directive itself, which leads to self-referential, circular reasoning. An equally erroneous approach would be to turn to the aim of the ATAD GAAR itself, as this would again mean incurring in circularity: to know whether the object or purpose of the ATAD GAAR was breached, one would have to ascertain that abuse exists, as the aim of the said rule is to fight against abuse. Yet, the abuse the ATAD GAAR aims to fight is the one that derives from its wording, which leads one to the starting point again[65].

A second option would consist of regarding the object and purpose of the national "applicable tax law" as a whole. Corporate taxes are a case in point because the scope of the Directive applies

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[59] In the context of the PPT, Kuźniacki (2020), p. 144; Danon et al. (2021), p. 494; Maisto (2021), sec. 25.2.2., also consider that "one of the main purposes" must be read as "the essential purpose".

[60] Such construction will be addressed *infra* at section 2.2.4. See also Maisto (2021), sec. 25.3. Danon et al. (2021), p. 494.

[61] See *supra* section 2.1.

[62] See an in-depth analysis in Osterloh-Konrad (2020), p. 577-602, 641-644.

[63] Cfr. the exhaustive analysis raised by de Wilde (2018), sec. 14.2.2.3.

[64] ATAD preamble, recital 2. On the concept of fairness in ATAD, see Koerver Schmidt (2020).

[65] The same critique, directed towards the so-called OECD guiding principle for the applicability of domestic GAARs in tax treaty scenarios, may be found in Zornoza Pérez and Báez Moreno (2010).

specifically to them[66], even if countries may expand the ATAD GAAR's reach to other taxes as well due to the minimum harmonisation configuration of the Directive[67]. Taking the purpose of the applicable tax as a whole is plausible if one considers the intent of the ATAD drafters. The original Commission proposal of the Directive did not refer to the object or purpose of "applicable tax law" but that of the "otherwise applicable tax provisions". The removal of the term "provisions" and its substitution for the term "law" in the final version of the Directive would point towards a broader reach than the merely applicable provisions under scrutiny.

Notwithstanding, the assessment of the applicable tax purpose as a whole –and specifically that of corporate taxes– is fairly challenging. Comprehensive corporate income taxes have as a primary goal the collection of revenue to finance public expenditure. Yet, the revenue collection goal, taken alone, does not help to ascertain whether abuse exists, for it would lead to the absurd outcome that the only way to structure business affairs is the one resulting in the highest tax burden, as the rest of the options would constitute abuse due to an outcome where fewer taxes are collected[68]. Such an approach clearly goes against the right to choose the most tax-efficient structure for its commercial affairs recognized in the preamble of the Directive and the case law of the ECJ[69].

However, it could be counterargued that corporate taxes do not merely aim at collecting revenue, but at achieving collection in a specific manner, i.e., in a way in which other goals are at the same time achieved. These secondary aims are, e.g., the elimination of double taxation, the granting of incentives to certain activities such as R&D, or of disincentives such as environmental measures targeting pollution, which are often embedded in the calculation of corporate taxes and, therefore, influence the revenue collection outcome. Prima facie, these aims are adequate to conduct meaningful teleological interpretation. Yet, if one combines the purpose of raising revenue with the parallel achievement of certain tax policy objectives, the examination of those provisions with a specific purpose necessarily leads to the examination of such concrete purpose in a sort of *renvoi* to the concrete, applicable rules, which points towards the inadequacy of referring to the purpose of the corporate tax as a whole.

An equally problematic approach in which the purpose of the tax as a whole would be adopted as reference consists in sustaining that the aim of corporate taxes is to raise revenue in a specific manner defined by the strict terms of the regulations that configure the tax. The problem with such a view is that it could lead to affirming that the aim of the corporate tax would always be respected as long as one attains to the wording of the said specific regulations, in which case abuse would never exist because the wording and the purpose of the corporate tax as a whole

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[66] Article 1 ATAD: "This Directive applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country".

[67] Several countries have decided to maintain their previously existing GAARs, some of which apply comprehensively to any tax. See *infra* sec. 3.1.

[68] See Schön (2010), p. 48; Báez Moreno and Zornoza Pérez (2019), p. 129.

[69] See *supra* section 2.1.

would always match. Therefore, it can only be concluded that the overall purpose of corporate taxes is not the proper reference for conducting a purposive analysis[70].

The third option –and the correct one in the opinion of the author– consists in analysing the purpose of the specific applicable tax rules, namely either the avoided rule, the captured rule, or their combination, which resulted in a tax advantage. In this endeavour, the aim of the rules must first be determined, and then establish whether such aim is relevant for the analysis of the existence of abuse[71]. If the aim of the applicable rules is indeed relevant, national legislation necessarily will influence the meaning of abuse since the applicable tax law is often the domestic law and practice of the Member States[72]. Yet, the lack of a useful purpose remains an issue in many cases within a meaningful examination of the GAAR's applicability. If the purpose does not help to conduct the analysis, the most likely outcome will be that the test will be simply reduced to the examination of the "genuineness" of the transaction, namely, the reduction of a "law purpose" test to an "arrangement's purpose" one[73]. The formulation would be as follows: if a transaction does not have a meaningful commercial purpose, then the purpose of the law is not met. This outcome may be either the result of the inexistence of a meaningful law purpose to conduct the abuse analysis –as exemplified with the case of tax treaties or those corporate tax rules without a specific goal other than raising revenue–, or due to a mistaken analysis on the side of the enforcer. Being conscious of this conundrum is critical to performing a serious assessment of the ATAD GAAR.

The reduction of the "law purpose" test to the "arrangement's purpose" may be illustrated through the following scenario[74]. Assume that a multinational group counts with a profitable operational subsidiary in an EU Member State. The corporate tax regulations of this country include a participation exemption regime and a fiscal unity regime. Assume that the group decides to incorporate a subsidiary that will act as a holding. The newly created holding company receives intra-group funding –at arm's length– from a subsidiary located in a country that does not tax interest income to purchase the shares of other group entities –located abroad– as well as shares of independent entities. The dividends received from these participations will be exempted, and the financial expenses generated by the intra-group loan may be compensated with the profits generated by the operational subsidiary thanks to the fiscal unity regime[75].

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[70] See García Prats et al. (2018), p. 19.

[71] Further issues would arise in this regard, as for instance when the purpose of the applicable law has changed over time. See García Prats et al. (2018), p. 19-20, exemplifying this with the case of the Parent Subsidiary Directive. See also Kuźniacki (2020), p. 153.

[72] See García Prats et al. (2018), p. 17. Critical, see Martín Jiménez (2021), p. 701; Traversa (2020), p. 89-90; Velthoven (2024), p. 115.

[73] The parameters to define the genuineness of a transaction are analysed *infra* in the next subsection.

[74] See a similar example in de Wilde (2018), sec. 14.2.2.4. The case described in this paragraph text was inspired by the facts of the *SGL Carbon Holding* decision (ES:TS:2021:3572), assessed in Navarro (2022), p. 343-344.

[75] For the sake of argument, assume that the interest limitation rule stemming from Article 4 ATAD does not have a meaningful effect in the structure.

How should one assess the aim of the applicable rules in such a case? Is the aim of the participation exemption regime, that of the fiscal unity regime, or that of the limitation to the deductibility of expenses useful in assessing the existence of abuse? Some would answer that these rules do not aim to benefit structures in which the intra-group funding is not at arm's length, the holding company does not count with enough substance, or the purchase of shares that belonged already to the MNE group is circular, but that's precisely the content of the genuineness test. This illustrates how, in certain cases, the purpose of the law seems to be relevant and subject to discussion, but the ultimate decision on whether abuse exists or not is defined by specific criteria referred to the arrangement's purpose –and not the law purpose– specified through abusive markers that, in the context of a GAAR, are defined by the judiciary.

As a takeaway, it is submitted that the purpose the ATAD GAAR refers to is that of the applicable rule. The lack of a useful purpose to conduct the analysis often lead to the reduction of a "law purpose" test to an "arrangement's purpose" one, focusing on the non-genuineness of the transaction, defined through abusive markers that will be examined in the next subsection.

2.2.4. Arrangements that "are not genuine", "not put into place for valid commercial reasons which reflect economic reality"

The ATAD GAAR requires the existence of arrangements that "are not genuine" for abuse to exist. Such lack of genuineness manifests itself when arrangements are "not put into place for valid commercial reasons which reflect economic reality".

Redundancy is again present in the formulation of this requisite in a new display of poor drafting. First, the "non-genuine" concept is superfluous as it has a defined content, namely "an arrangement that was not put into place for valid commercial reasons which reflect economic reality"[76]. Hence, the inclusion of that expression does not add any meaningful value. Second, already focusing on the said definition, the existence of valid commercial reasons necessarily reflects economic reality; thus, the expression "economic reality" is redundant[77]. Even if one would consider that economic reality reflects the need for discovering the true facts of a case, entailing a prohibition of sham, it goes without saying that any rule in a legal system –including the ATAD GAAR– requires a correct determination of the relevant facts, rendering the term unnecessary also from such angle[78]. If one interprets "economic reality" as the need to consider aspects beyond the tax sphere, this is exactly what the "valid commercial reasons" criterion refers to. Hence, the overlapping would be total from that

[76] Cfr. Weber (2016), p. 114.

[77] On the notion of "economic reality" in ECJ jurisprudence, see Weber (2013a), p. 257-258 and 261-262. It may well happen that some scholars attribute features to the concept of "economic reality" that this author considers embedded in the "valid commercial reasons" concept. If that were the case, the outcome would not vary, as all these features –regardless of their assignment to one concept or another– must manifest in a given case for abuse to exist. The present subsection analyses this issue in depth.

[78] Cfr. Iaia (2021); Danon et al. (2021), p. 499.

perspective as well[79]. Therefore, it is submitted that the only meaningful criterion that remains in this segment of the ATAD GAAR is the need for valid commercial reasons.

In fact, the need for valid commercial reasons truly settles the threshold of abuse in the ATAD GAAR[80]. On the one hand, if a mismatch between the wording and the purpose of the applicable tax law is ascertained in the terms explained in the previous subsection, the existence of valid commercial reasons will still have to be examined. On the other hand, if the applicable rules do not display a useful purpose to conduct such analysis –as addressed in the previous subsection–, then the definitive parameter to sustain that abuse exists will be the non-existence of valid commercial reasons. In both scenarios, such an element is critical.

