Article 6 of the Anti Tax Avoidance Directive – Living a Life on Its Own?

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ABSTRACT:

Art. 6 of the Anti Tax Avoidance Directive (ATAD) includes a minimum harmonization standard for so-called General Anti Abuse Rules (GAARs) in the field of corporate income taxation. A significant number of Member States has not enacted the provision but referred to their domestic law already fulfilling the demands of the directive. While this is possible, it could point towards a lack of awareness of what ramifications Art. 6 ATAD has on Member States´ tax systems. Against this background, the article aims to shed light on the life Art. 6 ATAD has, as part of EU law, begun to live on its own. In doing so, we will reflect on five dimensions: (i) the impact of the Philipp Morris line of case law on Member States´ ability to go beyond the minimum standard included in Art. 6 ATAD, (ii) the relation between Art. 6 ATAD and EU´s general anti-abuse principle, (iii) the impact of the EU fundamental rights protection on the application of the national implementation of Art. 6 ATAD, as well as (iv) the interpretational insights to be won from other secondary EU and (v) state aid provisions.

1. Article 6 Anti Tax Avoidance Directive: a part of the EU legal order – on the gateway to national tax systems

With Art. 6 of the Anti Tax Avoidance Directive, EU law obliges Member States to combat tax avoidance in the field of corporate taxation.[1] This provision – adopted and implemented within the ongoing time of overhaul of the international tax system, by a European Union that has become a key actor in international tax policy – is special, as it addresses tax avoidance not only with respect to intra EU situations, but also vis-à-vis third states and fully domestic scenarios. Art. 6 ATAD was devoted intensive attention in tax literature.[2] This article aims to add to the discussion by applying a somewhat different perspective.

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[1] EU:C:2016:1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 19 July 2016, L 193, p. 1.

[2] See, e.g. De Broe & Beckers, "The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law", 26 EC Tax Rev. 3 (2017), sec. 4.3; for more detailed analysis of the provision see, e.g. Brandsma, Pancham and Smit, "Secundair Unierecht op het gebied van het materiële belastingrecht (directe belastingen)" in Hofman, van Kempen & Rijkers (Eds.), *Cursus Belastingrecht* (Wolters Kluwer 2022), para. 8.5.8; Redactie Vakstudie-Nieuws, "Verhouding fraus legis en art. 6 ATAD", V-N 2022/14.23; Marres, *Winstdrainage door renteaftrek* (Kluwer 2020), para. 3.4; Bosman and Pötgens, "De toekomst van art. 17 lid 3 onderdeel b Wet VPB 1969 als antimisbruikbepaling*"* in Stevens & van de Streek (Eds.), *De toekomst van de vennootschapsbelasting: lessen uit 50 jaar Wet VPB 1969 (Congresbundel Erasmus Universiteit) (*Wolters Kluwer, 2019), para. 13.4.1.2; Marres, "De toekomst van fraus legis in de vennootschapsbelasting*"* in Stevens & van de Streek (Eds.), *De toekomst van de vennootschapsbelasting: lessen uit 50 jaar Wet VPB 1969 (Congresbundel Erasmus Universiteit)* (Wolters Kluwer, 2019), ch. 23; Redactie Vakstudie-Nieuws, "Wet implementatie eerste EU-richtlijn antibelastingontwijking (ATAD 1)", Memorie van toelichting Algemeen, V-N 2018/54.3, para. 2.3; Albert, "De misbruiktoets van art. 4-3-c Wet DB 1965 en 17-3-b Wet VPB 1969; voorrang gewijzigd?", NTFR-Beschouwingen 2018/41, para. 7; Kastrop, "Zetelverplaatsingen in het internationale fiscale landschap", WFR 2018/174, para 6.3; Gielen and Huisman, "Verslag van het tweede grote NOB Anti-BEPS-richtlijn congres van 3 april 2017", WFR 2017/142; Bastiaens and Bodelier, "Verslag Fiscale Conferentie ATAD 1 & ATAD 2", WFR 2017/113, para. 6; Weber, "De algemene antimisbruikregel in de Anti-belastingontwijkingsrichtlijn", FED 2016/110, para. 2; Drüen,"Missbrauch nach Art 6 der Anti-BEPS-Richtlinie" in Kirchmayr et al. (Eds.) *Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch?* (Linde, 2017); Langer & Orzechowski, "Die General AntiAbuse Rule (Art 6

We, that is, two authors coming from three different countries, intend to study the life Art. 6 ATAD lives on its own as a part of the EU legal system. What motivates us to engage in such structural reflections is the apparently diverging conception of the provision. In fact, a substantive part of Member States (12 out of 28) did not see a reason to formally enact Art. 6 ATAD, since they regarded their national law as complying already with the directive.[3] For sure, this is well possible,[4] especially as the existing national law can be interpreted to accord with the requirements of the directive.[5] Yet, this outcome has also surprised distinguished commentators, in particular given the differences that exist between the various national approaches to address abuse.[6]

This points toward a tension: On the one hand, it is apparent – and understandable – that Member States are reluctant to forfeit experience and jurisprudence on the application of their national anti-abuse rules. Some Member States have explicitly invoked this as a reason not to enact a new anti-abuse provision;[7] and among Member States that have enacted Art. 6 ATAD by taking legislative action are such that in preparatory works made clear their intention to stick to their existing practice as far as possible.[8] On the other hand, Member States have, unanimously, decided to include a GAAR into the ATAD. This means that it has become a (and will develop as) part of the EU legal system.

Against this background, we want to add to the understanding of Art. 6 ATAD via reflecting on the interconnection of this provision with other EU law. We believe that this perspective is particularly interesting, because GAARs, such as Art. 6 ATAD, are of high importance for the tax system overall. While in metaphorical terms it might go too far to speak about a GAAR as the theory of everything in

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der Anti-Tax-Avoidance-Richtlinie)" in Lang et al. (Eds.), *Die Anti-Tax-Avoidance Richtlinie* sec. 2.1. (Linde, 2017); Smit, "The Anti-Tax-Avoidance Directive (ATAD)*"*, in Terra & Wattel (Eds.), *European Tax Law* sec. 12.5.3.2. (Kluwer, 2019) (hereinafter, Smit ATAD); Garcia Prats et al., *EU Report*, in *Anti-avoidance measures of general nature and scope – GAAR and other rules* sec. 3.1.3. (IFA Cahiers vol. 103a, IBFD 2018); Lang, "Die Neuregelung des Missbrauchs in § 22 BAO", (2019) *Österreichische Steuerzeitung*; de Wilde, "Is the ATAD's GAAR a Pandora's Box?" in Pistone and Weber (Eds.), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, (IBFD, 2018); For monographs dealing with the specific impact on country practice, e.g. Geringer, *Der Grundsatz des Verbots missbräuchlicher Praktiken im Europäischen Ertragsteuerrecht und seine Implikationen für die Missbrauchstatbestände der Anti-BEPS-RL* (Universität Wien, 2021); Croneberg, *Att motverka skatteflykt: En komparativ studie av generella åtgärder mot skatteflykt iSverige och Danmark i ljuset av skatteflyktsdirektivets allmänna regel mot missbruk. (1 uppl.)* (Lunds universitet, 2021); Kaunisto, *Veron kiertämisen tunnistaminen - Oikeuden väärinkäytön kielto VML 28 §:n tulkinnassa* (Vaasa, 2022).

[3] IBFD's ATAD implementation tables for all individual EU Member States (and the United Kingdom).

[4] E.g. Case C-456/03, Commission v. Italy, EU:C:2005:388, para. 51; Further, Helminen, *EU Tax Law – Direct Taxation* (IBFD, 2020), sec. 1.4.2.2.

[5] There are, however, limitations to this consistent interpretation, namely the principles of non-retroactivity and legal certainty. A consistent interpretation of national law that is contra-legem is not allowed. See on this and further going, e.g.. Case C-212/04, *Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos*, ECLI:EU:C:2006:443, para. 110; Ehrke-Rabel, "Gemeinschaftsrechtskonforme Interpretation und Anwendungsvorrang im Steuerrecht", (2009) *Österreichische Steuerzeitung*; Kofler, "Auslegung und Anwendung des harmonisierten Steuerrechts" in Schaumburg and Englisch (Eds.) *Europäisches Steuerrecht* para. 13.16 (OVS, 2015); Wittock, "The Influence of the Principle of Union Loyalty in Tax Matters", 23 EC Tax Rev. (2014), sec. 3.2.3.; Wattel, *General EU Law Concepts and Tax Law*, in: Terra & Wattel (Eds.), *European Tax Law* (Kluwer, 2019) sec. 3.5.1.,

[6] Vanistendael, "From abuse to base erosion, how did it come to this?" in Haslehner et al. (Eds.), , *A Guide to the Anti-Tax Avoidance Directive* (Edward Elgar, 2020), para. 1.61.

[7] For example Finland, see, FI: Draft government proposal for implementing the requirements of the ATAD (2016/1164) with respect to CFC rules and the GAAR [*Luonnos Hallituksen esitys eduskunnalle sisämarkkinoiden toimintaa n suoraan vaikuttavien veron kiertämisen käytäntöjen torjuntaa koskevien sääntöjen vahvistamisesta annettuun neuvoston direktiiviin (EU) 2016/1164 sisältyvien väliyhteisösäännösten ja yleisen veronkiertosäännöksen kansallisesta täytäntöönpanosta*] (hereinafter Luonnos hallituksen esitykseksi 29.6.2018), available https://api.hankeikkuna.fi/asiakirjat/bae28760-2a50-48a3-a71d-1925726538f1/ad5e5ccf-9f59-464e-9cc0-f24ed986b75e/LAUSUNTOPYYNTO_20180807095000.PDF (accessed 23 June 2022), p. 53.

[8] The Austrian legislator, to name a concrete example, amended AT: Federal Fiscal Code (*Bundesabgabenordnung*, BAO) sec. 22 for the sake of ensuring that the provision unequivocally complies with the relevant EU requirements, whilst formulating the rule in an attempt to guarantee that the existing interpretation tradition remains "to the extent possible" relevant. *See* Erläuterungen zur Regierungsvorlage zum Jahresteuergesetz 2018 p. 42 (190, 26 G.P.), available at <https:// www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00190/fname_698480. pdf> (accessed 27 June 2019) and with respect to the amended sec. 22 BAO via the Jahressteuergesetz 2018, *see*, for example, Lang, op. cit. *supra* note 2.

tax law; they are the gateway to the heart and the soul of each tax system.[9] Thus, the impact might be stronger than it may seem from the outset and with the planned further developing European corporate tax system, it might grow even further.[10]

To inquire into these initial working assumptions, we regard the following structure to be feasible. First, in sec. 2., we will very briefly describe the background of the ATAD (sec. 2.1.), as well as the essence of Art. 6 ATAD (sec. 2.2). Thereafter, we aim to discuss the impact of other EU law on the interpretation of Art. 6 ATAD and the application of its national implementation. For this purpose, we will look into five dimensions:

First, and from a practical perspective rather importantly, we will elaborate on the possibility of EU Member States to provide for a stricter implementation of Art. 6 ATAD. On plausible grounds, namely, the explicit permission enshrined in Art. 3 ATAD to go beyond the minimum standard, it appears to be assumed that this is possible. However, strong arguments have been brought forward against such a result. In Sec. 3.1. we study the intersection of Art. 3 and Art. 6 ATAD against the background of the Phillip Morris (C-547/14) line of case law.

The second dimension concerns the impact of the ECJ´s case law on the EU's general anti-abuse principle on the interpretation of Art. 6 ATAD. This multifaceted question has been subjected to intensive discussion in tax specialist literature. We intend to reflect this as far as necessary and will add our own stance on the matter. This includes an inquiry into two preliminary questions on the scope and content of the general principle, which we will address in sec. 3.2.

The third dimension will discuss the influence that European fundamental rights protection may have on Art. 6 ATAD. In principle, Member States apply EU law when they apply the national implementation of Art. 6 ATAD, which brings the matter into the scope of European fundamental rights regime. We will first inquire whether this holds true for Member States´ implementations that go beyond the minimum requirement included in Art. 6 ATAD (sec. 3.3.2.) Thereafter, we will discuss Art. 6 ATAD in the light of the principle of equality (3.3.3.) and the *ne bis in idem* principle (sec. 3.3.4).