Three aspects must be highlighted to properly determine the content of the valid commercial reasons test. First, as it is obvious, one should distinguish between tax-driven reasons when conducting an arrangement and commercial-related ones. It is true that, in layman's terms, commercial reasons should include tax reasons because taxes are a component of the cost structure of any enterprise, and their minimization results in higher returns and, thus, in the generation of value for the shareholder. Yet, if one would follow such an approach in the context of the ATAD GAAR, the rule would turn inapplicable, which is an outcome clearly not wanted by the legislator[81]. Therefore, commercial reasons beyond tax minimization must be ascertained. Following this rationale, transactions with a pure tax motive –most notably circular transactions– clearly lack commercial reasons. However, arrangements that find commercial reasons would render the ATAD GAAR inapplicable, even if one of the main purposes in conducting them was the obtention of a tax advantage[82].

Second, the criterion seems not to call for a ponderation of commercial and tax purposes, or at least this cannot be derived from its wording, especially when compared to the drafting of the "one of the main purposes" requirement in which such is required. To put it differently, the requisite is simply the existence of "valid commercial reasons which reflect economic reality", meaning that the ascertainment of these reasons and their validity should suffice to declare the genuineness of a transaction and, therefore, its non-abusive character[83]. Yet, one must mention the following caveat: the existence of commercial reasons should not be mistaken with the existence of commercial effects understood as existing commercial implications derived from a certain structure. There will always be commercial effects in any structure because the obtention of income, the ownership of assets or the assumption of risks, even if directed towards tax abuse, entails effects from a private law perspective. Valid commercial reasons

[79] Cfr. criticism of the term "economic reality" in the context of the PPT posed in Schön (2022), sec. 12.2.3.4.
[80] Similarly, in the context of the PPT and tax treaty abuse, see Martín Jiménez (2022), p. 454.
[81] See de Wilde (2018), 14.2.2.4.
[82] Hence the unnecessary character of the "one of the main purposes" criterion, as posed *supra* in section 2.2.2.
[83] A similar view is expressed by de Broe (2022), p. 446 when addressing the prohibition of abuse as a general principle of EU Law: "In my view, as long as there is a genuine establishment in another Member State and genuine commercial activities (including holding, IP management and financing performed by competent directors and/or staff with the power to decide) are carried out, the fact that important tax savings are realized should by no means be decisive". See also, in the context of the prohibition of abuse as a general principle, Danon et al. (2021), p. 502.

should go beyond this notion because abuse would never exist if commercial effects were enough.

Third, the wording does not seem to call for a contrast between the commercial reasons derived from the arrangements that actually took place and possible alternative structures that the tax authorities could suggest as entailing more commercial reasons. Second-guessing arrangements in this regard should not be permitted.

Yet, even if the aforementioned considerations may be derived from the plain wording of the requirement, such wording is indeterminate enough to admit other interpretations, and ultimately the content of the "commercial reasons" requirement will largely depend on its enforcement by the tax authorities and its review by national courts on a case-by-case basis and ultimately by the ECJ. In this regard, a *corpus* of abuse markers will be built, and only then will there be some level of certainty on what the requirement demands. This is, in fact, the outcome that derives from the construction of an open-ended rule, i.e., that Courts have the power to determine its ultimate reach[84]. The ECJ may resort to several sources of inspiration to build abuse markers in the context of the ATAD GAAR. Probably the most relevant one is its own case law on domestic corporate tax anti-abuse rules in the context of the EU fundamental freedoms[85], in matters such as thin capitalisation rules[86], controlled foreign corporations' rules[87], the arm's length standard[88], rules limiting the deductibility of expenses[89], or those referred to loss compensation[90], among others[91]. ECJ jurisprudence on income tax Directives[92]

[84] This was anticipated *supra* in section 2.1. The building of special anti-avoidance rules would stand in contrast to this logic as a means that the legislator has to clearly define instances of abuse. How clear abuse is defined, of course, depends on the configuration of the special anti-avoidance rule under scrutiny because many are as open-ended as GAARs themselves. A seemingly different approach would consist of the concretion of abuse markers by the legislator, as exemplified by the markers posed in the 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 (Unshell proposal hereinafter). For an analysis, see Pistone et al. (2021); Arginelli (2024); Martín Jiménez (2022), p. 477-487.

[85] The landmark judgment is C-33/74, *Van Binsbergen*, EU:C:1974:131, where the Court determined that a Member State cannot be denied the right to take heasures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State (para. 13).

[86] See Case C-324/00, *Lankhorst-Hohorst*, EU:C:2002:749. Case C-524/04, *Thin Cap Group Litigation*, EU:C:2007:161.

[87] See Case C-196/04, *Cadbury Schweppes*, EU:C:2006:544. Case C-135/17, *X-GmbH*, EU:C:2019:136.

[88] See Case C-311/08, *SGI*, EU:C:2010:26. Case C-282/12, *Itelcar*, EU:C:2013:629. Case C-382/16, *Hornbach-Baumarkt*, EU:C:2018:366. Case C-558/19, *Pizzarotti*, EU:C:2020:806. Case C-484/19, *Lexel*, EU:C:2021:34.

[89] See Case C-168/01, *Bosal Holding*, EU:C:2003:479. Case C-318/10, *SIAT*, EU:C:2012:415. AG Emiliou Opinion in case C-585/22, *X BV*, EU:C:2024:238.

[90] See Case C-264/96, *ICI*, EU:C:1998:370. Case C-446/03, *Marks & Spencer*, EU:C:2005:763.

[91] See also Case 270/83, *Avoir Fiscal*, EU:C:1986:37. Case C-294/97, *Eurowings*, EU:C:1999:524. Case C-231/05, *Oy AA*, EU:C:2007:439. Case C-105/07, *Lammers & Van Cleeff*, EU:C:2008:24. C-337/08, *X Holding*, EU:C:2010:89. Joined Cases C-436/08 and C-437/08, *Haribo*. Case C-371/10, *National Grid Indus*, EU:C:2011:785. Joined Cases C-39/13 to C-41/13, *SCA Group Holding*, EU:C:2014:1758. In the area of personal income and inheritance taxation, see e.g. Case C-364/01, *Barbier*, EU:C:2003:665. Case C-9/02, *de Lasteyrie du Saillant*, EU:C:2004:138. Case C-472/22, *NO*, EU:C:2023:880.

[92] On the PSD, see Case C-350/11, *Argenta Spaarbank*, EU:C:2013:477. Joined Cases C-504/16 and C-613/16, *Deister Holding and Juhler Holding*, EU:C:2017:1009, Case C-6/16, *Eqiom and Enka*, EU:C:2017:641, Joined Cases C-116/16 and C-117/16, *T Danmark*. On the IRD, see Joined Cases C-115/16, C-118/16, C-119/16, C-299/16 *N Luxembourg 1*. On the MD, see Case C-28/95, *Leur-Bloem*, EU:C:1997:369. Case 321/05, *Kofoed*, EU:C:2007:408. Case C-352/08,

and on indirect taxation Directives[93] are also relevant references[94]. Overall, one would expect the ECJ to lean on previous cases in which it addressed abuse in tax matters, although it is hard to predict the specific threshold it will define[95]. In fact, the Court has determined different thresholds over several years and depending on the regulatory setting –abuse as a general principle of EU Law, abuse as a proportionality requirement for the fundamental freedoms, abuse as a positivized concept in corporate tax-related Directives or those referred to indirect taxes–, as well as the features of the arrangement under scrutiny.

To illustrate this issue, one may take as an example the comparison of the abuse markers employed in *Cadbury Schweppes*[96], a case concerning the freedom of establishment, decided in 2006, referred to CFC rules, with those posited in *T Danmark* and *N Luxembourg 1* –the Danish cases–, on the prohibition on the abuse of EU Law, decided in 2019 –post-BEPS– concerning Directive-shopping structures[97]. *Cadbury* defines as abusive arrangements deprived of any physical substance in terms of premises, staff, and equipment[98]. The Danish cases refer to an array of non-cumulative indications of the existence of abuse in the context of conduit companies, such as the payment of passive income soon after receiving it, the lack of enjoyment of such income, the obtention of an insignificant profit, and the lack of any economic activity distinct from the channelling of passive income. Other relevant factors are the existence of shortcomings in staff, premises, and equipment, as well as the lack of actual economic activity assessed through its management, its balance sheet and its cost structure[99].

Zwijnenburg, EU:C:2010:282. Case C-126/10, *Foggia*, EU:C:2011:718. Case C-14/16, *Euro Park Service*, EU:C:2017:177.

[93] On imports, see Case C-110/99, *Emsland-Stärke*. Case C-155/13, *SICES*, EU:C:2014:145. Case C-607/13, *Cimmino*, EU:C:2015:448. Case C-131/14, *Cervati and Malvi*, EU:C:2016:255. On excise duties, Case C-178/05, *Comm. v. Greece*, EU:C:2007:317. On VAT, Case C-255/02, *Halifax*, EU:C:2006:121. Case C-223/03, *University of Huddersfield*, EU:C:2006:124. Case C-425/06, *Part Service*, EU:C:2008:108. Case C-162/07, *Ampliscientifica and Amplifin*, EU:C:2008:301. Case C-103/09, *Weald Leasing*, EU:C:2010:633. Case C-277/09, *RBS Deutschland Holdings*, EU:C:2010:810. Case C-504/10, *Tanoarch*, EU:C:2011:707. Case C-417/10, *3M Italia*, EU:C:2012:184. Case C-33/11, *A Oy*, EU:C:2012:482. Case C-653/11, *Paul Newey*, EU:C:2013:409. Case C-589/12, *GMAC*, EU:C:2014:2131. Case C-419/14, *WebMindLicenses*, EU:C:2015:832. Case C-251/16, *Cussens*, EU:C:2017:881. Case C-4/20, *ALTI*, EU:C:2021:397. Case C-273/18, *Kuršu zeme*, EU:C:2019:588. Case C-281/20, *Ferimet*, EU:C:2021:910. Case C-276/18, *KrakVet*. Case C-227/21, *HA.EN.*, EU:C:2022:687. Case C-114/22, *Dyrektor Izby Administracji Skarbowej w Warszawie (VAT – Fictitious acquisition)*. Case C-341/22, *Feudi di San Gregorio Aziende Agricole*.
Case C-114/22, *W*, EU:C:2023:430.

[94] Other relevant sources would consist of domestic courts' case law on tax abuse, as the ATAD GAAR impacts the domestic corporate taxes of the Member States, which are mostly configured in line with national tax policy preferences. See comparative works in Lang et al. (2016); Dourado (2017); Rosenblatt and Tron (2018). Soft law instruments such as the OECD Model Tax Convention and its Commentaries –especially on what regards the commentary to the principal purpose test rule–, or the vast scholarly literature on tax abuse matters are also relevant.

[95] Vanistendael (2020), p. 29 expressed that "it is too early to envisage how this GAAR will be interpreted by the national courts of the Member States and above all by the CJEU".

[96] See, e.g., Martín Jiménez (2012), p. 271-276; Lenaerts (2015), p. 336-342.

[97] See an analysis in, e.g., De Broe and Gommers (2019); Hernández González-Barreda (2019); van Hulten and Korving (2019); Schön (2020a); Zalasiński (2019); Bærentzen (2020); Englisch (2020); Danon et al. (2021).

[98] Case C-196/04, *Cadbury Schweppes*, para. 67.

[99] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*, para. 126-139; Joined Cases C-116/16 and C-117/16, *T Danmark*, para. 99-114. See an in-depth critical analysis of these markers in Lazarov (2022), sec. 4.3.1. See a more general overview of markers so far adopted by the ECJ in Bærentzen (2022)., sec. 5.6-5.7.

One cannot but agree with the impression manifested almost unanimously in the literature that changes in the societal and political climate, especially reflected in the BEPS project in its all ramifications, influenced the design of the ATAD GAAR and the turn the ECJ undertook in the Danish cases[100]. This approach would consist of conceptualising abuse as an evolving concept, where the Court incorporate in its *ratio decidendi* views from sources different from its own case law. Given that the Court showed a tendency to adopt a unitary approach to tax abuse in the Directives and the fundamental freedoms[101], combined with the consolidation of the prohibition of abuse as a general principle of EU Law in the Danish cases, one would expect the Court to modulate the threshold by adopting abuse markers depending exclusively on the type of arrangement and not the field of EU Law concerned[102].

Once this caveat is clarified and without aiming at exhaustiveness, it is possible to identify two strands of abuse markers that will surely be relevant in the context of the ATAD GAAR, namely the lack of substance on the one hand and the recourse to other indirect or inappropriate means –such as circularity– on the other hand.

1. Substance. In the context of valid commercial reasons, one of the factors that will most commonly be assessed is substance, understood in a broad sense as the existence of a minimum level of production factors to conduct a meaningful economic activity beyond the compliance with formal requirements for an enterprise or an arrangement to exist in the realm of private law. Without substance, an arrangement will hardly qualify as displaying valid commercial reasons. However, issues arise as soon as one starts to wonder where the line of minimum substance should be drawn.

As regards entity-based substance, one may refer again to *Cadbury Schweppes* and the definition of what a wholly artificial arrangement entails in terms of "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"[103]. The obvious subsequent query would be how much of premises, staff, and equipment is needed to regard the arrangement as non-abusive. The case of holding entities receiving passive income is especially problematic, as conducting their activity requires a minimum display of functions, assets, and risks relative to the amount of income received[104]. In fact, in the era of automatization and artificial

[100] See Baker (2015), p. 416; de Wilde (2018), section 14.1; Cuoco (2019), p. 881. González-Barreda (2019), p. 416. Englisch (2020), p. 520; Ismer (2020), p. 74; Schön (2020b), p. 300; Traversa (2020), p. 87-88; Vanistendael (2020b), p. 634. Geringer (2023), p. 159; Traut and Weiss de Resende (2024), p. 236.

[101] See Szudoczky (2020), p. 113. Martín Jiménez (2021), p. 694.

[102] This is precisely the view expressed in De Broe (2022) and Velthoven (2024), p. 114.

[103] Case C-196/04, Cadbury Schweppes, para 67-68. Focusing on these factors or, more generically, on "letterbox" companies, see Case C-341/04, *Eurofood*, EU:C:2006:281, para. 35. Case C-419/14, *WebMindLicences*, para. 44-45. AG Kokott Opinion in Case C-115/16, *N Luxembourg 1*, EU:C:2018:143, para. 65. Case C-116/16, *T Danmark*, para. 104. Case C-135/17, *X GmbH*, para. 82. See Danon (2018), p. 389; Báez Moreno and Zornoza Pérez (2019), p. 120; Geringer (2023), p. 155. The mentioned formulation has been incorporated in the CFC rule of Article 7(2)(a) ATAD, stating that the CFC "shall not apply where the controlled foreign company carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances". See an analysis in Schönfeld (2017); Rust (2020).

[104] See Melkonyan and Schade (2019), p. 602. See also Bærentzen (2018); Lazarov (2018).

intelligence, continuing to delve into the physical presence of an entity to determine the existence of abuse is preposterous in most cases[105].

Alongside these "tangible-based" markers of abuse, financial and risk-based markers may also be employed to define the substance of entities. The ECJ, for instance, has considered factors such as the insignificant profit margin of a company or the fact that a company does not accept any commercial risk or responsibilities[106]. Lastly, conduct-based markers may be relevant as well, and they were remarkably so in the Danish cases. The ECJ considered factors such as the transfer of all or almost all the passive income perceived to other entities very soon after its perception [107], the lack of chance to use and enjoy the income perceived even when the entity is not bound by a contractual or legal obligation[108], or that the entities' sole activity is the receipt of dividends and their transmission to the beneficial owner or other conduit companies[109].

Aside from entity-based substance criteria, one may also refer to transaction-based substance as well. Specifically, the ECJ has employed the arm's length standard as a substance benchmark for transactions by stating that arrangements leading to a non-arm's length outcome, i.e., one that non-related parties would not have agreed to under similar circumstances, may be considered abusive[110]. A remarkable discussion yet to be settled by the ECJ is whether the compliance with the arm's length standard in conducting a series of arrangements within a group qualifies as a safe harbour that leads to discard the existence of abuse whatsoever[111].

An alternative take to the said distinctions, in line with BEPS developments, would consist of adopting an approach that merges both substance strands –entity-based and transaction-based– resulting in abuse markers based on the arm's length trinity of functions, risks and assets as

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[105] Similarly, see AG Kokott in Case C-116/16, *T Danmark*, para. 55: "In light of the fact that asset management companies in particular (may) engage per se in little activity, the requirements for satisfying this criterion are relatively minor. If the company has been validly incorporated, can actually be reached at its registered office and has tangible and human resources at its disposal on site to achieve its object, it cannot be seen as an arrangement that does not reflect economic reality". See also Debelva and Luts (2015), p. 227.

[106] C-155/13, *SICES*, EU:C:2014:145, para. 38-39; C-419/14, *WebMindLicences*, para. 45; C-131/14, *Cervati and Melvi*, para. 51. See also AG Kokott in C-6/16, *Eqiom and Enka*, EU:C:2017:34, para. 57.

[107] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*, para. 128, 131; Joined Cases C-116/16 and C-117/16, *T Danmark*, para. 101.

[108] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*, para. 132; Joined Cases C-116/16 and C-117/16, *T Danmark*, para. 105.

[109] Joined Cases C-116/16 and C-117/16, *T Danmark*, para. 104. Note that these criteria have also been relevant in the context of the interpretation and enforcement of beneficial ownership clauses in tax treaties. For recent comprehensive accounts on beneficial ownership, with their corresponding bibliographical references, see Hernández González-Barreda (2020); Kuźniacki (2022).

[110] See Case C-524/04, *Thin Cap Group Litigation*, para. 80. Case C-231/05, *Oy AA*, para. 59. Case C-105/07, *Lammers & Van Cleeff*, para. 30. C-311/08, *SGI*, EU:C:2010:26, para. 71-72. Case C-103/09, *Weald Leasing*, para. 45. Case C-653/11, *Newey*, paras. 49-50. Case C-282/12, *Itelcar*, para. 38. Case C-155/13, *SICES*, EU:C:2014:145, para. 38-39. Case C-382/16, *Hornbach-Baumarkt*, para. 49. In fact, Leczykiewicz (2019), p. 712 sustains that the use of the "premises, staff, and equipment" approach for entities and the arm's length reference for transactions points towards a non-uniform concept of abuse.

[111] Confront the outcome of Case C-484/19, *Lexel*, which points towards such "safe harbour" approach, with the conclusions of AG Emiliou Opinion in case C-585/22, *X BV*.

markers of substance[112]. A relevant antecedent may be found in the OECD commentaries to the PPT. Specifically, example G clearly employ transfer pricing jargon to determine whether a certain scenario may be regarded as abusive or not[113]. It refers to the use of a captive service provider, rendering services related to management, financing and treasury to group entities located in different countries of a certain region. In the example, the factors influencing the decision to establish in the country of residence of the service entity are "the skilled labour force, reliable legal system, business-friendly environment, political stability, membership of a regional grouping, sophisticated banking industry". The OECD considers that as long as the entity "exercises substantive economic functions, using real assets and assuming real risks", and the business is carried on by the entity through its own personnel, treaty benefits should be granted[114]. However, one could question the use of transfer pricing jargon in this context, as transfer pricing is a matter of "how much" profit is to be assigned to a certain entity in a field in which the relevant question is "whether or not" abuse exists, namely, a qualitative question –either abuse exists, or it doesn't– and not one of quantity.

It must be highlighted that the use of multiple substance-based markers in jurisprudence entails a significant shortcoming, i.e., it is difficult to ascertain where the specific threshold of abuse should be drawn. If several "non-cumulative" markers are mentioned, it is impossible to know whether it is enough that one manifests for abuse to exist or whether a combination thereof is needed. Plus, it is impossible to determine the weight of each marker relative to the others. Should conducting day-to-day operations weigh more than the adoption of strategic decisions? Should the performance of relevant functions by personnel weigh more than the assumption of risks? Should the enjoyment of income received be more relevant than the existence of a given profit margin? For the sake of legal certainty, it would be ideal if the ECJ, when assessing these matters, offered clear guidance on how to apply relevant abuse markers in a given case with the view of delineating when abuse exists as precisely as possible.

As a final critical remark, it must be stated that any of these interpretative choices may lead to absurd outcomes that stem from the very configuration of corporate taxes as they exist nowadays. Specifically, to vest an intermediary entity with premises, staff, and equipment plainly considered or to arrange its affairs so that its personnel adopt relevant decision-making and other relevant functions to which risks and assets would follow lead to a scenario in which it is relatively easy to "buy" substance enough to exclude abuse. In that regard, the matter would be reduced to a cost-benefit analysis: if the cost of counting with substance is lower than the expected tax savings, the structure will still be profitable from a tax perspective[115]. Yet, it must be remarked that this is not a hurdle of GAARs themselves but that of corporate taxes as they are conceived[116].