The fourth dimension concerns the potential ramifications other secondary EU law may have with respect to Art. 6 ATAD. In this regard, it is foremost the case law on anti-abuse rules included in directives that may exert influence on the interpretation and application of Art. 6 ATAD. Yet, Art. 6 ATAD may also be concretized through other secondary EU law, such as the now proposed Unshell-directive, or other contemplated initiatives (sec. 3.4.).

Finally, in sec. 3.5., the fifth and, prima facie most remote, but on a closer look very relevant, dimension of state aid will be discussed. In this regard, our particular focus will be on the recent General Court case Engie (T-516/18 and T-525/18), which could function as a backup to Art. 6 ATAD. This case, moreover, may inform how to test whether a Member State has incorrectly left the its implementation of Art. 6 ATAD unapplied. Thereby, we hope to get closer to a very important, but inherently difficult, issue regarding the enforcement of Art. 6 ATAD: how to test, whether, or when, a Member State has misinterpreted the object and purpose of its own law?

[9] Compare here, e.g. Öner, "Is Tax Avoidance the Theory of Everything in Tax Law? A Terminological Analysis of EU Legislation and Case Law", 27 EC Tax Review (2018); R. Knuutinen, "Veron kiertäminen tutkimuskohteena – tutkimuksen näkökulmia, menetelmiä ja suuntauksia koskeva oikeusvertaileva tarkastelu", (2021) *Lakimies*. For a recent seminal contribution on the phenomenon, see, e.g. Osterloh-Konrad, *Die Steuerumgehung* (Mohr Siebeck, 2019).
[10] COM(2021) 251, "Commission Communication on Business Taxation 21st century".

2. Briefly on the history and content of Art. 6 ATAD.

2.1. Background of the ATAD – the implementation of OECD work and beyond

In the aftermath of the financial crisis, the shining examples of the meagre tax bill of some very large MNEs gave rise to a public outcry[11] that induced,[12] together with states´ revenue needs, an attempt to reshape the international tax system. What started in 2008 with agreeing on enhanced information exchange standards[13] continued with the 2013-2015 OECD/G20 Base Erosion and Profit Shifting (BEPS) Project[14] that included various anti-abuse rules to be implemented into states domestic tax law and tax treaties. Three out of five rules that are included in the ATAD (i.e., controlled foreign company rules,[15] interest limitation rules[16] and anti-hybrid rules[17]) were included as recommendations in the OECD BEPS reports.[18] The provision on exit taxation included in the Art. 5 ATAD was not included in the BEPS report, although its relation to tax treaties was addressed.[19] The GAAR of Art. 6 ATAD is similar to the so-called Principal Purpose Test, which is the tax treaty GAAR the OECD suggested in the BEPS project.[20]

The ATAD, as well as its update via ATAD 2,[21] are based on Art. 115 TFEU, which is the usual procedure used in direct taxation matters.[22] Recourse to this Treaty provision that foresees the implementation of directives based on the special legislative procedure[23] is possible when differences between Member States' national rules obstruct the exercise of the fundamental freedoms[24] or cause significant distortions of competition.[25] In addition, Art 115 TFEU can also be relied on to prevent the emergence of future obstacles to trade resulting from the divergent development of national laws,

[11] According to the Commission: '*Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International'. See* Commission, ´State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion´ < https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> accessed 23 June 2022.

[12] *Compare* Brauner, "BEPS: An Interim Evaluation", 6 World Tax Journal (2014), naming, as an example, the newspaper articles by Duhigg and Kocieniewski, "How Apple Sidesteps Billions in Taxes", (28 Apr. 2012*) The New York Times;* Drucker, "Google Revenues Sheltered in No-Tax Bermuda Soar to $10 Billion", (10 Dec. 2012) *Bloomberg;* and Waters, "Microsoft's foreign tax planning under scrutiny", (7 June 2011) *Financial Times;* See also OECD, "What the BEPS are we talking about?" <http://www.oecd.org/ctp/what-the-beps-are-we-talking-about.htm>accessed 25 May 2022; On the importance of negative media coverage as an impetus for the OECD/G20 BEPS Project, *see* Christians and Shay, "General Report", in International Fiscal Association, *Assessing BEPS: Origins, Standards, and Responses* sec. 2.1. (IFA Cahiers vol. 102a, Sdu Fiscale & Financiele Uitgevers 2017).

[13] See, including a further discussion, Shay and Christians, op. cit. supra note 12, sec. 1.1.

[14] See ibid, and for a detailed analysis, Kingma, *Inclusive Global Tax Governance in the Post-BEPS Era* (IBFD, 2020), ch. 9.

[15] Art. 7-8 ATAD.

[16] Art. 4 ATAD.

[17] Art. 9 ATAD.

[18] In more detail on the implementation of the BEPS Action plan in the EU, see, e.g.. Pistone & Weber, "The Implementation of Anti-BEPS legislation in the European Union: A Comprehensive Study" (IBFD 2018); Douma, "EU Report", in International Fiscal Association,, *Assessing BEPS: Origins, Standards, and Responses* sec. 2.2.2. (IFA Cahiers vol. 102a, Sdu Fiscale & Financiele Uitgevers 2017).

[19] Art. 5 ATAD.

[20] The OECD report on tax treaty abuse also includes elaborations dealing with the interaction of domestic law GAARs and tax treaties.

[21] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

[22] Direct taxation matters are a shared competence. Thus, Member States shall act to the extent that the EU has not done so. The latter is relatively typical in direct taxation. Pursuant to Art. 114(2) TFEU, the ordinary legislative procedure does not apply in this field. See for a broader discussion e.g. Kofler, "EU power to tax: Competences in the area of direct taxation" in Panayi, Haslehner and Traversa (Eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020), sec. 2.3

[23] This requires unanimous agreement in the Council. European Parliament and the Economic and Social Committee are to be consulted.

[24] Case C-58/08, *Vodafone Ltd*, ECLI:EU:C:2010:321, para 32; Case C-380/03, *Germany v. Parliament and Council*, ECLI:EU:C:2006:772, para 37; Kofler, op. cit. supra note 22, sec. 2.2.

[25] Case C-58/08, *Vodafone Ltd*, para 32; Case C-380/03, *Germany v. Parliament and Council*, , paras. 84 and 106; Kofler, op. cit. supra note 22, sec. 2.2.; Braun Binder, *Rechtsangleichung in der EU im Bereich der direkten Steuern* (Mohr Siebek, 2017), 48-49.

provided this is likely and the measures in question are designed to prevent it.[26] Whether Art. 115 TFEU is, indeed, available as a legal basis for the ATAD has been debated in literature.[27] Based on the, in our view, plausible assumption that anti-abuse standards would diverge more strongly in the absence of the ATAD than in its presence, we see the better reasons speaking in favour of Art. 115 TFEU being an adequate basis for the directive. Furthermore, as it will be discussed in more detail in sec. 3.5., the positive effect of the ATAD on the Internal Market goes beyond the benefits related to harmonization, because the directive also sets a floor to regulatory competition via tolerating certain tax planning activities – a phenomenon that has been paid relative wide attention to in economic literature.[28] The ATAD, as a legally binding and enforceable agreement, helps to overcome collective action problems that tend to hinder individual country action towards increasing the effective taxation of mobile capital.[29]

2.2. The GAAR of Art. 6 ATAD – mandatory teleological interpretation based on some qualifiers

The ATAD GAAR, as included in Art. 6 of the ATAD, reads 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. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
>
> 3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

There are four elements inherent in the text of the provision.[30] First, the ATAD GAAR focuses on arrangements and series of arrangements. Second, for the ATAD GAAR to apply, the arrangement, or series of arrangements, has to be put into place for the main, or one of the main purposes, of deriving a tax advantage. Third, the obtainment of the tax benefit has to frustrate the object and purpose of the applicable tax law. Fourth, the arrangement, or series of arrangements, must be regarded as non-genuine, having regard to all facts and circumstances. This means that there were no valid commercial reasons reflecting economic reality behind the setting up of the arrangement, or series of arrangements. Arrangements or series of arrangements can also be partly non-genuine. Upon the fulfilment of the above criteria, Member States must ignore the targeted set-up and calculate tax liability in accordance with national law without the use of the abusive arrangement in question.

Essentially this means that Member States, with the taxpayer meeting certain qualifiers, are obliged to conduct a teleological interpretation.[31] It is not a mere business purpose test, even though business

[26] E.g. Case C-58/08, *Vodafone Ltd*, para 33; Case C-380/03, *Germany v. Parliament and Council*, para 38; Kofler supra n. 22, sec. 2.2.

[27] Critical on Art. 115 TFEU being available as a legal basis for the ATAD, e.g. de Graaf and Visser, "ATAD Directive: Some Observations Regarding Formal Aspects", 25 EC Tax Review (2016); Bizioli, "Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?", 26 EC Tax Review (2017) 199-210; Lazarov and Govind, "Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law", 47 Intertax (2019), 852-868; Regarding Article 115 TFEU to be an adequate legal basis see, e.g. Braun Binder, op. cit. supra note 25, 92-94; Szudoczky, "The relationship between primary, secondary and national law" in Panayi, Haslehner and Traversa (Eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020), sec. 2.2.

[28] See the discussion and references in sec. 3.5.

[29] In more detail see ibid.

[30] Based on de Broe and Beckers, op. cit. supra note 2, sec. 4.3. (2017); for more detailed analysis of the provision see, e.g. the references provided for in footnote 2.

[31] See principally, Schön, "The Role of 'Commercial Reasons' and 'Economic Reality' in the 'Principle Purpose Test' under Art.29(9) OECD Model Tax Convention 2017" (February 8, 2022) Working Paper of the Max Planck Institute for Tax Law

purposes, of course, play a role in the process of finding out whether a taxpayer´s arrangement is, actually, covered by a norm providing for a tax benefit or not.[32] The extent to which this imposes a change for a Member State depends on the legal tradition in prevailing in a certain country. Especially the limiting effects of the wording of the law appears different. In some Member States it is, for instance, principally possible to broaden the interpretation of a norm beyond its wording,[33] whilst in others such tax increasing analogies are unthinkable.[34] Yet, when the taxpayer´s tax motive was too strong and the arrangement non-genuine, the gates to a purposive interpretation (if there are any) get open and the protecting effect of the wording (if any) vanishes.[35] For addressing abuse, this is of crucial relevance, because when demanding a tax benefit that is, in the light of the object and purpose of the relevant law at stake not to be granted, it is often the wording behind which the taxpayer tries to hide.[36]

3. Art. ATAD as part of Union law – five dimensions

3.1. First dimension: The Minimum Standard Criterion of Art. 3 ATAD in light of *Philip Morris* (C-547/14) and its impact on Art. 6.

The ATAD aims to create "a minimum level of protection for national corporate tax systems against tax avoidance practices across the Union."[37] This is reflected in the various options included in the directive,[38] as well as Art. 3 ATAD stating that the ATAD shall not preclude Member States from implementing more strict rules.[39] These limitations on the harmonizing effect is at the core at the above mentioned doubts on the availability of Art. 115 TFEU as a legal basis.[40]

Similar kinds of concerns have also been at stake in *Philip Morris* (Case C-547/14), which dealt with the directive of harmonizing the presentation and sales of tobacco products (2014/40).[41] Art. 24(2) of this directive allowed Member States 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*." On plausible grounds it can be assumed that this should enable Member States to foresee an even stricter approach than what is foreseen in the directive. However, the ECJ explicitly denied this as going against

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and Public Finance No. 2022-03, available at <https://ssrn.com/abstract=4029573>, (accessed 23 June 2022), ; as well as for a fundamental analysis of the phenomenon of GAARs, see Osterloh-Konrad, op. cit. supra note 9.