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[112] See Martín Jiménez (2017), sec. 2.5.2; Lazarov (2022), sec. 4.3.1 *in fine.* Geringer (2023), p. 161.
[113] See OECD, Commentaries to the OECD Model Tax Convention 2017, article 29, para. 182 (example G).
[114] See an analysis in Navarro (2024), sec. 14.4.1.
[115] See Shaviro (2009), p. 453.
[116] See a complete diagnose of the matter and proposals to address it in Devereux et al. (2021).

2. Other inappropriate means. The author cannot foresee an arrangement that lacks substance but passes the "valid commercial reasons" test. This would imply that substance –as defined in this contribution– is a *sine qua non* requirement of the ATAD GAAR. Yet the reverse scenario may well happen, i.e., arrangements well-off in substance that lack commercial reasons due to the use of inappropriate means to conduct an arrangement. A simple example would be that of a back-to-back arrangement with a financial institution acting as an intermediary. Such arrangements may be conducted by entities with personnel performing relevant functions, assuming risks and employing relevant assets in exchange for an arm's length remuneration. Yet these elements would not be the key factors to consider when assessing the existence of commercial reasons, but instead, the fact that such arrangements are circular, and their only meaningful effect refers to the obtention of tax savings[117]. Relevant markers in this regard are, for instance, the existence of elements in the arrangements which have the effect of offsetting or cancelling each other, or arrangements that are circular in nature[118].

Hence, substance does not exhaust the reach of valid commercial reasons. The use of other inappropriate means to conduct a transaction, such as the existence of circularity in the mentioned example, may lead to the conclusion that no commercial reasons were involved in a given arrangement. That said, the existence of inappropriate means should be approached with caution because it could be employed as a back door for a test based on the taxpayers' "intentions", which often is used as a shortcut to infer the existence of abuse through mere statements that lack sufficient reasoning and/or ignore other relevant factors in the analysis.

As a takeaway, it is submitted that the "valid commercial reasons" criterion is the only meaningful one when assessing the arrangement's purpose. Its content is determined through abusive markers yet to be defined by Courts of law and ultimately by the ECJ. These markers may fall either in the category of substance –ultimately comprising the need for meaningful functions, assets and/or risks to undertake an economic activity– or under other inappropriate means, such as circular arrangements.

2.2.5. "Where arrangements or a series thereof are ignored, the tax liability shall be calculated in accordance with national law"

The legal consequence of the ATAD GAAR entails ignoring the abusive structure, but the rule leaves the determination of the specific resulting tax treatment to the applicable national law[119].

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[117] For instance, in Case C-110/99 *Emsland-Stärke*, export refunds were abusively reclaimed following the importation of goods into Switzerland and their immediate re-exportation into the internal market. See Danon et al. (2021), p. 499. See, in the context of the PPT, see Chand (2018), p. 28-29. van Weeghel (2019), p. 31; Blessing (2020), sec. 2.1.1. Danon (2020), p. 248; In the context of the Unshell proposal, see Martín Jiménez (2022), p. 485.
[118] See 2012 Commission Recommendation on Aggressive Tax Planning, para. 4.4
[119] Article 6(3) ATAD. For an analysis in the context of the PSD, see Weber (2016), p. 126-128.

In other words, the legal consequence is left to be determined by each Member State[120]. There are at least two ways to approach the outcome of a GAAR, which may be best illustrated with an example. A corporate taxpayer resides in an EU Member State in which the corporate income tax counts with a participation exemption regime and an indirect credit regime allowing to credit both the withholding tax paid abroad by a resident entity receiving foreign dividends and the corporate income tax born by the (foreign) paying entity. The taxpayer obtained dividends paid from a non-EU country with which its country of residence has not signed a tax treaty. Assume that the taxpayer tried through abusive means to apply the participation exemption regime, which rendered the overall tax burden to be lower than the one resulting from applying the indirect credit regime. Assume that the domestic GAAR is applicable to such a case and that, as a result, the participation exemption regime is unapplied.

In this scenario, the domestic law of that Member State could lead to one of the following three constructions. First, it could allow for the application of the indirect credit regime and thus the alleviation of international double taxation because that is the regime that would have applied if abuse did not exist[121]. Second, the GAAR could be designed not to allow for the applicability of the indirect credit regime, perhaps due to a "*fraus omnia corrumpit*" approach by which no tax benefits should be granted to those who abused the law. Third, the GAAR could require to "reconstruct" what would have happened had abuse not exist. In the example, a possible discussion in such context would be whether the payment should be characterized as not amounting to a dividend, but e.g. to interest, or any other payment not leading to the applicability of the participation exemption or the indirect credit regime. Yet, this third option may turn problematic, as a reconstruction of the arrangement may often be conducted in several ways, leading to different consequences[122].

It must be emphasized that, as these three options fit in the wording of the rule, Member States should decide which one to implement[123]. Plus, the adoption of any of the three is at any rate allowed by the minimum protection rule of article 3 ATAD, as the disregard of any benefits for the taxpayer is more protective of domestic taxable bases. Therefore, arguments against such a stance cannot be derived from an infringement of the content of the ATAD GAAR itself but from the breach of constitutional law or EU primary law on the basis of, e.g., ability to pay concerns or double jeopardy if penalties were imposed[124].

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[120] This is especially so if one compares the wording of the ATAD GAAR with that of the Commission's proposal: "the tax liability shall be calculated by reference to economic substance in accordance with national law". Allegedly, such formulation was rejected due to the opposition of certain Member States to which the notion of "economic substance" is unknown in their national law. See Rigaut (2016), p. 503; De Broe and Beckers (2017), p. 143-144.

[121] Such an approach corresponds to the one adopted by the ECJ in Case C-255/02, *Halifax*, par. 94. Case C-103/09, *Weald Leasing*, para. 51. Case C-251/16, *Cussens*, para. 46. See Maisto (2021), sec. 25.2.3.

[122] See an analysis of the "reconstruction" issue in the context of transfer pricing in Navarro (2018), sec. 4.2.

[123] Cfr. Báez Moreno and Zornoza Pérez (2019), p. 132-134. Kuźniacki (2020), p. 168.

[124] See arguments that point towards these hurdles in Báez Moreno and Zornoza Pérez (2019), p. 134. See, in the context of tax treaties, Lang (2014), p. 662.

2.3. Context: confronting the ATAD GAAR with SAARs

The regulatory context in which the ATAD GAAR is inserted comprises other relevant anti-abuse rules and hierarchically superior rules such as EU primary law. The present subsection will focus on the relationship with anti-avoidance rules of specific reach, often called special anti-avoidance rules or SAARs, while compatibility issues with primary law will be discussed below in section 3.

As noted above, the ATAD preamble provides relevant remarks regarding the interaction of the ATAD GAAR with SAARs[125]. It notes two aspects. First, GAARs feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. Second, GAARs function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. One may derive from these statements that SAARs should be applied without considering the possible impact that a GAAR would have in an arrangement that falls under their scope. Namely, SAARs are blind to GAARs when it comes to their reach. This notion could be inserted in the rationale of *lex specialis*, namely, the special rule applies with preference to the general one, which therefore sees its scope limited in the very specific parcel defined by the SAAR. Another relevant consideration –purely linked to EU Law matters– refers to the fact that the existence of SAARs should not be regarded as the implementation of the ATAD GAAR, and therefore, the configuration of that general rule should not impact the interpretation of SAARs.

However, even if the ATAD drafter expresses that the ATAD GAAR should tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions, such an approach may raise certain doubts. Specifically, it does not clarify whether the SAAR blocks the applicability of a GAAR in the context of the specific type of covered arrangements or whether the GAAR would be enforced as soon as an arrangement falls out of the reach of a SAAR[126]. In this regard, one should ascertain that this is not an issue of conflicts of rules because once a SAAR is not applicable, the only potentially applicable rule would be the GAAR. Therefore, to state that *lex specialis* would prevent the GAAR from applying is incorrect[127].

Yet, before conducting such an analysis, it is important to acknowledge the differences in the design of special anti-avoidance rules. What characterizes these rules is their restricted applicability to a certain concrete aspect versus the wider reach of a "general" anti-avoidance rule. Yet, such a distinction does not say anything about how the rule is configured. Most SAARs establish clear boundaries of what is to be considered abusive, namely the 30% EBITDA rule of Article 4 ATAD, the 50% of real estate assets required by the land-rich provision envisaged in Article 13.4 of the OECD Model Tax Convention, or the Belgian 5:1 thin cap

[125] See *supra* section 2.1. See ATAD preamble, recital 11.
[126] See García Prats et al. (2018), p. 17.
[127] See Báez Moreno (2021), p. 783.

rule[128]. These SAARs should be distinguished from the so-called Targeted Anti-Avoidance Rules or TAARs, which are open-ended rules that – similar to a GAAR– require an ex-post evaluation in line with the specific facts of a case to determine whether abuse exists. These are rules such as the "valid commercial reasons" test present in the MD[129], the very PPT rule present in several tax treaties after its introduction in the 2017 OECD Model Tax Convention and the Multilateral Instrument[130], or domestic rules limiting the deductibility of a certain type of payment unless the taxpayer proves that the arrangement that generated it was predominantly based on commercial considerations[131].

Within this context, to address the applicability of the ATAD GAAR in cases in which a SAAR was complied with, it is relevant to consider two aspects. The purpose of SAARs that establish a clear threshold of abuse is to grant certainty to legal operators who know beforehand what is expected of them, as the legislator is drawing a clear line in this regard[132]. Therefore, it would be somehow schizophrenic, and surely very problematic from a legal certainty standpoint, if a threshold was complied with but the tax authorities had the chance of "moving the posts" of the abuse threshold via the ATAD GAAR[133]. On the other hand, there are cases in which the taxpayer may adopt artificial arrangements in order to escape the reach of these types of SAARs through, e.g., circular arrangements, just to meet the requirements of an otherwise applicable SAAR. In those cases, the ATAD GAAR should remain as a safeguard against transactions that lack commercial reasons in the terms defined in the previous section.

As regards the above-mentioned TAARs –open-ended anti-avoidance rules applicable in specific settings–, their configuration leads to the determination of abuse markers defined ultimately by Courts of law. Very often, the ultimate analysis will consider commercial reasons concretized in the absence of substance or other indirect means to reach a tax advantage. Hence, if it is determined that a certain taxpayer meets the requirements of a TAAR due to the existence of commercial reasons, it would be illogical to then submit the case to the test of the ATAD GAAR. Notice that such a conclusion stands from a substantive viewpoint when the abuse markers employed in the context of the TAAR are identical or very similar to those relevant to the ATAD GAAR. However, if a TAAR was not applicable due to procedural matters or because its substantive configuration defined by case law differs from the configuration of the ATAD GAAR –ultimately to be determined by the ECJ– the ATAD GAAR should remain applicable, subject to the same caveat noted in the previous paragraph, namely,

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[128] See, e.g., Article 198, §1, 11º of the Belgian *Code des impôts sur les revenus 1992 / Wet op de inkomstenbelastingen 1992* (Income Tax Law of 1992), applicable to interest paid to beneficiaries located in tax havens.
[129] Article 15(1)(a) MD. See an in-depth analysis in Englisch (2013).
[130] Article 7 of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.
[131] See, e.g., Article 10a(1)(3)(a) of the dutch *Wet op de vennootschapsbelasting 1969* (Law on Corporate Income Tax of 1969). The compatibility of this rule with EU Law will be soon reviewed by the ECJ. See AG Emiliou Opinion in case C-585/22, *X BV*.
[132] Debelva and Luts (2015), p. 232. García Prats et al. (2018), p. 17. Danon et al. (2021), p. 482–516, 485 and 504. Geringer (2023), p. 169.
[133] See Kuźniacki (2020), p. 134 and literature quoted therein.

that complying with a TAAR should be relevant in the analysis of whether abuse exists or not from the perspective of the ATAD GAAR.

3. Implementation: transposition of the ATAD GAAR into domestic law and its review against EU Law

3.1. The ATAD GAAR transposition into domestic law

The fulfilment of the obligation to transpose the content of the ATAD GAAR to domestic law has taken place in a heterogeneous manner. As stated, the Directive aims at establishing a minimum level of protection. Therefore, the Member States must adopt measures complying with the protection precluded in the Directive or go beyond them, in the sense of safeguarding a higher level of protection for domestic corporate tax bases[134].

Following this logic, one may classify the transposition outcome into two groups[135]. The first one comprises 16 countries that have decided to adopt a domestic GAAR identical or almost identical to the ATAD GAAR in terms of its semantic configuration[136]. Ideally, if the intention of the Member States were to harmonize the concept of abuse, all Member States would have adopted the ATAD GAAR as this group of countries did to minimize disparities, but this is not the case. There is a second group of countries comprising the remaining 11 Member States, which have simply stated that their existing domestic GAARs already fulfil the protection level established by the ATAD GAAR[137]. Moreover, certain Member States have explicitly expressed their willingness to maintain, to the extent possible, their jurisprudence and practice in applying their respective GAARs[138]. Clearly, this second group of countries presents more challenges than the first one in terms of EU law compatibility[139].

Notwithstanding, the transposition into domestic law is not the only aspect to consider when assessing EU law compatibility. Given the open-ended configuration of the ATAD GAAR, enforcement turns crucial to determine whether a country is complying with the required minimum level of protection, whether it goes beyond, or whether it does not match it. Determining criteria to classify countries in accordance with the enforcement parameter would entail a detailed examination of practices at the administrative and judicial levels, which clearly

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[134] Article 3 ATAD.

[135] The information was retrieved from the IBFD database on April 7th, 2024.

[136] This group includes the following Member States: Austria, Cyprus, the Czech Republic, Denmark, Estonia, France, Greece, Hungary, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, the Slovak Republic and Slovenia.

[137] These are: Belgium, Bulgaria, Croatia, Finland, Germany, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden.

[138] This is the case, e.g., of Austria and Finland. See Scherleitner and Korving (2023), p. 1071.

[139] Pistone (2017), sec. 4.3.2, criticises the ATAD's configuration in this regard and anticipates EU Law compatibility issues: "by legitimating such different national standards, the ATAD is structurally unsuitable to achieve an EU-wide level playing field and turns into the source of possible legal biases within the European Union".

exceeds the aim of this contribution. Plus, assessing the enforcement of domestic GAARs against the standard posed by the ATAD GAAR is not possible until the ECJ starts building a body of case law concretizing the meaning of the ATAD GAAR components, especially on what regards the establishment of abuse markers that will specifically define where the said minimum protection level lies. Despite these hurdles to the analysis, one may anticipate a series of scenarios that may arise, which will be examined in the next sections.

3.2. Review of the ATAD GAAR implementation against EU Law

The transposition of the ATAD GAAR may be reviewed against EU primary and secondary law for a number of reasons that will be addressed in this section. To properly frame the discussion, an initial distinction should be made between the assessment of the Directive as a secondary law instrument to be reviewed against primary law, and the assessment of the domestic law implementation of the ATAD GAAR against EU Law, comprising both primary law and secondary law.

First, one must acknowledge that the EU and its legislative acts are subject to review against primary law[140]. Specifically, the compatibility of the ATAD as a secondary law instrument against primary law may give rise to certain concerns, mainly referring to the inadequacy of resorting to Article 115 TFEU as the legal basis for harmonisation. These matters are not going to be examined in detail because they do not refer to the implementation of Article 6 ATAD and, therefore, fall outside of the scope of this section[141]. However, it should be mentioned that, even if they were to be covered, the likelihood of compatibility conflicts against primary law is fairly low. The standard of conformity built up by the Court is so indulgent that only when 'manifestly inappropriate' measures are at stake would secondary law be considered contrary to primary law[142]. This rarely happens. Although one may find some examples, such as the compatibility of certain administrative tax regulations that were tested against EU fundamental rights[143], these comprise non-economic individual rights –e.g., privacy– instead

[140] See Case C-26/78, *Viola*, EU:C:1978:172, paras. 9–14 and Case 15/83 *Denkavit Nederland* EU:C:1984:183 para. 15. Regarding direct tax directives, see Case C-168/01, *Bosal Holding*, para. 26, and Case C-471/04, *Keller Holding*, EU:C:2006:143, para. 45. See Geringer 2023, 162.

[141] For a discussion, see de Graaf and Visser (2016), p. 204; Brokelind (2019); Lazarov and Govind (2019); Haslehner (2020), p. 38-42; Kofler (2020), p. 24–26.

[142] See Szudoczky (2020), p. 106. Lazarov (2022), sec. 5.1.2. See Case C-157/21, *Poland v Parliament and Council (Rule of Law)*, EU:C:2022:98, para. 354: "the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices […] its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue". See also C-265/87, *Schräder*, EU:C:1989:303, para. 22. Case C-189/01 *Jippes*, EU:C:2001:420, para. 82-83. Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741, para. 123 Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, para. 52. Case C-58/08, *Vodafone*, EU:C:2010:321 para. 52. Case C-390/15, *RPO*, EU:2017:174, para. 54.

[143] In Case C-694/20, *Orde van Vlaamse Balies*, EU:C:2022:963, the notification obligation of tax arrangements for Lawyer-Intermediaries under Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC-6), was declared invalid due to the breach of articles 7 and 47 CFR, on the respect for private and family life and the right to an effective remedy and to a fair trial respectively. In Joined Cases C-37/20 and

of economic rights[144]. Therefore, although being somewhat frustrating from the perspective of a rigorous EU constitutional law analysis, the current state of the ECJ jurisprudence in these matters leads the author to consider the compatibility of the ATAD with primary law as given[145].

Additionally, the compatibility of the ATAD GAAR with the prohibition of abuse of EU Law as a general principle of EU Law is assumed, as the ATAD GAAR establishes a definition of what abuse entails for corporate tax matters and, therefore, furthers the notion that abuse of EU Law must be combatted. In fact, the ATAD GAAR has been labelled as the codification of the said general principle[146], although it is important to bear in mind that the scope of the rule is different from that of the general principle. On the one hand, the ATAD GAAR has a wider scope in that it affects purely domestic cases of corporate tax abuse, which fall outside the scope of the general principle. On the other hand, the ATAD GAAR has a more restricted scope than the general principle, as the general principle applies to any EU Law-related matter and not only to corporate tax matters –although the scope of a national GAAR might be extended *ex* Article 3 ATAD–. Plus, the temporal effects of the ATAD GAAR are relevant from the moment the rule is transposed, while the general principle theoretically applies both to future and past cases of abuse[147].

Due to the mentioned reasons, only the compatibility of the ATAD GAAR's domestic law implementation with EU Law will be thoroughly scrutinized. To examine the compatibility of the domestic transposition of the ATAD GAAR, one may query whether such exercise should be performed vis-à-vis secondary law exclusively –namely, the content of the ATAD– or also against primary law. In this respect, the Court has repeatedly stated that any national measure in an area which has been subject to exhaustive harmonisation must be assessed in the light of the provisions of that harmonising measure and not in the light of the provisions of primary law[148]. In this regard, the ECJ has, for instance, considered that no such exhaustive harmonisation has taken place in the context of the Merger Directive[149], or in that of the Parent-Subsidiary Directive[150]. Specifically, in *Euro Park Service*, the Court stressed that it is for the Member States, observing the principle of proportionality, to determine the provisions needed

C-601/20, *Luxembourg Business Registers*, EU:C:2022:912, the ECJ considered that public access in the EU to the information on beneficial ownership registries goes against articles 7 and 8 CFR, enshrining the respect for private and family life and the protection of personal data. See Korving (2024), p. 41-42.

[144] The distinction is drawn, e.g., in Tridimas (2006); Hofmann et al. (2011).

[145] See a critical view in Lazarov (2022), sec. 5.1.2, who raises the issue of the fundamental rights compatibility and potential conflicts with the principle of conferral enshrined in article 5(2) TEU. See an account of the discussion and relevant literature in Kofler and Tenore (2010), sec. 13.1. See also Bizioli (2017).

[146] See, e.g., de la Feria (2020), p. 146.

[147] The relevant limit in this context is defined by the applicable statute of limitations applicable in each Member State.

[148] See Case C-37/92, *Vanacker and Lesage*, EU:C:1993:836, para. 9. Case C-324/99, *Daimler Chrysler*, EU:C:2001:682, para. 32; Case C-210/03, *Swedish Match*, EU:C:2004:802, para. 81. Case C-198/14, *Visnapuu*, EU:C:2015:751, para. 40. See Haslehner (2020), p. 53; Lazarov (2022), sec. 5.1.3; Velthoven (2024), p. 117.

[149] See Case C-14/16, *Euro Park Service*, para. 19-26.

[150] See Case C-6/16, *Eqiom and Enka*, para. 16-18. Joined Cases C-504/16 and C-613/16, *Deister Holding and Juhler Holding*, para. 45-46; Order C-440/17, *GS*, EU:C:2018:437, para 31.

for the purposes of adopting measures that would fulfil the aim of such rule[151]. Following this rationale, whenever the Member States have room to configure an anti-abuse rule because the Directive has not stringently done so, no such exhaustive harmonisation exists[152].