[32] Compare Schön, op. cit. supra note 31, , who concisely summarizes Osterloh-Konrad´s so called divergence phenomenon, which is helpful to understand the underlying tax technical problem that GAARs are meant to overcome, as follows: "*This concept refers to a situation where a mismatch between a provision's object and purpose on the one hand and the provision's wording on the other hand comes to light. The "unhappy interpreter" who is in charge of addressing a specific case confronts the fact that the wording of the provision is either over-inclusive or under-inclusive when compared with the policy underlying the provision. Both in the context of statutory law and tax treaties, there exist cases in which a literal interpretation of a provision supports awarding a (tax) benefit, which is not justified in the light of the object and purpose of the provision. In such a situation the judge will seek to overcome the limitations imposed by the wording of the provision by applying a (statutory or judge-made) GAAR. One might call this mismatch between wording and purpose of a provision the "teleological" element of a GAAR. If there is no mismatch, the application of a GAAR doesn't make sense.*"

[33] See, including a discussion of preconditions that may exist for this purpose, for Germany, Englisch: "Rechtsanwendung im Steuerrecht", in Tipke and Lang (Eds.), *Steuerrecht* para 5.78 (Otto Schmidt, 2021); Osterloh-Konrad, op. cit. supra note 9, p. 47 et seq; Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU* (Linde, 2016); For a discussion in Austria see, e.g. Leitner, *Steuerumgehung und Missbrauch im Steuerrecht 58* et seq (Lexis Nexis, 2013).

[34] For Finland, see, e.g. Helminen, "Etuyhteysosapuolten välisten liiketoimien sivuuttamista ja korvaamista - VML 31 §:n ja VML 28 §:n välisiä rajanvetokysymyksiä" in Viherkenttä et al. (Eds.), *Veronkiertäminen tutkimuskohteena - 50 vuotta Kari S. Tikan väitöskirjasta* (Aalto, 2022).

[35] See, again, Schön, op. cit. supra note 31.

[36] In more detail, e.g. Schön, op. cit. supra note 31; Osterloh-Konrad, op. cit. supra note 9.

[37] Recital 3 to ATAD (2016/1164).

[38] Three of the ATAD´s SAARs, i.e., the interest limitation rules (Art. 4), CFC rules (Art. 7-8) and anti-hybrid rules (Art. 9), include options that Member States can chose from.

[39] These limitations on the harmonizing effect are at the core at the above mentioned doubts on the availability of Art. 115 TFEU as a legal basis. See, e.g. the references provided for in supra note 27.

[40] See supra note 27.

[41] 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 and repealing Directive 2001/37/EC, O.J. 2014, L 127.

Art. 114 TFEU,[42] due to undermining the harmonization effect of the directive.[43] Although this is not reflected by the wording of Art. 24(2) of Directive 2014/40, this provision shall be interpreted as allowing Member States to provide for stricter requirements only in relation to aspects of the standardization of the packaging of tobacco products, which have not been harmonized by the directive.[44] Based on this, doubts were raised as to whether a reading of Art. 3 ATAD towards allowing Member States to provide for stricter anti-abuse rules is in line with Art. 115 TFEU.[45]

If it holds true it could mean that Art. 3 ATAD only allows the implementation of further anti-abuse rules, but not to go beyond harmonized ones.[46] In the context of Art. 6 ATAD this is a particularly far-reaching question, because, as mentioned, many Member States have referred to their existing anti-abuse measures as already covering the minimum requirement enshrined in Art. 6 ATAD. If the above reading of Art. 3 ATAD is in place it would not be possible for Member States to provide for an outcome that is stricter than what is demanded by Art. 6 ATAD. Rather it would have to be just what Art. 6 ATAD demands. In other words, national GAARs would in this case be fully bound to Art. 6 ATAD. While mentioning that there are other grounds brought forward that question from (another) primary law perspective the space Art. 3 ATAD leaves to Member States to be stricter than what is demanded by Art. 6 ATAD (see sec. 3.2.), we are not convinced that Phillip Morris (Case C-547/14) can be extrapolated towards depriving Art. 3 ATAD of its meaning.

First, even though a full harmonization would be more optimal, already an approximation via a minimum standard is a step forward – in direct taxation even a huge one.[47] Secondly, indicated in sec. 2.1., and to be further elaborated upon in sec. 3.5., the ATAD, arguably, also benefits the Internal Market as a legally enforceable agreement to abstain from a certain form of tax competition.[48] It is hard to believe that these two dimensions are equally present in the realm of tobacco advertising. Rather, the goal of the above-mentioned directive mainly appears to lie in harmonizing the packaging standards, which should ease the sale of the product abroad. On the other hand, the directive does not seem to specifically aim at preventing a race to the bottom in overly lenient rules in this area.[49] When only the harmonizing dimension matters, it is easier to understand that the ECJ insists on this harmonization to actually happen. With respect to the ATAD, such a strict stance might not seem adequate.

As underlined in recital 16 of the ATAD, the principle of proportionality included in Art. 5 TEU demands the EU not to go further than necessary to achieve its goal, which, expressis verbis, lies in the implementation of a minimum standard. One could regard this argument as circular and as insufficient to prove the inapplicability of the Phillip Morris logic with respect to Art. 3 ATAD, because, per the above-mentioned Art. 24(2) of the tobacco advertising directive, the goal, likewise, was to provide for a minimum standard. However, the ECJ ought to be careful not to remain in this narrow perspective. Taxation is an integral part of Member States´ economic and social policy and an integral part of their sovereignty. This is, in itself, respected by primary law, not as some sort of ancient national state

[42] Which this directive was based on and which – according to literature – informs the interpretation of Art. 115 TFEU as well. See, e.g. Kofler, op. cit. supra note 22; Korte, "AEUV Art. 115" in Callies and Ruffert, EUV/AEUV (Beck, 2022), paras. 3 et seq.

[43] Case C-547/14, *Philip Morris*, ECLI:EU:C:2016:325, para 71-72.

[44] Ibid., at para 73.

[45] I. Lazarov, *Anti-Tax Avoidance in Corporate Taxation under EU Law: The Internal Market Narrative*, (IBFD, 2022), at sec. 5.5.2.

[46] Ibid. As an alternative Lazarov offers an implicit reading of a free-movement clause into Art. 3 ATAD. Based on this Member States have to mutually recognize foreign standards, as long as they meet the minimum, whilst they can themselves provide for stricter rules. Also see his references to Case C-11/92, *The Queen v. Secretary of State for Health, ex parte Gallaher and Others*, ECLI:EU:C:1993:262, para. 22; Dougan, "Minimum Harmonization and the Internal Market", 37 CML Rev. (2000); and Rott, "Minimum Harmonization for the Completion of the Internal Market? The Examples of Consumer Sales Law", 40 CML Rev. (2003). While in the context of CFC rules, in the context of which Lazarov provides for the argument, this is easier to understand, it is not immediately clear how this logic should work in the context of the GAAR.

[47] Supportive, e.g. Musil, "BEPS RL" in Musil and Weber-Grellet (Eds.), *Europäisches Steuerrecht* (Beck, 2019).

[48] See in more detail below at sec. 3.5.

[49] See also recital 53 to directive of harmonizing the presentation and sales of tobacco products (2014/40).

thinking, but, simply, for democratic reasons. Directly elected parliaments rule on taxation and are accountable for it.[50] Art. 3 ATAD also reflects this, as well as the differences in country profiles, and their pressure/preference to engage in different sorts of tax competition. A Phillip Morris like primary law conform interpretation of Art. 3 ATAD towards demanding Member States with stricter anti-abuse rules to downgrade their standards to the minimum could give rise to a rather significant need to adapt the rules, which would distort the balance found in the ATAD, and may induce Member States to react to the changing landscape.[51] Such an outcome would have substantial consequences and is, by all means, not what Member States have signed up to. If Member States, ultimately, refuse to do this, the European Commission would have the possibility to launch infringement procedures. Making use of it might be politically dangerous, given that tax directives require a special legislative procedure and, hence, unanimity in the Council.

To close this argument, it should be remembered that there are various options in the ATAD. Even if Art. 3 ATAD was to be interpreted along the lines of Phillip Morris, it would be clear that these options remain in place, because they are not part of Art. 3 ATAD, but enshrined in the material provisions. Hence, what would happen is, ultimately, nothing else that one option, namely, Art. 3 ATAD, falling away, with the rest staying valid as intended. The minimal benefits this brings in terms of harmonization are in our view clearly outweighed by the harms of such an interpretation for the internal market, which is why we oppose it.

3.2. Second dimension: The impact of the general principle of abuse and its impact on Art. 6 ATAD

3.2.1. Preliminary question – the general anti-abuse principle in EU law; how far does it extend?

EU law includes a general anti-abuse principle in primary law.[52] What is of most interest at this stage of the article is the scope of it. Is it, as understood by parts of literature, valid within the whole EU and, thus, also with respect to domestic law?[53] Or does it, as argued by others, apply only with respect to EU law? The answer to this is of crucial relevance for our understanding of Art. 6 ATAD. If the general anti-abuse is an EU-wide obligation to combat abuse, Art. 6 ATAD would be a concretization of a certain abuse understanding in the scope of the ATAD. Arguably, Art. 6 ATAD would be rather superfluous under such circumstances, because whenever the abuse-principle applies, would there already be a need to take away the tax benefit, which factually depletes Art. 6 ATAD of its application.

An argument towards this end was made by Leczykiewicz (2019),[54] who states that the ECJ in Cussens[55] "insisted not only that EU law contained an autonomous and self-standing principle laying down a prohibition of abusive practices, but also that its consequence was that a private party should be prevented from exploiting a tax advantage available under national law, exempting them from a tax

[50] Vanistendael, op. cit. supra note 6.
[51] When Member States with higher anti-abuse rules are forced to decrease their standards, the effective tax rate they impose on mobile capital sinks. This can put pressure on Member States that are at the minimum to react by competing outside the agreement, potentially through more blunt tools such as a general decrease in the CIT rate. See on this the discussion and references provided for in sec. 3.5.
[52] See, with further references, Case C-115/16, *N Luxembourg*, ECLI:EU:C:2019:134. For broader elaboration, e.g. Lazarov, above op. cit. supra note 45, sec. 4.1.2.; and Leczykiewicz, "Prohibition of Abusive Practices as a 'General Principle' of EU Law", 56 CML Rev (2019) .
[53] Leczykiewicz, above op. cit. supra note 52, 703.
[54] Who, notably, does not refer to Art. 6 ATAD in her article.
[55] Case C-251/16, *Cussens*, ECLI:EU:C:2017:881.

whose imposition was *not* mandated by EU law."[56] The fact that the ECJ in *Ömer Altum*[57] and *N Luxembourg 1*,[58] under reference to Cussens, emphasized the connection to EU law,[59] does not automatically disprove this observance,[60] because these cases also dealt with the abuse of EU law.[61]

However, as convincingly argued by Lazarov (2022), also the facts at stake in Cussens were under the ambit of EU law.[62] In essence, Ireland was taking advantage of an option provided for in the VAT Directive, subject to the boundaries of it.[63] Even though the decision as to whether to act upon an option is imputable to Member States for the purposes of State aid scrutiny, the content of the act is confined by the directive and, hence, is an implementation of EU law and, thus, affected by the general principle of the prohibition of abuse.[64] Furthermore, in the pre-Cussens case 3M Italia,[65] the ECJ was very explicit in denying a general principle of the prohibition of abuse when EU law is not involved.[66] If it really had been the intention of the ECJ to set this aside in Cussens, it would have been sensible to engage with 3M Italia. Yet, this did not happen.[67]

This means that the general principle on the prohibition of abuse applies only when EU law is at stake.[68] Most relevantly, this concerns instances of harmonization, as well as cross-border situations, involving

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[56] Leczykiewicz, above op. cit. supra note 52, 704. The technical argument for this is provided in id., at p. 727*: "Cussens, on the other hand, concerned a tax advantage created by Irish law, which instead of using the criterion of first occupation, as suggested by the Directive, exempted from VAT transfers of property which had previously been "disposed", on condition that the first disposal was subject to tax and the property was not developed between the two disposals. Secondly, the activity carried out by the appellants in Cussens was not subject to tax by any rule of EU law. Instead, Ireland exercised its power to tax additional activities, expressly recognized as a power, and not a duty, by Article 4(3) of the Sixth VAT Directive."*

[57] Case C-359/16, *Ömer Altun and Others*, ECLI:EU:C:2018:63, para. 49; "The principle of prohibition of fraud and abuse of rights, expressed by that case-law, is a general principle of EU law which individuals must comply with. The application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law."

[58] Case C-115/16, *N Luxembourg*; and the parallel Cases C-116 & 117/16 *Skatteministeriet* v. *T Danmark and Y DenmarkAps* EU:C:2019:135., para. 70: "It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends."

[59] Ibid.

[60] Leczykiewicz, above op. cit. supra note 52p. 706, there was also a clear difference "[A]s in *Ömer Altun*, in *N Luxembourg 1*, the ECJ created an exception to the application of EU rules in favour of national rules, and not an exception to the application of one national rule in favour of another national rule, as it was the case in *Cussens."* id, at p. 739, still regards these judgments as a sign for the Court to "return to a more constitutionally acceptable position". Furthermore, and backed up by a broader discussion, she regards it likely "that the Halifax principle and its extension in Cussens to instances of abuse of national rules will be confined in future cases to the VAT context." See ibid., at p. 740.

[61] Leczykiewicz, above op. cit. supra note 52, p. 704

[62] Lazarov, above op. cit. supra note 45, sec 4.1.2.

[63] See for a more detailed elaboration ibid.

[64] Ibid., who further substantiates the argument, by referring to the prohibition of domestic parallel VAT-like taxes. See art. 33 Sixth Directive and art. 401 Directive 2006/112, interpreted in, among other places, Case C-475/03, *Banca Popolare di Cremona Soc. Coop.a.r.l v Agenzia Entrate Ufficio Cremona*, ECLI:EU:C:2006:629.

[65] Case C-417/10, *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. 3 M Italia SpA*, ECLI:EU:C:2012:184, para. 30: " [I]t must be observed to begin with that the dispute in the main proceedings is not one in which taxpayers rely or are liable to rely on a provision of European Union law for fraudulent or abusive ends."

[66] Ibid., at para. 32: "[I]t is clear that no general principle exists in European EU law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European EU law is not involved."

[67] Neither the Court in Case C-251/16, *Cussens*, nor Leczykiewicz, above op. cit. supra note 52, consider Case C-417/10, 3M Italia.

[68] This is, interestingly, also what Leczykiewicz argues for. In Leczykiewicz, above op. cit. supra note 52, at p. 739, she also regards Case C-359/16, *Ömer Alun*, and Case C-115/16, *N-Luxembourg*, as a sign for the Court to "return to a more constitutionally acceptable position". Furthermore, and backed up by a broader discussion, she regards it likely "*that the Halifax principle and its extension in Cussens to instances of abuse of national rules will be confined in future cases to the VAT context.*" See id., at p. 740. Other scholars regard the non-application of the general anti-abuse principle to domestic law situations as rather self-understanding. See, e.g. Danon et al., "The Prohibition of Abuse of Rights After the ECJ Danish Cases", 49 Intertax (2021), 484.

a derogation from the freedoms.[69] Hence, Art. 6 ATAD is not widely superfluous. Rather, in its scope, it sets aside 3M Italia and brings into domestic law an obligation to combat abuse of national law co-existing with the EU principle for advantages resulting from EU law.[70]

3.2.2. Preliminary question – what does the general principle contain and how is it shaped?

The general-anti abuse principle consists of a subjective and an objective element.[71] With respect to unharmonized areas of tax law, the general anti-abuse principle manifests as a justification for a derogation of the freedoms. In this regard it is important to recall that regulatory competition is not forbidden, but rather, endorsed by the fundamental freedoms.[72] A taxpayer can, for instance, set up a subsidiary in another Member State that provides for low taxation. The intention to benefit from low taxation does not suffice to qualify as abusive.[73] What matters is whether the entity is genuine, which essentially is a question of economic activity and substance in terms of premises, staff and equipment sufficient to the economic activity performed.[74] This stems from the object and purpose of the freedom of establishment that aims to provide for the possibility for stable participation in the economic life of another Member State.[75] When a transaction of a (genuine) entity is at stake, artificiality is determined based on the so-called arm´s length principle, meaning, in essence, that everything within the boundaries of what independent parties would have agreed upon does not amount to abuse in relation to transaction concerned.[76]

With respect to the application of the general anti-abuse principle to harmonized areas of tax law, "proof of an abusive practice requires, first, a combination of *objective circumstances* in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a *subjective element* consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it."[77] It is structurally not different than the abuse test conducted above in the course of the primary law. What matters is, ultimately, again a teleological argument, that is, whether granting a tax benefit is in line with the object and purpose of the secondary law in question. The practical difference lies in other things being of relevance. While it is the goal of the fundamental freedoms to award protection to genuine transactions; the mere genuine nature of a transaction might, or might not, be decisive with respect of the harmonized areas – it depends on the object and purpose of the rules.[78,79]

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[69] See Opinion of Advocate General Sharpston, Case C-427/06, *Bartsch*, ECLI:EU:C:2008:297, para. 69, and Lazarov, above op. cit. supra note 45, at sec. 4.1.2., discussing the third scenario, that is when the Treaties themselves impose a substantive obligation on the Member States, which is not typically relevant in tax law.

[70] Smit ATAD, op. cit. supra note 2, sec. 12.5.2.

[71] Case C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, para. 64; Case C-110/99, *Emsland-Stärke*, ECLI:EU:C:2000:695, paras. 52 and 53; and Case C-255/02, *Halifax and Others*, ECLI:EU:C:2006:121, paras. 74 and 75; Case C-115/16, *N Luxembourg*, ECLI:EU:C:2019:134, para. 124.

[72] In more detail and with further references e.g. Lazarov, above op. cit. supra note 45, sec. 3.3.

[73] Case C-196/04 *Cadbury Schweppes*, para. 36.

[74] Case C-196/04 *Cadbury Schweppes*, para. 54; Case C-504/16, *Deister Holding*,; Case C-6/16, Eq*iom SAS, formerly Holcim France SAS, Enka SA v. Ministre des Finances et des Comptes publics*, ECLI:EU:C:2017:641. See for a broader discussion, Lazarov, above op. cit. supra note 45, sec. 4.3.1.1..

[75] Case C-196/04, *Cadbury Schweppes*, , para. 53.

[76] Case C-324/00 *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, ECLI:EU:C:2002:749; Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, ECLI:EU:C:2007:161; Case C-311/08, *Société de Gestion Industrielle (SGI) v. Belgian State)*, ECLI:EU:C:2010:26; Case C-382/16, *Hornbach-Baumarkt-AG v. Finanzamt Landau*, ECLI:EU:C:2018:366; Case C-558/19, *Impresa Pizzarotti (Avantage anormal consenti à une société non-résidente*, ECLI:EU:C:2020:806; and, Case C-484/19, *Lexel*, ECLI:EU:C:2021:34. For an elaboration, also see Lazarov, above op. cit. supra note 45, at 4.3.1.2.

[77] Case C-115/16, *N Luxembourg 1 v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 124.

[78] See dissenting: Lazarov, above op. cit. supra note 45Lazarov, supra n. xyz. He argues that in harmonized areas the abuse test equals a business purpose test.

[79] For clearness sake, this does not mean that transactions at arm's length value cannot be subject to SAARs, like, e.g. interest limitation rules.

3.2.3. The interaction of the effect of the general anti-abuse principle, Art. 6 ATAD and the national implementation

There is, thus, (i) an anti-abuse principle in primary EU law that addresses the abuse of EU law, (ii) Art. 6 ATAD, and (iii) its national implementation. What is of special interest for the purposes of this article is the extent to which the first two EU law sources influence the national implementation of Art. 6 ATAD. Given the existing research on the matter in specialist literature, this is not the most decisive question of this contribution, but for the sake of interpretation of the national implementation and with a view to lay the ground for the perspectives provided later in this article, the "ground-work" on the interaction of these concepts and rules must be done.

The first question concerns the relation of Art. 6 ATAD and the general anti-abuse principle of primary law. In the initial proposal of the ATAD the European Commission held in the Explanatory Memorandum that "the proposed GAAR is designed to reflect the artificiality tests of the CJEU where this is applied within the Union."[80] This sentence, however, has not made it to the final version of the ATAD. On practical grounds, and subject to further elaboration in sec. 3.4, it would be plausible to assume that the ECJ in the end would try to make an effort to streamline the interpretation of anti-abuse concepts.[81] Nevertheless, formally, the interpretation of Art. 6 ATAD is not bound to the present and evolving interpretation of the general anti-abuse principle of primary EU law. After all, the general anti-abuse principle prohibits the abuse of EU law, whilst Art. 6 ATAD is a harmonization of domestic anti-abuse rules. Unless a more special anti-abuse provision applies,[82] Art. 6 ATAD, in its scope,[83] addresses also the abuse of EU law.[84] Only and to the extent it does not apply, it is the general principle that does so. In other words, in protecting the integrity of EU law, the general principle applies to what is "left over" after Art. 6 ATAD. Given that the goals of the concepts are aligned, it does not seem likely that differences occur. However, it is not compelling to say that one (viz. the general principle) controls the other (viz. Art. 6 ATAD).

Furthermore, Art. 6 ATAD does not automatically come into contact with the general anti-abuse principle in the latter´s role of a justification of a derogation of the fundamental freedoms. On the one hand, this comes as the provision applies also in situations that are not covered by the freedoms. These can be purely internal situations, to which the freedoms in principle do not apply, as well as to third country situations, to which only the free movement of capital could apply.[85] On the other hand, it must be noted that in testing direct tax rules under the freedoms, the ECJ, but for rare exceptions,[86] normally applies a discrimination approach. Member States must not treat cross-border situations differently than comparable domestic situations. If they do, they must be able to justify it by an acceptable reason, such as the anti-abuse principle, in relation to which the domestic rule under discussion must be proportionate.[87] Hence, while in the context of the (non-discriminatory) restriction approach, which

[80] 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 – 2016/011 (CNS), Explanatory Memorandum; Kuźniacki, "The GAAR (Article 6 ATAD)" in Haslehner et al. (Eds.), *A Guide to the Anti-Tax Avoidance Directive* para. 6.10, pp. 131-132 (Edward Elgar, 2020).

[81] Also see Danon, et al., above op. cit. supra note 68,483.

[82] Like Art. 1, paragraphs 2 and 3 of the Parent-Subsidiary Directive (2011/96).

[83] In more detail on the scope of the ATAD see especially, Caziero and Lazarov, "The substantive scope of the Anti-Tax-Avoidance Directive: The remaining leeway for national tax sovereignty", 58 CML Rev. (2021) 1789-1818.

[84] See on this especially, sec. 3.5.

[85] Whether this freedom is applicable to the underlying case is a separate question, but, in general terms, not unlikely, because the Art. 6 is not limited to shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Art. 49 TFEU on freedom of establishment. See e.g. Case C-464/14, *SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública*, ECLI:EU:C:2016:896, para. 31.

[86] See further going, and relevant references, e.g. Englisch, "Grundfreiheiten: Vergleichbarkeit, Rechtfertigung und Verhältnismäßigkeit" in Lang (Ed.), *Europäisches Steuerrecht* (DStJG Tagungsband, 2018), 277.; Bammens, "The principle of non-discrimination in international and European tax law" (IBFD, 2012), sec. 13.4.2.2..

[87] With further references Korving, *Internal Market Neutrality* (Sdu, 2019), sec. 3.2.2.3-3.2.2.4.

usually prevails when testing non-tax rules under the fundamental freedoms,[88] the application of a GAAR would immediately give rise to a need for justification, this is not the case when the discrimination approach is relevant. In anticipation of the problem, recital 11 of the ATAD says: "It is furthermore important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ."