That said, one can hardly sustain that the ATAD GAAR has led to full harmonization. Article 3 ATAD explicitly determines that the Directive intends to establish a minimum level of protection that may be increased by the Member States, thus assuming the possibility of differences in the specific domestic law implementation. On the other hand, the design of the ATAD GAAR does very little to contribute to meaningful harmonisation, as its components are fairly open-ended. Until a meaningful body of case law is built, nobody can acknowledge the actual reach of the rule. Therefore, due to the lack of full harmonisation, the domestic implementation of the ATAD GAAR may be tested against the content of the ATAD and also against EU primary law.

Notwithstanding this, the specific implementation of the ATAD GAAR by each Member State will be relevant for the analysis, as there may be instances equivalent to exhaustive harmonisation if a Member State implements the ATAD GAAR as is, namely in the minimum level of protection form required by the Directive. Therefore, the assessment of the implementation mode in domestic law should distinguish those countries that have decided to adopt an equivalent level of protection from those in which the level of protection would go beyond the minimum required by the ATAD GAAR. Both scenarios will be dealt with in the next subsections.

3.2.1. Equivalent level of protection: domestic GAAR = ATAD GAAR

The first scenario to be scrutinized is one in which the level of protection resulting from the domestic GAAR corresponds to that of the ATAD GAAR. If implementation both at the legislative level and at the level of enforcement of the domestic GAAR is conducted in that manner, the domestic GAAR should be shielded against primary law because conducting a primary law analysis against such domestic rule would be equivalent to conducting it against the Directive. In other words, a domestic law adoption that mimics the ATAD GAAR would lead to a limited review against EU Law[153]. Therefore, what may be subject to review is not the national GAAR as such, but its adequate enforcement to ascertain whether it effectively complies with the minimum protection requirement established in the ATAD. This poses two relevant issues.

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[151] Case C-14/16, *Euro Park Service*, para. 24. The Court also refers to Case C-28/95, *Leur-Bloem*, para. 39.

[152] Interestingly, the European Commission expressed the opposite opinion –yet without providing arguments to sustain it– in the DG TAXUD Note on the Application of the "Minimum Level of Protection", Room Document #4 Working Party on Tax Questions – Direct Taxation Anti-Tax Avoidance Directive (ATAD), 18 March 2016, p. 3: "the definition of a 'non-genuine arrangement' in paragraph 2 does not set a minimum. It is an absolute rule and should be complied with as such where EU law prescribes that the impact of the GAAR be limited to 'nongenuine' arrangements. Where there are no EU law constraints, Member States could enlarge the scope of the GAAR beyond what is 'non-genuine'. Yet, even then, the definition of 'non-genuine' remains unchanged".

[153] Cfr. Mitroyanni (2016), sec. 2.6.1.; Kuźniacki (2019), p. 264-265.

First, the minimum protection level resulting from the ATAD GAAR is yet to be ascertained. As stated above, the concretion of the content of this rule will be determined by its ultimate interpreter, namely the ECJ, through relevant abuse markers[154]. The more cases the ECJ reviews, the more certainty on what regards the specific threshold of abuse defined by the ATAD GAAR. The Member States that adopted a domestic GAAR identical to the ATAD GAAR in their legislation will have to continuously review whether its enforcement by the national tax authorities and Courts is in line with the parameters fixed by the ECJ because otherwise, they would risk non-compliance with the minimum protection requirement. From the perspective of national Courts, they will most probably be required to perform a conform interpretation and re-adapt their previous case law to the new abuse markers defined by the ECJ on the run[155]. This scenario should be contrasted to that of Member States having domestic GAARs that offer a higher level of protection than the one prescribed by the ATAD GAAR. In this latter case, the benchmark of abuse defined by the ECJ when interpreting the ATAD GAAR will not be as relevant as long as the enforcement of the domestic GAAR effectively results in higher protection.

Second, it remains unclear whether it is necessary to adopt all components of the ATAD GAAR to offer the same level of protection at the domestic level. In this regard, one should insist on the idea that, even if the wording of a GAAR is not exactly drafted in the terms of the ATAD GAAR, it may offer the same level of protection by way of enforcement. Yet, one may wonder what would happen if a country adopted a GAAR with components that, at first sight, are more stringent than those of the ATAD GAAR, while other components are designed in a less stringent fashion. This is not merely an abstract enquiry if one, for instance, examines the wording of the Czech GAAR (emphasis added):

> "In the administration of taxes, no account shall be taken of legal acts and other facts relevant to the administration of taxes, **the predominant purpose** of which is to obtain a tax advantage contrary to the meaning and purpose of the tax legislation"[156]

Prima facie, the use of the wording "predominant purpose" is more restricted –covers fewer cases of abuse– than the fairly ample "one of the main purposes" employed in the ATAD GAAR. On the other hand, the non-genuine requirement is absent in such a formulation; therefore, the Czech GAAR would cover more cases of abuse from that perspective. Is the

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[154] See above section 2.2.4.

[155] The principle of consistent interpretation is especially relevant in EU Law. It is based in the primacy of EU Law and requires national courts to interpret, to the greatest extent possible, their national law in conformity with EU law in order to ensure the effectiveness of all provisions of EU law, only limited by the principle of legal certainty and more specifically by the impossibility for an interpretation of national law *contra legem*. See Case C-212/04, *Adeneler*, EU:C:2006:443, para. 109-111. Joined cases C-378/07 to C-380/07, *Angelidaki*, EU:C:2009:250, para. 200. Case C-573/17, *Popławski II*, EU:C:2019:530, para. 75-76. Case C-205/20, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, EU:C:2022:168, paragraph 35-36. Case C-397/21, *HUMDA*, EU:C:2022:790, para. 43. Case C-582/22, *Länderbahnm*, EU:C:2024:213, para. 59-60. See Wittock (2014), p. 176; Szudoczky (2020), p. 112-114; Scherleitner and Korving (2023), p. 1071; Wattel and Douma (2023), sec. 3.5.1.

[156] Paragraph 8(4) of the Czech Procedural Code (Zákon daňový řád).

Czech GAAR compliant with the ATAD? Should one conduct conform interpretation and consider the non-genuine requirement to be embedded in the "predominant purpose" formulation of such domestic GAAR? Such an option would be plausible if one considers that both the "one of the main purposes" requirement and the "non-genuine" one refer to the nature of the arrangement performed by the taxpayer. Hence, both could be interpreted unitarily in the specific case of the Czech GAAR. In fact, most probably, to determine whether the predominant purpose of an arrangement is to obtain a tax advantage contrary to the purpose of the tax legislation, one should balance the tax and the non-tax motives in the form of evaluating the outcome as well as the substance of the arrangement, which is precisely what the "non-genuine" requirement refers to. At the end of the day, if one follows this rationale, the discussion should revolve around the specific abuse markers determined by the Czech case law as relevant to determine the existence of abuse and whether these markers meet the minimum requirement of protection defined by the ATAD GAAR.

Even if these aspects are relevant to the Member State's compliance with the minimum level of protection required by the ATAD, it seems that the EU Commission is not concerned about these matters so far. In the analysis of the ATAD transposition into domestic law, they ignored the different approaches adopted by the Member States and the specific components of their domestic GAARs[157]. Yet, once the ECJ case law delineates abuse markers, it may well be that the Commission reviews the enforcement of domestic GAARs by tax authorities and Courts in the EU to determine whether the minimum protection required by the ATAD GAAR is met and, if the answer is in the negative, open infringement procedures due to a breach of the content of the Directive[158], or a State aid investigation[159].

3.2.2. Higher level of protection: domestic GAAR > ATAD GAAR

A higher level of protection of domestic tax bases vis-à-vis that of the ATAD GAAR may be materialized at the level of the wording of the domestic GAAR, its enforcement, or both. A domestic GAAR may present a broader configuration by applying taxes beyond corporate taxes and/or containing criteria that lead to a threshold of abuse that is more protective vis-à-vis that of the one resulting from the components of the ATAD GAAR[160]. A higher level of protection may also result from enforcement of the domestic GAAR that surpasses the minimum resulting from the ATAD GAAR as interpreted by the ECJ. In any case, a higher level of protection is

[157] See the Report from the Commission to the European Parliament and the Council on the implementation of 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 as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, COM(2020) 383 final. See Velthoven (2024), p. 113.

[158] See article 258 TFEU. See an overview in Gormley (2017)

[159] See Article 107 TFEU. On this matter, see Scherleitner and Korving (2023), p. 1097-1101. See also Velthoven (2024), p. 122-124.

[160] Cfr. Haslehner (2020), p. 36. Contra Perdelwitz (2018), sec. 15.4.2, who argues that "Member States' domestic GAARs would need to provide for the same dual test" existing in the ATAD GAAR, and that "the only way to make the provision stricter would, in principle, be to tighten the requirements under the different tests".

adopted, a review against EU primary law must be performed[161]. Four aspects are examined in this section.

1. Minimum or maximum harmonisation? The minimum protection approach adopted in the ATAD shows that the EU legislator advocates giving Member States leeway to adopt a more demanding GAAR than that of the Directive[162]. Yet, it has been sustained that a conform interpretation of the Directive with primary law could lead to a different outcome, namely to maximum harmonisation, entailing the obligation for Member States to transpose the ATAD GAAR in a uniform manner, mimicking its reach, without the option to go beyond its level of protection. Specifically, Lazarov considers that the internal market rationale demands a reading of the ATAD as entailing maximum harmonization as regards the clauses adopted in that Directive, restricting the effect of Article 3 ATAD to newly adopted domestic anti-abuse rules different from those enshrined in the ATAD[163]. Otherwise, this provision cannot be said to improve the conditions for the establishment of the internal market, as required by Article 115 TFEU, which was the gateway employed to adopt the Directive. He draws a parallel with the *Philip Morris* case, referring to a Directive that introduced harmonisation on the presentation and sales of tobacco products[164], which included a minimum protection clause similar to Article 3 ATAD[165]. This clause allowed for an increase in the cigarette package's surface dedicated to showing health warnings above the 65% required by the Directive. The ECJ held that if the minimum protection clause was interpreted as permitting Member States to maintain or introduce further requirements in relation to all aspects of the packaging of tobacco products, that would amount, in essence, to undermining the harmonisation with regard to the packaging of those products[166]. Instead, the ECJ resorted to consistent interpretation[167] to conclude that the clause "permits Member States to maintain or introduce further requirements only in relation to aspects of the standardisation of the packaging of tobacco products which have not been harmonised by the directive"[168].

Extrapolating these conclusions to the assessment of the ATAD, Article 3 would allow Member States to adopt additional anti-abuse clauses that are more protective of the domestic taxable bases, but it wouldn't allow to expand the reach of the measures adopted in the ATAD itself,

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[161] See Case C-247/08, *Gaz de France*, EU:C:2009:600, para. 59. See Haslehner (2020), p. 54.
[162] On minimum harmonisation in EU Law, see Dougan (2000); De Cecco (2006).
[163] The argument is developed in Lazarov (2022), sec. 5.5.2.
[164] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products.
[165] Article 24(2) of Directive 2014/40: "This Directive shall not affect the right of a Member State to maintain or introduce further requirements, applicable to all products placed on its market, in relation to the standardisation of the packaging of tobacco products, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. Such measures shall be proportionate and may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Those measures shall be notified to the Commission together with the grounds for maintaining or introducing them".
[166] Case C-547/14, *Philip Morris*, EU:C:2016:325, para. 71-73.
[167] See references posed *supra* in note 155.
[168] Case C-547/14, *Philip Morris*, para. 73.

entailing maximum harmonisation[169]. In the specific case of the ATAD GAAR, this would mean uniformization of the interpretation of the GAARs adopted by the Member States under the prism of the abuse markers that the ECJ will establish in its case law.

Yet, there are reasons to remain sceptical of the extrapolation of the ECJ's reasoning in *Philip Morris* to the ATAD context. It has been noted by the ECJ itself that harmonisation in steps should be possible[170], and the adoption of a common minimum GAAR is a significant step in that regard[171]. However, the most relevant argument probably refers to the essence of the internal market as a framework aimed at enhancing economies of scale. If tobacco packaging were required to meet different standards, its effectiveness would be compromised. Therefore, it was logical for the ECJ to invalidate an interpretation that resulted in such an outcome. From that perspective, extrapolating the outcome of *Philip Morris* to the ATAD context turns less plausible.

At any rate, the outcome of such a challenge is exceptionally relevant for the implementation of the ATAD GAAR. Should a maximum harmonisation approach prevail, all national GAARs across the EU would have to be in line with the ECJ jurisprudence on the ATAD GAAR and display identical results in line with the considerations expressed in the previous section. The abuse markers defined by the Court would configure a uniform concept of tax abuse across Member States[172]. The incentives to promote a preliminary reference procedure would increase dramatically because a national GAAR with overkill effects would be as contrary to EU Law as one that displays a lower level of protection than that prescribed by the ATAD GAAR. In this scenario, taxpayers would be able to challenge domestic GAARs based on this rationale.

Differently from this, minimum harmonisation entails that any domestic implementation of the ATAD GAAR that results in higher protection would be compliant with EU Law, unless there is a breach of general principles of EU Law or EU fundamental rights. If these instances of EU primary law were respected, to ascertain the validity of a domestic GAAR, the ECJ would restrict its EU Law compatibility analysis to determine whether the level of protection demanded by the ATAD GAAR was reached and stop the analysis once the answer was in the positive[173]. This approach would render the preliminary reference procedure less relevant when compared to a fully-fledged requirement of an alignment of the domestic GAAR with the ATAD GAAR. In that scenario, the taxpayer would never benefit from a preliminary reference procedure: either the ECJ would state that the level of protection required by the ATAD GAAR was fulfilled, and therefore, the enforcement of the domestic GAAR in the assessed case was in

[169] A similar outcome is supported by De Broe and Beckers (2017), p. 142.
[170] On incomplete harmonisation, see Szudoczky (2020), p. 105-106.
[171] See Scherleitner and Korving (2023), p. 1078, emphasising the different nature of the issues that entail the harmonisation of the packaging of tobacco products with the limits to tax competition in the form of anti-abuse rules.
[172] At least so in what respects the reach of the domestic GAARs of the Member States.
[173] Interestingly, the interpretation posed by Öner (2020), according to which the ATAD GAAR components render it inapplicable, would result in the absence of boundaries for the Member States when configuring their domestic GAARs. If the level of protection offered by the ATAD GAAR were nil, anything would be valid over that (inexistent) minimum level of protection.

line with EU Law, or the domestic GAAR was not reaching the required level of protection, meaning that the GAAR should have been applied to the case at hand.

2. The incidence of the EU fundamental freedoms. The EU fundamental freedoms are relevant in direct taxation matters when national rules lead to a worse outcome for a cross-border scenario that is comparable to a domestic one[174]. Such an outcome may be considered against EU Law in intra-EU scenarios regarding all freedoms and third-country scenarios in the case of the freedom of movement of capital. However, the discriminatory treatment could be in line with EU Law if it finds a valid justification and the applicable regulations meet a proportionality requirement[175]. The fundamental freedoms do not pose limits to national law in instances in which there is equal treatment or better treatment of the cross-border scenario compared to the domestic one, when dealing with purely domestic scenarios, or in instances of discrimination referred to third countries outside the scope of the freedom of capital movement.

In this context, it is important to acknowledge that the ATAD GAAR is intended to apply uniformly in domestic and cross-border scenarios, as demanded by the EU legislator in the preamble[176], probably due to an awareness of the potential risks of disparities in the treatment that could lead to conflicts vis-à-vis primary law[177]. As the minimum level of protection determined by the ATAD GAAR covers *prima facie* any arrangement impacting the calculation of the corporate tax liability irrespective of its domestic or cross-border nature, a correct transposition of such rule into domestic law should avoid instances of discrimination against EU Law[178]. Notwithstanding, two scenarios may pose further concerns in this regard.

The first scenario refers to cases in which the domestic GAAR is drafted to apply to cross-border arrangements covered by EU fundamental freedoms while not being applied to domestic ones[179]. This may happen when a country configures a GAAR that complies with the minimum standard of the ATAD GAAR but explicitly introduces more stringent elements –comprising more cases of abuse– applicable exclusively to transactions with a cross-border element vis-à-vis domestic transactions. This is unlikely to happen, and in fact, so far, none of the Member States have configured their domestic GAARs this way. The second scenario regards a persistent practice by tax authorities, endorsed by Courts, systematically treating worse cross-border

[174] See, e.g., Englisch (2018), p. 277. See also Scherleitner and Korving (2023), p. 1084.
[175] On the analysis applied by the ECJ, see the works of Bammens (2012); Schön (2015); Englisch (2018); Dziurdź (2019); Korving (2019); Bizioli and Reimer (2020); Wattel and Weber (2023).
[176] ATAD preamble, recital 11.
[177] See the Opinion of AG Geelhoed in Case C-524/04, Test Claimants in the Thin Cap Group Litigation, EU:C:2006:436, para 68: "Such an extension of legislation to situations falling wholly outwith its rationale, for purely formalistic ends and causing considerable extra administrative burden for domestic companies and tax authorities, is quite pointless and indeed counterproductive for economic efficiency. As such, it is anathema to the internal market".
[178] Concurring, see García Prats et al. (2018), p. 17
[179] See De Broe and Beckers (2017), p. 141. García Prats et al. (2018), p. 22.

arrangements covered by the fundamental freedoms when compared to domestic arrangements, leading to *de facto* discrimination[180].

Yet, such instances of discrimination find a justification in the fight against abuse. However, the enforcement of the national GAAR under scrutiny would have to be proportionate to the aim pursued, leading to a scenario in which the body of case law on the incidence of the fundamental freedoms in income tax matters would turn out to be particularly relevant. This is yet another indicator pointing towards the ECJ adopting a single set of abuse markers both to interpret the ATAD GAAR and to address fundamental freedoms matters[181], as it would certainly be problematic if the Court did configure different abuse markers in each scenario, as the same rule –national GAARs– would see its effects differ depending on the domestic or cross-border character of the arrangement under scrutiny.

3. Relevance of EU general principles and fundamental rights. The minimum protection granted by the ATAD GAAR against abuse clearly entails the implementation of EU Law, and thus, EU fundamental rights and general principles of EU Law, such as the principle of proportionality, are relevant in that regard[182]. Yet, it must be determined whether these rights and principles are also applicable in instances in which a national GAAR was designed in a more expansive manner because the reach of fundamental rights enshrined in the CFR are applicable only when EU Law is being implemented[183]. For example, this could be relevant in a scenario in which a Member State adopts burden of the proof requirements that limit the consideration of certain business reasons when determining the existence of abuse. Such restriction would run contrary to the intention of the legislator expressed in the ATAD preamble, stating that "When evaluating whether an arrangement should be regarded as non-genuine, it could be possible for Member States to consider all valid economic reasons, including financial activities", but would be in line with the minimum protection approach enshrined in Article 3 ATAD. Does primary law pose a proportionality requirement that would impede a restriction such as the one described?[184] Legal certainty is another general principle that could be invoked to confront a more expansive national adoption of the ATAD GAAR. In

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[180] A similar stance may be found in Kuźniacki (2020), p. 132.

[181] On a unitary conception of tax abuse to be likely adopted by the ECJ, see the analysis posed *supra* in section 2.2.4.

[182] As Ismer (2020), p.72 notes, "the Court has nevertheless continuously stressed the principle of proportionality as a principe général du droit as a limit to anti-abuse provisions". In this regard, he quotes case law the area of VAT, namely Case C-384/04, *Federation of Technological* Industries, EU:C:2006:309. Case C-146/05, *Collée*, EU:C:2007:549. Case C-587/10, *VSTR,* EU:C:2012:592. Case C-24/15, *Plöckl*, EU:C:2016:791. Case C-101/16, *Paper Consult*, EU:C:2017:775. See also Case C-1/21, *MC*, EU:C:2022:788. On the function of the proportionality principle in EU Law, see Harbo (2010).

[183] Answering in the affirmative, see Maisto (2021), sec. 25.2.4. See also Martín Jiménez (2021), p. 704. "All of the principles of EU law (legal certainty) and the EU Charter of Fundamental Rights are relevant where the ATAD GAAR is applied by member states". On p. 705, the author additionally puts forward a very thought-provoking idea: "One might argue that the PPT in tax treaties can be regarded as the implementation of the ATAD GAAR, and therefore that the case law of the CJEU on the prohibition of abuse is also relevant in the context of tax treaties with non-EU countries".

[184] Smit (2023), sec. 19.5.3.4 answers in the affirmative: "An automatic reversal of proof is not permitted, let alone automatic exclusion of proof". See also De Broe and Gommers (2023), sec. 3.1.4.

this regard, the ECJ has held that rules of law must be clear, precise and predictable[185]. Are these principles posing relevant limits to the adoption of national GAARs beyond the reach of the ATAD GAAR?