As part of secondary law Art. 6 ATAD can be tested against primary law. Such a question could reach the CJEU as a part of a preliminary ruling in which the referring court seeks guidance with respect to the assessment of the national implementation legislation – which will be discussed immediately below – as well as on the compatibility of Art. 6 ATAD itself with primary EU law.[89] At this stage, it is necessary to ask whether it is Art. 6 ATAD, or the national implementation legislation, that can be applied discriminatorily. Based on the above, it could be argued that it is not Art. 6 ATAD, because it is meant to apply neutrally.[90] If this is true, then Art. 6 ATAD does not itself trigger a derogation from primary EU law (e.g. fundamental freedoms and EU principles), which also means that a remedying primary law conform interpretation is not strictly speaking necessary. If it is wrong, then an interpretation of Art. 6 ATAD in accordance with primary law is necessary, but, of course, only to the extent the matter is covered by the general-anti abuse principle.

To get a more complete picture, it is necessary to look at the national implementation of Art. 6 ATAD and the EU law scrutiny it faces. Up until the minimum standard, it will only be tested for whether it complies with Art. 6 ATAD. This comes, because to this extent the matter is subject to exhaustive harmonization, in which instance national implementation legislation is only tested against the rules creating exhaustive harmonization.[91] A test of the national implementation legislation against primary EU law is then not possible, but, as mentioned, the legality of the minimum standard included in Art. 6 ATAD itself can be tested under primary EU law.[92] This means, in practice, that the outcome of the application of the national implementation legislation needs to be tested against the outcome of a fictitious implementation and application of Art. 6 ATAD. In case the domestic implementation legislation does not take away the tax benefit, while Art. 6 ATAD would, the Member State would be in breach of the directive, if it does not take away the tax benefit.[93] The occurrence of such instances is easily conceivable when the national domestic implementation foresees a higher threshold in the subjective test. This could mean that in the lack of a sufficiently high tax motivation, the action of the taxpayer does not yet need to undergo a purposive interpretation, while under a direct implementation of the ATAD it would have been exposed to such interpretation, which would have taken away the tax benefit. In case the national implementation and the fictitious implementation of Art. 6 ATAD lead to the same outcome, there is no tension between the national implementation and Art. 6 ATAD, whilst the underlying secondary law remains still testable against primary EU law (see above).

This is different when the national implementation of Art. 6 ATAD takes away a tax benefit, which a fictitious direct implementation of Art. 6 ATAD would not demand. Based on Art. 3 ATAD, as interpreted in sec. 3.1. of this article, this is in line with the directive. Yet, now the relevant domestic legislation of the Member State is subject to full primary law scrutiny.[94] Conceivably this could happen,

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[88] Further going, including examples, see e.g., Englisch, op. cit. supra note 87.
[89] Lazarov, above op. cit. supra note 45.
[90] Recital 11 to ATAD (2016/1164).
[91] Case C-324/99, *Daimler Chrysler*, ECLI:EU:C:2001:682, para. 32; Case C-322/01, *Deutscher Apothekerverband*, ECLI:EU:C:2003:664, para. 64; Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz*, ECLI:EU:C:2004:799, para. 53; and, Case C-205/07, *Gysbrechts and Santurel Inter*, ECLI:EU:C:2008:730, para. 33. Further see: Lazarov, above op. cit. supra note 45, at sec. 4.2.1. and 5.1.3.; de Broe & Beckers, above op. cit. supra note 2 Dissenting Govind & Zolles, "The Anti-Tax Avoidance Directive", in Lang et al. (Eds.), *Introduction to European Tax Law in Direct Taxation* (Linde, 2020), p. 237.
[92] Such a question may be posed in the same preliminary ruling request.
[93] Similarly, e.g. Scherleitner, "The Application of the Finnish General Anti-Abuse Rule in Light of Article 6 of the EU Anti-Tax Avoidance Directive (2016/1164) – Some Initial Thoughts", 59 Eur. Taxn. (2019).
[94] E.g. Case C-379/05, *Amurta*, ECLI:EU:C:2007:655.

for instance, when a Member State addresses abuse only via purposive interpretation, without attaching any separate meaning to the subjective test. In such cases the (low) subjective threshold included in Art. 6 ATAD as a gateway to purposive interpretation might,[95] in a fictitious direct implementation, have led to the outcome of the tax benefit not being taken away.[96] At this point, we come back to the same issue as above, that is, the only way for the application of the domestic implementation legislation to come under primary law scrutiny is its discriminatory application to the detriment of the cross-border situation. How exactly such a test may look like is not immediately clear. Two possibilities are, at least, conceivable.

First, the focus could be outcome based, with the emphasis being on the application of the GAAR. The cross-border transaction, to which the GAAR applies, is fictitiously transferred into a purely domestic setting, after which the application of the GAAR is tested. If the GAAR applies only in the former, but not the latter case, one could argue that this is discriminatory. This approach finds some support in literature.[97] In addition, it finds implicit support in national case law in which the national Court applied the national GAAR leaning on ECJ jurisprudence on the abuse justification. In these cases the discriminatory application of the domestic GAAR must have been conceivable to the Court.[98] For sure, that does not prove that the application was discriminatory, because it is the ECJ that has the last word in determining it. Yet, a need for a preliminary ruling is not given, when the national Court itself implicitly moves to the justification level where it applies the anti-abuse justification, and thus, the general anti-abuse principle. Whenever this reasoning prevails, the general-anti abuse principle, as further developed by the ECJ, will, in practice, also be given effect.[99] Metaphorically speaking, this would amount to the application of the general principle to push down the room for maneuver under Art. 3 ATAD to go beyond Art. 6 ATAD to be inexistant. It would be this missing possibility to go beyond Art. 6 ATAD based on Art. 3 ATAD that in practice gives effect to the minimum standard.[100] The outcome of Art. 6 ATAD being, both a minimum, and, practically, also a maximum standard, has gained support in tax literature.[101]

Secondly, the focus could also be on the method. As mentioned in sec. 2.2., Art. 6 ATAD, with some qualifiers, obliges Member States to conduct a purposive interpretation with a potential limiting effect of the wording vanishing. If the cross-border transaction that triggered the GAAR, would have been subject to such interpretation if it had been conducted in a domestic setting, then one could also argue that a discrimination did not occur. Even if the tax outcome may differ, the interpretative process did not. If this is what matters, the general-anti abuse principle, as further developed by the Court, would not have a direct relevance.

While in legal dogmatic terms there are some nuances as to when an application of a GAAR is to be tested in the light of the minimum standard, or in the light of primary EU law, it appears that the object and purpose of the national rules matters ultimately most. The ECJ is not competent to interpret this and, thus, will have the national Court to do so. However, as we will argue in sec. 3.5., the national Court may be looked after in this process as well. What remains to be seen is the readiness of the ECJ to provide for "indications" that are to be taken into consideration by the national courts. In the Danish

[95] See in more detail on such an interpretative access to GAARs including such two-pronged test, Schön, op. cit. supra note 31; Osterloh-Konrad, op. cit. supra note 9.

[96] A difficult question is whether a Member State´s practice of taking away the tax benefit without a teleological interpretation as demanded by Art. 6 ATAD would amount to a stricter implementation of the directive, which would be covered by Art. 3, or would be so different from Art. 6 ATAD, as to it being, ultimately, a different concept that cannot be said implementing the directive. In any way, such a rule or practice would have to withstand primary law scrutiny.

[97] Vanistendael, op. cit. supra note 6

[98] With respect to the Austrian example see, e.g. Geringer, above op. cit. supra n. xy, pp.384-385.

[99] In the result similarly, see Lazarov, above op. cit. supra note 45.

[100] As opposed to Art. 6 ATAD itself.

[101] In each case based on a more sophisticated argumentation under reference to the ECJ case law on the general principle and the precise wording and systematic of Art. 6 ATAD. Also see de Broe and Beckers, op. cit. supra note 2; Lazarov, above op. cit. supra note 45.

beneficial ownership cases the ECJ was rather active in this respect.[102] Yet, at stake here was the Parent-Subsidiary Directive as well as the Interest and Royalty Directive, and the interpretation of the object and purpose of them is in the hands of the Court.

3.3. Third dimension – the impact of European fundamental rights protection on the application of Art. 6 ATAD

3.3.1. Overview and applicability of European fundamental rights protection

EU law supersedes national law, including national constitutional law and its inherent fundamental rights.[103] This necessity to ensure the uniformity and efficacy of EU law goes in hand with the need for a European fundamental rights protection to fill the gap.[104] Inspired by the constitutional traditions common to the Member States and the European Convention of Human Rights (ECHR),[105] the ECJ has established that fundamental rights form an integral part of the (unwritten) general principles of EU law.[106] Via the Treaty of Lisbon, this case law was codified into Art. 6(3) TEU.[107] In addition, the EU recognizes the Charter of Fundamental rights (ChFR), which, based on Art. 6(1) TEU, is granted the same legal value as primary EU law.[108] Hence, in the EU there is a written and unwritten catalogue of fundamental rights, both of which govern the application of EU law[109] and, thus, the national implementation of Art. 6 ATAD.[110]

The overall ramifications of this connection are complex and go, of course, far beyond this article. Furthermore, the actual extent of the change depends on the national fundamental rights framework that are, in the area of application of EU law, replaced by EU fundamental rights. In the below we will limit ourselves to a brief discussion of two fundamental rights that appear particularly relevant to us, namely, the equality principle in Art. 20 ChFR and the ne bis in idem principle of Art. 50 ChFR (secs. 3.4.3-3.4.4).[111] Prior to this, we must reflect on a more principled question that is of high relevance for Art. 6 ATAD. Does European fundamental rights protection apply to the extent the national implementation goes beyond the minimum standard included in Art. 6 ATAD?

3.3.2. Application of the Charter beyond the minimum standard?

Art. 3 ATAD allows Member States to provide a higher level of protection for domestic corporate tax bases. Thus, metaphorically speaking, and subject to the above discussion, there can be a room beyond the minimum standard, but below primary law constraints. Whether such Member States´ room for

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[102] Like it did in Case C-115/16, *N Luxembourg*, and the parallel Cases C-116 & 117/16 *Skatteministeriet* v. *T Danmark and Y Denmark Aps.*

[103] Case 29/69, Stauder, ECLI:EU:C:1969:57, para. 7; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

[104] Ibid., 3-4.

[105] Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, ECLI:EU:C:1974:51, para 12-14; and, Case 44/79, *Hauer*, ECLI:EU:C:1979:290, para 15; Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

[106] In more detail, see e.g. Perrou, "Fundamental rights in EU tax law in Research Handbook on European Union Taxation Law Research Handbooks" in Panayi, Haslehner and Traversa (Eds.), *Research Handbook on European Union Taxation Law* (Elgar, 2020), p. 513; Kofler, "Europäischer Grundrechtsschutz im Steuerrecht", in Lang (Ed.), *Europäisches Steuerrecht* (DStJG Tagungsband, 2018), pp. 125 et seq.

[107] In more detail, instead of many, Kingreen, "EUV Art. 6", in Callies and Ruffert (Eds.), *EUV/AEUV* (Munich, 2022).

[108] Art. 6(1) TEU. In more detail see, e.g. Schorkopf, "Art. 6 EUV" in Grabitz, Hilf and Nettesheim (Eds.), *Das Recht der Europäischen Union* (Beck, 2019).

[109] On the relation between Art. 6(1) and Art. 6(3) TEU, and in favour of the primacy of the Charter, see e.g. Kingreen, op. cit. supra note 107, paras. 15-18; Schorkopf, op cit. supra note 108, at para. 56. See the latter, at paras. 50 et seq for an overview of the discussion on the role of Art. 6(3) aside the Charter, TEU.

[110] Based on Art. 6(2) TEU, the EU shall accede to the ECHR.

[111] This does, of course, not mean that other fundamental rights are irrelevant.

maneuver is covered by the Charter or not has been subject to considerable debate[112] that got new life by the recent (Grand Chamber) case TSN.[113]

At stake was the following problem: Based on the Working Time Directive (WTD) Member States must ensure that every worker is entitled to four weeks of paid leave per year.[114] This right, included in Art. 7 WTD, is explicitly set out in Art. 31(2) ChFR.[115] In interpreting Art. 7(1) WTD, the ECJ held that in case annual leave and sick leave overlap, workers can recuperate the days of annual leave they missed out due to being sick.[116] Finland correctly implemented these requirements and, in addition, has certain domestic rules that provide for annual leave in excess of the requirements of the directive,[117] which, however, exclude the carrying over of sick leave days.[118] The question was whether the case law demanding the recuperation of sick leave days is applicable with respect to this "national" annual leave that is granted in excess of the minimum requirements of the directive. In this regard, the referring Finnish court, inter alia, wanted to know if the Art. 31(2) ChFR could be interpreted towards this end.[119]

In the first place – and this is the most interesting aspect of the whole judgement – this is a question of whether Finland was implementing EU law and, thus, pursuant to Art. 51(1) ChFR triggered the applicability of the Charter. Other than AG Bot, who saw the scope of the Charter opened because the WTD itself authorized a Member State to go beyond the directive,[120] the Court denied the applicability of the Charter. According to the ECJ:

> "[Art. 15 WTD] *pursuant to which that directive 'shall not affect' Member States' 'right' to apply provisions of national legislation that are more favourable to the protection of the safety and health of workers, does not grant the Member States an option of legislating by virtue of EU law, but merely recognises the power which they have to provide for such more favourable provisions in national law, outside the framework of the regime established by that directive. […] Therefore, the situations at issue in the main proceedings are different from the situation in which an act of the Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and from the situation in which such an act authorises the adoption, by the*

[112] See with further references, Tecqmenne: "Minimum harmonisation and fundamental rights: a test-case for the identification of the scope of EU law in situations involving national discretion?", 16 European Constitutional Law Review (2020), 501.
[113] Joined Cases C-609 & 610/17, (*Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry* v. *Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto (AKT) ry* v. *Satamaoperaattorit ry*), ECLI:EU:C:2019:981; for a detailed analysis of the case and its implications, see Tecqmenne, op. cit. supra note 112,; De Cecco, "Minimum harmonization and the limits of Union fundamental rights review: TSN and AKT", 58 CML Rev.(2021).
[114] See Art. 7 and 15 of Directive 2003/88/EC of the European Parliament and of the Council of 4 Nov. 2003 concerning certain aspects of the organization of working time, O.J. 2003, L 299/9.
[115] See on the connection of Art. 7 of the working time directive and Art 31(2) ChFR, e.g. Case C-385/17, *Hein*, ECLI:EU:C:2018:1018.
[116] E.g. Case C-178/15, *Sobczyszyn*, ECLI:EU:C:2016:502, para 24.
[117] The duration depends on the collective agreement. The health sector collective agreement at stake in Joined Cases C-609 & 610/17, *TSN*, for instance, provided for seven weeks.
[118] Ibid., at paras. 9 et seq..
[119] Ibid., para. 24.
[120] Opinion of Advocate General Bot, Joined Cases C-609 & 610/17, (*Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry* v. *Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto (AKT) ry* v. *Satamaoperaattorit ry*), ECLI:EU:C:2019:459, para. 65 et seq. See especially ibid., at para. 86, stating that "the adoption of national measures, such as those at issue in the main proceedings, which go beyond a hard core of minimum protection defined by a directive, constitute the domestic extension of the provisions laid down in that directive. The adoption of measures providing enhanced national protection constitutes a means of implementing the directives establishing minimum requirements." and para. 90: "I consider that a national measure adopted in application of a provision of a directive that authorises enhanced national protection is closely linked to that directive and must therefore be regarded as implementing EU law." – an argument that was also expressed in earlier tax literature, see, e.g. Kokott and Dobratz, "Der unionsrechtliche allgemeine Gleichheitssatz im Europaïschen Steuerrecht" in Heber and Schön (Eds.), *Grundfragen des Europaischen Steuerrechts* (Springer, 2015).

Member States, of specific measures intended to contribute to the achievement of the objective of that act." [121]

TSN is undoubtedly a strong indicator pointing towards the Charter not being applicable when Member States, based on Art. 3 ATAD, go beyond the minimum standard enshrined in the ATAD. However, we are not ultimately sure whether this extrapolation works so easily. Literature emphasized the close connection of the judgement to the field of social policy and urges for carefulness to not too readily expand it to other policy areas.[122] The WTD, as also reiterated by the Court, is based on Art. 153 TFEU that includes a constitutional minimum harmonization clause.[123] This forbids, per definition, full harmonization.[124] Whether this necessarily makes a difference with respect to the ATAD will be left for future research. In this regard, it will also be necessary to reflect on differences in regard to the specificity requirement, according to which national rules fall outside the scope of the Charter "where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto."[125] The regulatory context present in TSN was, apparently, not regarded to be specific enough for the Charter to be applicable.[126] It could be – as remains to be determined – that the autonomy Member States have in going beyond Art. 6 ATAD is much smaller than in going beyond Art. 7 WTD, because Art. 6 ATAD provides for a rather close framework that can only narrowly be made stricter without leaving the system of the rule. In other words, Member States could, conceivably, decrease or delete the qualifying requirements for subjecting an arrangement or series of arrangements to a mandatory teleological interpretation. However, it cannot get rid of the latter element, without violating the minimum standard itself. As this necessitates further research, we will have to leave the topic open. The implication of this question is, however, rather high because the below elaborations either apply, or not, with respect to situations in which Member States provide for a result that is stricter than Art. 6 ATAD would require.

3.3.3. The equality principle in Art. 20 ChFR – equal application of the GAAR

In applying the national implementation of Art. 6 ATAD the equality principle included in Art. 20 ChFR is relevant. According to it, "everyone is equal before the law." This principle has been part of the common constitutional traditions of the Member States, which is why testing the application of a GAAR against an equality principle is no structural novelty.[127] Still, with the applicability of Art. 20 ChFR, it will now be the ECJ that has power to judge. At the level of detail, this may lead to differences vis á vis the national traditions and approaches of applying this principle.[128]

[121] Opinion of Advocate General Bot, Joined Cases C-609 & 610/17, *TSN*, para. 48-49.
[122] Tecqmenne, op. cit. supra note 112,. 509.
[123] Joined Cases C-609 & 610/17, *TSN*, para. 48. Such clauses are also found in other politically sensitive fields. See 82(2) TFEU for the field of criminal law, 169(4) TFEU with respect to consumer protection, and Art. 193 TFEU with respect to environmental protection. More generally on constitutional minimum harmonization, that is such via the Treaty, and legislative minimum harmonization, see Klamert, "What We Talk About When We Talk About Harmonisation", 17 Cambridge Yearbook of European Legal Studies (2015).
[124] See ibid., and Tecqmenne, op. cit. supra note 112.
[125] Joined Cases C-609 & 610/17, *TSN*, para. 53.
[126] Note in this regard that in earlier case law Case C385/17, *Hein*,, it was held that Member States cannot use the upward flexibility if that results in undermining the core of the right enshrined in Art. 7 WTD. See De Cecco,e, op. cit. supra note 113, 190. As such, this is not completely free of EU law limitations. See also the opinion of Opinion of Advocate General Bot, Joined Cases C-609 & 610/17, *TSN*, at para. 59.
[127] Which is why it has been relevant in ECJ case law already before the implementation of Art. 20 ChFR See e.g. Joined cases C-117/76 and C-16-77, *Ruckdeschel*, ECLI:EU:C:1977:160; In more detail and with further references see Rossi, "GRCh. Art. 20", in Callies and Ruffert (Eds.), EUV/AEUV (Beck, 2022).
[128] Compare, in principle, also Kokott and Dobratz, op. cit. supra note 120.

Art. 20 ChFR forbids equal situations to be treated unequally, and unequal situations to be treated equally. As any principle of equal treatment also Art. 20 ChFR needs to be provided with values from outside in order to identify the tertium comparationis.[129]

So far case law on the interaction of Art. 20 ChFR and the application of Art. 6 ATAD, or another GAAR in secondary EU direct tax law is, to our knowledge, missing. At this stage we also emphasise to be careful in extrapolating (future) case law on the discriminatory application of GAARs under the fundamental freedoms to Art. 20 ChFR. The fundamental freedoms only prohibit treating the cross-border situation worse than a comparable domestic situation. Art. 20 ChFR, on the other hand, applies more broadly. We think that a sensible way to establish comparability for the purposes of the equality principle of the Charter would be to compare taxpayers on the basis of the economic facts they have realized. In case they are in relevant parts sufficiently similar, they should be subject to the same legal consequences, i.e. the application, or non-application, of the GAAR. Likewise, in case the underlying economic facts are sufficiently different, the application of the GAAR to both cases is problematic, too. The application of the GAAR, thus, is a matter of equal application of the law. In case a discriminatory application of the GAAR is found, it needs to be justified.[130] If this does not succeed, the application of the GAAR under these circumstances is void.

It seems that this area is still rather undeveloped and future case-law and research will cast more light on it. We only allow to raise two questions. First, GAARs usually come into play in tax audits, and not all taxpayers are audited.[131] This is, of course, inevitable, because not all taxpayers can be audited. However, will there be a point beyond which it may be argued that the implementation of Art. 6 ATAD is structurally unequal? Could this mean that the national implementation of Art. 6 ATAD is in violation of Art. 20 ChFR and, thus, invalid and the respective Member State in breach of the ATAD due to structurally not applying the implementation of Art. 6 ATAD correctly? Secondly, if unequal treatment is found, in which direction should it be remedied, that is, should the GAAR be applied to both situations or none of them? Non-tax case law suggests the latter;[132] and it would appear adequate to uphold this also in this context.

3.3.4. Ne bis in idem – prohibiting one Member State from imposing a penalty

According to the *ne bis in idem* principle a person must not be tried or punished twice for the same offence.[133] This right is enshrined in Art. 50 ChFR and corresponds to Article 4 of Protocol No 7 to the ECHR – with the notable difference that the former also prohibits to be tried or punished again in another Member State.[134] The transnational scope could make Art. 50 ChFR increasingly relevant for the application of Art. 6 ATAD, particularly in case two Member States apply the domestic implementation of leg cit *and*, in doing so, impose a punitive tax increase on the taxpayer. The latter is not untypical in applying GAARs.[135] In the ECtHR jurisprudence punitive tax increases are considered a punishment.[136] Based on Art. 52(3) ChFR this is directly relevant for the interpretation of the *ne bis*

[129] Bell, "Equality Before the Law", in Peers et al. (Eds.), *Charter of Fundamental Rights – A Commentary 20, 23* (Bloomsbury, 2021); Heber, "The Interest Limitation Rule in the Light of European Constitutional Law", 31 EC Tax Review (2022), 75; Kokott and Dobratz, op. cit. supra note 120.
[130] In more detail, instead of many, Rossi, op. cit. supra note 127; or Bell, op. cit. supra note 129.
[131] Krever, "General Report", in Lang et al. (Eds.), *GAARs – A Key Element of Tax Systems in the Post-BEPS World* (IBFD, 2016), who notes that this is a frequent concern expressed with respect to GAARs.
[132] Case C-406/15, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, ECLI:EU:C:2017:198, para. 67.
[133] In more detail, instead of many, Blanke, "Art. 50 GRCH" in Callies and Ruffert (Eds.), *EUV/AEUV* (Beck, 2022).
[134] The ne bis in idem principle of the ECHR only applies to the same state. See e.g. Kokott, *Das Steuerrecht der Europäischen Union* (Beck, 2018), pp. 215 et seq.
[135] Instead of many, see, e.g., with respect to the Finnish practice, Helminen, "Finland " in Lang et al. (Eds.), *GAARs – A Key Element of Tax Systems in the Post-BEPS World* (IBFD, 2016), sec. 12.3.1.
[136] Kokott, op. cit. supra note 134, pp. 215 et seq.

in idem principle in Art. 50 ChFR.[137] The transnational application of the latter rule then prevents one Member State from applying the penalty.[138] Recital 11 to the ATAD, according to which "Member States should not be prevented from applying penalties where the GAAR is applicable",[139] does, of course, not change that. A difficult question in this regard may concern the punitive effect of the application of the GAAR itself. Art. 6 ATAD demands the arrangement, or series of arrangements in question to be ignored for the purposes of calculating corporate income tax. This, however, also requires it to be replaced by something else, that is, an arrangement that is not abusive. Although not this is not necessarily the case, it is conceivable that such a recharacterization has a punitive character as well. This could give rise to complex questions, which we have to leave open here.