On the one hand, it is plausible to defend that fundamental rights should apply when a Member State expands the protection offered by its domestic GAAR. If a domestic GAAR equivalent to the ATAD GAAR entails the implementation EU Law and is thus subject to fundamental rights scrutiny, all the more should this happen with a more expansive GAAR, where the risk of breaches of fundamental rights increase. In fact, it would be nonsensical if a Member State could escape fundamental rights scrutiny by simply applying a tougher anti-abuse rule. One must insist on the idea that the protection of the financial interests of the Member States against abuse is not an objective of EU Law, and thus, measures adopted under the framework created by the ATAD GAAR must be susceptible to fundamental rights scrutiny.

On the other hand, the current status of the ECJ case law points towards the opposite, i.e., that EU fundamental rights would not be relevant in a scenario in which a member state goes beyond what is required by the Directive and adopts a more expansive national GAAR than the ATAD GAAR. In *Julián Hernández*[186], as well as in *TSN and AKT*[187], the Court considered that the exercise of national regulatory autonomy over and above minimum standards falls outside the scope of EU law and is – therefore – immune from a fundamental rights review. The Court also stated that a minimum harmonisation clause was to be distinguished from instances in which a Union act gives Member States the freedom to choose between various methods of implementation or grants them a margin of discretion. Specifically, it recognizes that pre-existing or future regulatory intervention above the minimum Union standards is an expression of retained competence and falls outside the scope of EU law[188]. Hence, a fundamental rights analysis cannot be conducted under the EU Charter, but in accordance with the national constitutional law of the Member States.

4. ECJ's jurisdiction to review. Clearly, the ECJ has jurisdiction to review cases in which it is questioned whether a certain Member State has met the minimum level of protection enshrined in the ATAD GAAR. In fact, this is probably the most important implication of the harmonization of domestic GAARs undertaken by the ATAD. Yet, one may wonder whether the ECJ may review cases going beyond the protection level established in the ATAD GAAR.

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[185] See Case C-318/10, *SIAT*, EU:C:2012:415 and Case C-282/12, *Itelcar*, EU:C:2013:629, in which the ECJ derives legal certainty as a requirement of proportionality in the context of the fundamental freedoms. As legal certainty is also a general principle of EU Law, it is plausible to assume that its content as such must be the same. Cfr. Weber (2013); De Broe and Beckers (2017), p. 135. As regards the compatibility of the PPT with EU Law in this respect, see Weber (2017), p. 56-59.

[186] See also Case C-198/13, *Julián Hernández*, EU:C:2014:2055, para. 41-47.

[187] Case C-609/17, *TSN*, EU:C:2019:981, para. 48-55. See also Case C-301/21, *Curtea de Apel Alba Iulia*, EU:C:2022:811, para. 75.

[188] See the analysis of Scherleitner and Korving (2023), p. 1088-1090, where the authors express scepticism on the extrapolation of TSN to the context of the ATAD. See also Arena (2018), p. 334; Tecqmenne (2020), p. 501; De Cecco (2021), p. 193-194.

The matter is relevant because once ascertained that such protection level has been achieved – and assuming that the case does not pose questions of primary law compatibility– a potential breach of EU Law would not be in question anymore. May the ECJ still address the interpretation of a domestic GAAR in such a scenario?

The ECJ case law points towards answering in the affirmative. In the *Dzodzi* line of cases, the Court has stated that when regulating pure internal situations, if the national legislator adopted the same solutions as those existing in the EU legal order, it is in the interest of the Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to be applied[189]. Yet, the referring court must indicate to the ECJ –in accordance with Article 94 of the Rules of Procedure of the Court of Justice–, in what way the dispute, despite its purely domestic character, has a connecting factor with the provisions of EU law that makes the preliminary ruling on interpretation necessary for it to give judgment, clearly providing objective and consistent evidence enabling the Court to ascertain whether such a link exists[190]. In the opinion of the author, such a link should not be difficult to establish, yet national courts should be aware that the request for a preliminary ruling should be drafted with care in this regard.

Another relevant query refers to the juridical relevance of the approach adopted by the ECJ. It would be reasonable to assume that the national Court would be bound to follow the decision adopted by the ECJ because of two reasons. First, the national Court is the one deciding to pose the preliminary reference request before the ECJ[191]. Hence, it would be rather contradicting not to follow its indications; otherwise, the request would not have been sent in the first place. Second, the ECJ doctrine established in cases in which the abuse threshold determined by the ATAD GAAR was surpassed might also be relevant to delineate the concept of abuse enshrined in that very rule. In fact, to preserve coherence when applying a national GAAR either to cases comprised within the reach of the ATAD GAAR or those that go beyond it due to a more protective national GAAR is precisely the purpose of the *Dzodzi* line of cases.

3.3. The most likely outcome: soft harmonisation and judicial dialogue

Given the analysis conducted so far, one must conclude that the implementation of the ATAD GAAR will most likely lead to a certain degree of harmonisation that will increase in parallel

[189] Case C-166/84, *Thomasdünger*, EU:C:1985:373. Joined Cases C-297/88 and C-197/89, *Dzodzi*, EU:C:1990:360, para. 37. Case C-73/89 *Fournier*, EU:C:1992:431, para. 23. Case C-28/95, *Leur-Bloem*, EU:C:1997:369, para. 32-33; Case C-48/07 *Les Vergers du Vieux Tauves*, EU:C:2008:758 para. 21, 27. Joined Cases C-439/07 and C-499/07, *KBC Bank*, EU:C:2009:339, para. 55, 59. See Kaleda (2000); Lefevre (2004); Ritter (2006); Iglesias Sánchez (2018). Specifically, regarding the relevance of this case law for the ATAD GAAR, see Báez Moreno (2016). See also Hey (2017), p. 257.

[190] See Case C-268/15, *Ullens de Schooten*, EU:C:2016:874, para. 47, 55. Case C-343/17, *Fremoluc*, EU:C:2018:754, para. 28-29. Case C-394/21, *Bursa Română de Mărfuri*, EU:C:2023:146, para. 51-52. Case C-660/22, *Ente Cambiano*, EU:C:2024:152, para. 28.

[191] See Velthoven (2024), p. 120.

to the development of abuse markers by the ECJ. Such soft harmonisation will have a disparate impact among Member States, depending on how much tax authorities and national courts are able to integrate the ECJ doctrine into their national GAAR practice. At any rate, it would be naïve to think that national courts will turn a blind eye to the (yet to be built) ECJ jurisprudence on the ATAD GAAR when assessing national GAAR cases, even in cases in which the national GAAR is more protective of the national taxable bases than the ATAD GAAR. It is the degree of influence that remains an open question. For now, it suffices to say that the achievement of soft harmonisation, and not uniformity, seems a plausible outcome and also seems to be the intention of the EU legislator when adopting the minimum harmonisation provision of Article 3 ATAD.

However, the influence in building abuse markers and thus giving shape to the content of national GAARs based on the ATAD GAAR will not only stem from the ECJ and influence national courts (top-down), but the ECJ itself will likely consider, when assessing a case, the anti-abuse doctrine followed in the Member State under scrutiny and be influenced by it, as well as by the aims pursued by the national corporate tax law under scrutiny and the indications provided by the referring national Court (bottom-up). This is why, in this context, it is appropriate to speak of judicial dialogue between the national courts of the Member States and the ECJ in shaping both the ATAD GAAR and the resulting national GAARs.

4. Conclusion

This contribution examined the general anti-avoidance rule of the Anti-Tax Avoidance Directive (ATAD GAAR) regarding the definition of its aim, reach and outcome (interpretation) and the way the Member States have implemented it into their national law, as well as issues of review against EU Law that may result from it (implementation).

The ATAD GAAR allows tax authorities to go beyond the reach of applicable tax rules – through analogy or teleological restriction– in cases in which their outcome does not match the aim of the avoided or captured rules if the criteria established in the relevant GAAR are fulfilled. Therefore, these rules provide a balance between legal certainty on the one hand and neutrality and efficiency on the other.

The components of the ATAD GAAR were thoroughly examined. The outcome of the analysis shows that the two most relevant components defining the reach of the rule are (1) the defeat of the object or purpose of the applicable national tax provisions and (2) the lack of valid commercial reasons to be determined by the ECJ through a *corpus* of abuse markers, most probably inspired by its own jurisprudence on tax abuse. The ECJ will likely build abuse markers based on the concepts of (1) substance, understood as the existence of a minimum level of production factors to conduct a meaningful economic activity beyond the compliance with formal requirements for an enterprise or an arrangement to exist in the realm of private law, both at an entity level and at a transaction level, and (2) other inappropriate means, such

as circular arrangements. The open-ended configuration of the ATAD GAAR implies that Courts of law, and ultimately the ECJ, will ultimately define its reach.

As regards the implementation of the ATAD GAAR into national law, some countries have decided to adopt a domestic GAAR identical or almost identical to the ATAD GAAR in terms of its semantic configuration, while others simply stated that their existing domestic GAARs already fulfil the required protection level. Notwithstanding, given the open-ended configuration of the rule, enforcement turns out to be crucial to determine whether a country is complying with the required minimum level of protection defined by the ATAD.

The transposition of the ATAD GAAR may be reviewed against EU primary and secondary law. The specific implementation of the ATAD GAAR by each Member State is relevant for the analysis, for there will be instances which lead to a scenario equivalent to exhaustive harmonisation, specifically when a Member State implements the ATAD GAAR as is. The assessment of the implementation mode in domestic law should distinguish those countries that have adopted an equivalent level of protection from those in which the level of protection would go beyond the minimum required by the ATAD GAAR. When an equivalent level of protection is adopted, compatibility with primary law is assumed, as this scenario is akin to exhaustive harmonisation. The Member States that adopted a domestic GAAR identical to the ATAD GAAR in their legislation will have to continuously review whether its enforcement by the national tax authorities and Courts is in line with the parameters fixed by the ECJ because otherwise, they risk non-compliance with the minimum protection requirement. When a higher level of protection is adopted, a review vis-à-vis EU primary law must be performed. Four aspects were examined: (1) the issue of "maximum harmonisation", (2) the relevance of the EU fundamental freedoms (3) the (non) applicability of EU fundamental rights and general principles of EU Law, and (4) the jurisdiction of the ECJ in reviewing cases beyond the scope of the ATAD GAAR.

Given the analysis conducted, one may conclude that implementing the ATAD GAAR will most likely lead to a limited degree of harmonisation and to judicial dialogue, in which national courts will assimilate the abuse markers defined by the ECJ asymmetrically, and to judicial dialogue, as the ECJ will too be influenced by the approach to tax abuse taken by national courts and the aim and design of the domestic tax regulations under scrutiny.

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