3.4. Fourth dimension – the impact of other secondary EU law on the interpretation of Art. 6 ATAD

3.4.1. The promotion of the Internal Market as common denominator

As direct tax directives based on Art. 115 TFEU need to promote the Internal Market, they all pursue the same meta-goal. This common denominator hints towards it being feasible to search for interpretational help in other tax directives. In this chapter, we aim to briefly expand on this thought, especially in foresight to future harmonization efforts that may further advance the EU direct taxation system – a (currently) loose term encompassing EU tax rules affecting direct taxation.[140] In the below we aim to reflect, first, on the interaction of jurisprudence on other anti-abuse rules with Art. 6 ATAD (sec. 3.4.2). Thereafter, we look into the potential impact of the proposed Unshell directive to the interpretation of Art. 6 ATAD (sec. 3.4.3.).

3.4.2. How does the case law on other anti-abuse standards influence the interpretation of Art. 6 ATAD?

Art. 6 ATAD has been inspired by the Principal Purpose Test developed in the OECD BEPS project, as well as the GAAR included in the Parent Subsidiary Directive.[141] Based on this, one could be inclined to believe that their interpretation should, in one way or another, be streamlined. On practical grounds, this would appear sensible. Even though Member States´ right to provide for stricter rules, ultimately, prevents the existence of a single anti-abuse standard for direct taxation in the Internal Market, an endeavor of the ECJ towards a uniform interpretation of different anti-abuse clauses would diminish disparities that could be the result from abuse being addressed differently in dependence on what tax benefit is at stake. Apart from that, it would give rise to more jurisprudence and, thus, could help to quicker concretize the unclear notions inherent in GAARs. Having regard to the demonstratively low degree of attention the ECJ pays to the wording of GAARs in the field of taxation,[142] as well as given the confirmation of the applicability of the EU general anti-abuse principle to the field of direct taxation, one may prudently assume that the ECJ would aim to provide for a uniform approach.

That being said, it does not seem immediately clear to what extent such consolidation would succeed. After all, just as the ATAD GAAR, also the other anti-abuse standards, i.e. those included in the directives that reproduce the general anti-abuse principle, as well as the PPT, may be understood as rules that, upon the fulfilment of certain qualifiers, demand scrutinizing the awarding of the tax benefit from a teleological perspective. While, as mentioned, the degree of novelty included in this process depends on the general doctrine on the interpretation of tax law present in a Member State, it is clear

[137] In more detail on the impact of the ECHR for the interpretation of the ChFR, e.g. Kingreen, "Art. 52 GRCH" in Callies and Ruffert (Eds), *EUV/AEUV* (Beck, 2022).
[138] What Member State this should be is a different question, which we cannot deal with here.
[139] Recital 11 to ATAD (2016/1164).
[140] E.g. Helminen, op. cit. supra note 3.
[141] During the Working Party discussions on the introduction of the ATAD GAAR, the text of the provision was 'upgraded to the PSD anti-abuse clause wording, in order to ensure consistency'. See Working Party on Tax Questions – Direct Taxation, ROOM DOCUMENT # 1, 15 Apr. 2016, Ares(2016)3255612; see also recital 3 to ATAD (2016/1164).
[142] See with further references, eg. Lang op. cit. surpa note 2; de Broe & Beckers, op. cit. supra note 2.

that, ultimately, a benefit can only be taken away, in case granting it would be at odds with the object and purpose of the law, the integrity of which the GAAR in question seeks to protect. The interpretation of this will be in the hands of national Courts when national law is at stake and the ECJ when EU law is at stake.[143] Thus, as long as the underlying tax benefit is based on national law, what remains for the ECJ is to interpret the meaning of the qualifiers, i.e. the motive test and the genuineness test that – in some judications, but not in others – is needed to overcome the limiting effect of the wording. In other words, via Art. 6 ATAD, the Court can streamline the process of addressing abuse; also via the interpretation of the same conditions included in other parts of related anti-abuse regulations. It cannot, however, make a final decision on what is abuse, unless the matter is in the scope of EU law.

Given that direct taxation is still a national competence, the essence of addressing abuse in direct taxation will, hence, remain a task for domestic lawyers. However, this could change quickly, if harmonization goes forward. At this stage we urge readers to pay attention to the Commission´s ambitious "business taxation for the 21st century".[144] Neither the proposed DEBRA directive,[145] nor the proposed minimum tax directive,[146] include – such as the old tax directives – a GAAR. With the applicability of the EU general anti-abuse principle, this is also not necessary. Nonetheless, recital 6 to the DEBRA proposal it is held that the directive should subject to the application of Art. 6 ATAD.

Be it via the application of the national implementation of Art. 6 ATAD or via application of the general anti-abuse principle, the interpretation of the object and purpose of the directive will be up to the ECJ. What is especially interesting in this regard is the fact that two of the Commission's projects, so the already proposed minimum taxation directive,[147] as well as the to-be-proposed European income taxation framework,[148] include rules on the tax base. It is conceivable that the interpretation of these rules by the ECJ can have ramifications for the interpretation of similar rules concerning the national tax base.

3.4.3. Potential interaction with the Unshell directive

Apart from case law on (other) anti-abuse provisions informing the application of Art. 6 ATAD, it is also possible that other directives cast an effect on the interpretation of the ATAD GAAR. An example for this may be the proposed Unshell directive, which, amongst others, targets at denying tax benefits to companies that make use of entities having too little substance or are investments of low substance entities.[149] For this purposes, it establishes a filtering system that obliges companies meeting three gateway tests to report whether they fulfill certain minimum substance requirements.[150] In this regard the proposal sets out a list of indicators relating, for instance, to the premises of the company, its bank accounts and the tax residence of its directors or employees.[151] In case one indicator is not fulfilled, the company is considered a shell entity. The burden of proof then switches to the company, which now

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[143] de Broe & Beckers, op. cit. supra note 2. Franz, "Die Bedeutung der ATAD GAAR für § 42 AO", 56 Deutsches Steuerrecht (2018), sec. 3.5.).
[144] COM(2021)251 supra note 10.
[145] COM(2022)216, Proposal for a Council Directive on laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes of 11 May 2022.
[146] COM(2021)823, Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union of 22 Dec. 2021.
[147] Ibid.
[148] COM(2021)251 supra note 10, 11-12: "BEFIT will be a single corporate tax rulebook for the EU, based on the key features of a common tax base and 12 the allocation of profits between Member States based on a formula (formulary apportionment)."
[149] For a comprehensive discussion of the proposal, also see Pistone et al., "Abuse, Shell Entities and Right of Establishment: A Plea for Refocusing Current Proposals and Achieving Deeper Coordination within the Internal Market", 14 World Tax Journal (2022).
[150] COM(2021)565, Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU of 22 December 2021, (hereinafter, Unshell proposal). Based on Art. 6 of the proposed Unshell directive, the additional reporting requirements apply, in essence, when a company is not exempted under Art. 6(2) and (i) mainly receives passive income (ii) is mainly engaged in cross-border business and (iii) has outsourced corporate management and administration services. The exemption applies, for instance, to regulated financial undertakings.
[151] Art. 7 Unshell proposal.

needs to rebut the presumption of being a shell entity by ascertaining the commercial rationale behind the undertaking, as well as providing information on the employee profiles and evidence that relevant decision making takes place in the Member State of the shell.[152] In case this does not succeed, certain tax benefits will be denied: (i) the Member State of the source country must deny benefits resulting from tax treaties, the PSD and the IRD, which could allow it to levy a WHT;[153] and, (ii) The Member State of the shareholder is obliged to tax the income of the shell entity on a flow-through basis.[154] For both situations, the tax consequences apply notwithstanding the application of tax treaties and directives between the entities, whereby ignoring the shell company. Furthermore, the Member State of the shell company has to deny issuing a residence certificate, or, alternatively, issue such noting that the entity is not entitled to tax treaty and PSD and IRD benefits.[155]

The strongest interaction between the Unshell directive (sometimes referred to as ATAD 3) and the existing provisions of the ATAD concerns CFC rules. Literature questioned, whether meeting the minimum substance criterion in the Unshell directive should automatically be treated as qualifying for the substance carve out included in the CFC rules.[156] The latter rule equals an exemption from CFC rules, which was included in the ATAD based on ECJ case law on the freedom of establishment.[157] Given that CFC rules and the Unshell directive purse a similar goal, that is, lifting the corporate veil for direct tax purposes under certain predefined circumstances, we see good reasons for such an outcome to prevail.[158] An interesting question is whether this logic can be extended to Art. 6 ATAD as well? In other words, is the presence of enough substance for the purposes of the Unshell directive a guarantee that the ATAD GAAR cannot anymore be invoked to substance related issues? Literature argued that "insofar as the Directive reflects the Court's case law on abuse of establishment, the outcome of not being considered a shell under the Directive should imply that no abuse would be detected under any test developed on the basis of its case law."[159] We agree on that and, simultaneously, call for precision: this cannot mean that substance questions have to be, overall, assessed under reference to the Unshell directive. Rather, what matters is still the relevant law at stake. The telos of the circumvented tax increasing provision or the shopped into tax decreasing provision will tell what economic substance will fall under it and what not.[160] Consequently, when a company passes through the Unshell directive – i.e. having sufficient substance – the application of Art. 6 ATAD should not change that. On the other hand, when a company would have sufficient substance under the Unshell directive, this would not rule out the application of Art. 6 ATAD outside the focus area of the proposal. In other words, having sufficient substance under ATAD 3 cannot be considered a safe harbor for the application of the ATAD GAAR.

Prima facie it appears conceivable that also the process outlined in the Unshell directive for the provision of counterproof could have ramifications outside the scope of the directive. As mentioned above, for successfully providing counterproof, the taxpayer needs to establish a commercial rationale for the undertaking and, in addition, must provide for certain evidence on employers and decision making. In line with literature, we do not regard it to make much sense to require demonstration of substance at this stage of the analysis, given it is a lack of substance that drives the taxpayer into the

[152] Art. 8 Unshell proposal.
[153] Art. 11(1) Unshell proposal. The applicable WHT depends on the shareholder of the shell entity, provided that this is not a shell itself. See further Pistone et al., op. cit. supra note 149, sec. 7.1.
[154] Pistone et al., op. cit. supra note 149, sec. 7.2.
[155] Art. 12 Unshell proposal. See critically Pistone et al., op. cit. supra note 149, sec. 7.3.
[156] Pistone et al., op. cit. supra note 149, sec. 7.2.
[157] Most relevantly: Case C-196/04, *Cadbury Schweppes*, para. 52 et seq.
[158] Apparently also Pistone et al., op. cit. supra note 149, sec. 7.2.
[159] See Pistone et al., op. cit. supra note 149,, sec. 6.2., who correctly demand that in the rebuttal, it shall be questioned whether despite that the entity is a shell, it is not set up for tax reasons but for other commercial reasons.
[160] For this logic, see, e.g. Schön, op. cit. supra note 31; Danon et al., op. cit. supra note 68.

need to provide for the counterproof.[161] Apart from that, there are no signs that these specific procedural rules should extend to the application of the national implementation of Art. 6 ATAD.[162]

3.5. Fifth dimension – Art. 6 ATAD and state aid rules

3.5.1. Conceptual relevance of the state aid rules for Art. 6 ATAD – addressing regulatory competition

The starting point in sec. 3.4. was the common denominator of directives based on Art. 115 TFEU of aiming to improve the Internal Market. Based on the same logic one may also look into Art. 107 TFEU on the prohibition of state aid. For sure, formally these rules, being part of EU competition law, have little to do with the ATAD. However, as mentioned in sec. 2.1., the ATAD does not only aim to improve the Internal Market via providing for a minimum harmonization of anti-abuse rules, but also via providing a floor to regulatory competition that takes place via tolerating that certain taxpayers decrease their tax burden via exploiting certain tax planning channels. The prevention of harmful competition is also what state aid rules are about.[163]

To substantiate this connection, we need to consider that States compete for investment and there is strong evidence that this happens also via their tax-systems.[164] The forces at play can well be observed by the strong downward trend in general CIT rates,[165] but tax competition can also have more targeted forms. In the latter case, it is, in broad terms, typically tried to decrease the effective tax rate for the mobile tax base, while the effective tax rate on the immobile tax base is kept up.[166] This can happen via targeted tax incentives or, more discretely, by leaving open avenues for tax planning, which mainly the

[161] In more detail Pistone et al., op. cit. supra note 149.
[162] More generally on procedural autonomy, Wattel, op. cit. supra note 5, sec. 3.5.2.1.
[163] The distortion of competition is one of the constitutive elements of the state aid definition. See further e.g., S. Douma, "State Aid and Direct Taxation" in Terra & Wattel (Eds.), *European Tax Law* sec. 22 (Kluwer, 2019).
[164] Taxation can have an influence on the investment decision, especially between countries that have similar attributes. Luring mobile capital away from other states can have substantial benefits, including technological spill-overs, as well as additional revenue that is attached to the mobile capital and the increased economic activity induced by it. For instance, attracting a car-factory brings with it much more than the taxable profits attributable to it, and losing it cost more than the unemployment benefits for the redundant workforce. Further going, Keen, *"Competition, Coordination and Avoidance in International Taxation"*, 72 Bulletin for International Taxation (2018), sec. 3; Genschel & Seelkopf, "Winners and Losers of Tax Competition" in Dietsch and Rixen (Eds.), *Global Tax Governance: What is wrong and how to fix it*, ECPR Press ,2015); Zodrow, "Capital Mobility and Capital Tax Competition", 63 National Tax Journal. (2010), 866-867.
[165] Between 2000-2018, combined nominal CIT rates decreased by 7,7% (G20 average), 8,5% (OECD average), and 9,5% (EU23 average) – According to the OECD Tax Database, available at www.oecd.org/tax/tax-policy/tax-database/tax-database-update-note.pdf (accessed 28 May 2020); see also Röder, "Weltweite Mindestbesteuerung multinationaler Unternehmen? Der Global Anti-Base-Erosion-Vorschlag der OECD und seine Relevanz für das deutsche Unternehmenssteuerrecht", 97 Steuern und Wirtschaft (2020), 39-40. Data suggests that, in general, the corresponding broadenings of the tax base have not compensated for the rate reductions - so, at least with respect to the EU-15 for the time period of 1998-2017: Bräutigam, Spengel and Stutzenberger, "The Development of Corporate Tax Systems in the European Union from 1998 to 2017: Qualitative and Quantitative Analysis", 47 Intertax (2019), 536-562; See further going Kawano, and Slemrod. "How Do Corporate Tax Bases Change when Corporate Tax Rates Change? With Implications for the Tax Rate Elasticity of Corporate Tax Revenues", 23 International Tax and Public Finance (2016), 401, who, for 331 country-year corporate tax base changes during 1980–2004 in OECD countries, report 161 changes that broadened the tax base, 108 that narrowed the tax base, and 62 changes that both broadened and narrowed the tax base.
[166] A decrease of the general CIT rate may have various motives, including, for instance, the fostering of economic activity. In addition, it may, ceteris paribus, also lead to an inflow of mobile capital. However, for the sake of promoting the latter, which is a typical goal in tax policy, a general decrease in the CIT rate is hardly an optimal tool. The gains achieved in new and mobile investment are met by a mere give-away in CIT revenue on immobile and already effected investments. The factors to be considered in this trade-off are, naturally, different for different countries, and for some such a policy move tends to be more natural than for others. Compare, e.g. Schön, "International Tax Coordination for a Second-Best World (Part II)*"*, 1 World Tax Journal (2010).

mobile tax base is likely to exploit.[167] The result mirrors the existence of different CIT rates for different groups of taxpayers – despite the CIT being formally uniform.[168]

Although all Member States are necessarily exposed to tax competition pressures, it is fair to say that some Member States pay increased attention to their tax systems being competitive and enabling the attraction mobile capital. For the purposes of this article, we do not see a need to single them out; neither will we engage in a discussion on the extent to which such competition harms the Internal Market, and to what extent the ATAD remedies it. The only aspect that is of interest to us is the following:

The ATAD is an enforceable agreement not to compete by tolerating certain tax planning behavior. Member States that try to gain a competitive advantage by undercutting the rules may trigger an infringement procedure. It is, in principle, conceivable that a Member State may misapply Art. 6 ATAD, which means that it does not ignore an arrangement and therewith take away the tax benefit, in circumstances in which this should have happened. This is problematic, not only from the perspective of the harmonization, but also because it can lead to distortions to competition between taxpayers. In fact, the incorrect application or even non-application of the ATAD GAAR, ultimately, means that a taxpayer gets a benefit it is not entitled to, whilst others, doing the same, correctly, do not get it.

This is – as confirmed by the recent Engie case – a setting that is close, or almost identical with state aid procedures. The State that incorrectly leaves unapplied the national implementation of the ATAD violates the directive, which aims at prohibiting such behavior because it amounts to granting an advantage to the taxpayer that, based on the directive, should not be granted. Usually this is due to the domestic tax authorities making use of their discretionary competence in an individual situation. Likewise, incorrect non-application of a national GAAR can, as so far confirmed by the Engie case,[169] amount to state aid.

In the below, we will provide for a brief discussion of the Engie case, after which we discuss its ramifications (sec. 3.5.2). Thereafter, and intellectually more challenging, we aim to reflect on whether Art. 107 TFEU can itself have an influence on the ATAD GAAR (sec. 3.5.3). It will again be the Engie case that underlies the inquiry, because it contains a (tentative) answer to a question that has bothered the authors throughout the project: How can an EU Court assess, whether the national Court has incorrectly interpreted national law?

3.5.2. The Engie case – opening a second front for non-complying Member States?

In its 2016 Notice on the notion of State aid, the Commission pointed out that anti-abuse rules could be considered selective if they provide for a derogation, that is, non-application of the anti-abuse rules to specific undertakings or transactions, which would not be consistent with the logic underlying the anti-abuse rules in question.[170] With the Engie case such a question came up at the General Court – and the Commission´s position on the matter was confirmed.[171]

The situation, in essence, concerned the granting of several rulings by the Luxembourg tax authorities with the combined effect that a double non-taxation outcome was created within Luxembourg. In other words: Due to the use of a combination of transactions involving an interest free mandatorily convertible loan (ZORA), Luxembourg accepted an interest deduction on one side and the application of the participation exemption on the other side, all among Luxembourg resident companies. Luxembourg did not apply its GAAR to the case, which the Commission considered to amount to granting an

[167] Zodrow, op. cit. supra note 164,. 866-867.
[168] See further going Weichenrieder and Xu, "Are tax havens good? Implications of the crackdown on secrecy," 127 Journal of Economics (2019).
[169] The case was appealed to.
[170] COM(2016/C 262/01), Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, point 183.
[171] De Broe and Massant, "The General Court's Judgment in Engie: The Non-application of a National GAAR Confers State Aid", 31 EC Tax Review (2022).

unjustifiable selective benefit for the taxpayer. For this purpose, the Commission had to convince the Court that the four criteria for the application of the Luxembourg GAAR namely "*first, the use of a legal form governed by private law, secondly, the reduction in the tax burden, thirdly, the use of inappropriate legal means and, fourthly, the absence of non-tax related reasons*"[172] had been fulfilled. Without going into the substance of the case, the General Court followed the argumentation.

We are careful not to open up a separate topic, but still mention that the judgment received high attention in literature.[173] If it holds at the level of the ECJ it could mean that, on the one hand, the incorrect non-application of the national implementation of Art. 6 ATAD can trigger a state aid procedure, and, on the other hand, an infringement procedure for either the incorrect implementation of the ATAD GAAR or for structurally not correctly applying the national implementing rules for Art. 6 ATAD.[174] These procedures do not preempt each other and can operate simultaneously or alternatively.[175] Given that, as outlined in sec. 3.5.1, the objectives of the state aid procedure and the infringement procedure are aligned in this respect – both conceptually address the distortions resulting from incorrectly not applying the GAAR – it would be surprising if the outcome is different. However, it ultimately depends on the case at hand. Further research should after the final judgment was delivered take a closer look into the matter.

3.5.3. Can state aid rules inform the supervision of Art. 6 ATAD?

Having said the above, we allow to provide some reflections on what structural insights could be won from Engie for the supervision of the correct application of the implementation of the ATAD. While some elements of the ATAD GAAR, namely the motive test, as well as the genuineness criterion may be regarded as EU law concepts of which the interpretation is up to the ECJ, this is, as mentioned, principally not the case with respect to the national law that is abused.[176] This is up to the national Court. As such it is, however, also structurally difficult for the Commission to verify whether the GAAR was correctly applied or not, because it must show that the national interpretation of national law was wrong.

In Engie the Commission succeeded in this respect. Without attempting to go into the detail of the matter, this is conceptually striking, because it does, after all, require making assumptions. One can, per se, criticize this as not being in the power of the Union. On the other hand, it would appear against the idea of Art. 6 ATAD, as well as state aid rules, not to allow the Commission to scrutinize the plausibility of the respective Member States´ arguments. This topic is, again, more complex than can be reflected here. We, nonetheless, think that there is a point in questioning whether object and purpose of the law can be "in tax matters, the promotion of complex financial arrangements resulting, in real terms, in the double non-taxation of distributed income at the level of a subsidiary and of its parent company."[177] Having regard to the object and purpose of Art. 6 ATAD itself, it would not seem adequate to deny the Commission the possibility to scrutinize, on reasonably plausible grounds, whether interpretation of national law is on point. Not doing so, at least, could give the Member State too much of a leeway undercut the application of Art. 6 ATAD. On the other hand, the Commission should not

[172] Case T-516/18, *Luxembourg v Commission*, ECLI:EU:T:2021:251, para. 387.

[173] De Broe and Massant, op. cit. supra note 171, pp. 4-5; Englisch, "State Aid Prohibition: The New GAAR in Town", 30 EC Tax Rev.(2021Douma, "Staatssteunpraatjes vullen geen gaatjes!", NTFR 2018/38; Gunn, "EC bewijst dat Luxemburg met rulings onterechte staatssteun heeft verleend in de vorm van selectieve voordelen aan Engie", NTFR 2021/1883; Luja, "(Bestrijding van) misbruik van recht en staatssteun", TFO 2021/175.4.

[174] Or, as phrased by Craig and De Búrca: Even when legislation is properly implemented, a state may be held in breach if an administrative practice infringes EU law, at least in circumstances where the practice is consistent and general. See Craig and de Búrca, *EU Law* (Oxford 2011), pp. 427-428. Also see Case C-494/01, *Commission v Ireland*, ECLI:EU:C:2005:250; and, Case C-441/02, *Commission v Germany*, ECLI:EU:C:2006:253.

[175] De Broe and Massant, op. cit. supra note 1711, sec. 5; Englisch, op. cit. supra note 174, sec. 5.

[176] See, sec. 3.5.

[177] Case T-516/18 *Luxembourg v Commission*, para. 442.

be awarded too much leeway in interpreting national law either. A balance will have to be struck, whereby also the extent of the deviation may play a role.[178] We eagerly await the outcome of the appeal.

4. Conclusion

Our initial goal was to get to the ground on what we perceived as a lethargy towards Art. 6 ATAD. Does this provision, which is a seminal move in European direct tax integration, really change – practically – nothing? Or is the genie out of the bottle with the Art. 6 ATAD connecting national tax law to a wide range of constantly developing EU law concepts?

We think that both is true. Abuse of domestic tax law is, ultimately, a question of domestic tax law. As long as the underlying rules are not harmonized, Art. 6 can harmonise the process of addressing abuse, but not the result. At the same time, we discovered a wide range of ramifications of EU law onto this process. The provision does live at life on its own and with GAARs being on the gateway to the core of tax systems, it is more impactful than one may think at the outset.

[178] De Broe and Massant, op. cit. supra note 171, sec. 5; as well as, Englisch, op. cit. supra note 174, sec. 2 call for the Commission and the Court should restrain themselves to asking whether the failure to apply a domestic GAAR is manifestly erroneous or arbitrary.