A Common GAAR to Protect the Harmonized Corporate Tax Base: More Chaos in the Labyrinth

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The analysis of the general anti-avoidance tax rule in five countries of the European Union (United Kingdom, Austria, Germany, Sweden and France) shows clearly the frailty and weakness of the theoretical and jurisprudential constructions designed to fight this international problem. The research also displays a high degree of judicial discretionary, a worrying level of legal uncertainty – as a result of the introduction of tax rules linked to vague and imprecise concepts – and an inefficiency in the revenue collection unacceptable.

Furthermore, the article analyses the structure and function of the common general anti-avoidance rule (EU-GAAR) approved by the European Parliament, its scope and the problems that it's possible interaction with another anti-avoidance rules (introduced by the domestic law, community law and conventional law) could generate. The author considers that the labyrinth which derives from the principle of non-discrimination on which the ECJ is trapped is also the labyrinth on which is trapped the cross-border application of the Member States GAAR's and SAAR's. The adoption of an EU-GAAR not solves the problem and only increases the chaotic juxtaposition of ineffective anti-avoidance rules.

1 BACKGROUND AND PREVIOUS CONSIDERATIONS

The two biggest approaches around which the anti-avoidance rules debate turns (statutory general anti-avoidance rules and judicial general anti-avoidance doctrines) continue without giving us instruments able to satisfy the demands of juridical certainty with the criteria of efficiency on revenue collection. In some countries, the fight against tax avoidance has led to the 'topical' that Vieweg proposed for the problematic thoughts like a counterpoint to the streams of the Law systematization, decreasing the juridical security by way of the judicial interpretation of vague, imprecise, contradictory or incomplete tax rules. Other countries, clinging more to the systematic proposals, still continue to give unintentional shelter to abusive tax transactions. Thus, until today neither of these two approaches has been able to stop the continuous erosion of the tax revenue; on the contrary, they have contributed to seriously damaging the effectiveness of some tax systems, and also increased their instability and complexity.

According to Arnold, there is an inverse relationship between quantity and quality on what has been written about tax avoidance. This is probably an exaggeration, however, it is curious that after many years the scholars still continue to turn around the same axis and make little progress, or if one prefers, a very slowly progress. If the situation was bad, the issue is now more complex as the result of some decisions of the EU Court of Justice (ECJ hereinafter) whose language has been studied to exhaustion (‘wholly artificial arrangement’, ‘sole purpose’, ‘principal aim’ and so on), trying to find in this sort of exegetical analysis the theoretical and conceptual basis capable of revitalizing doctrines imported from private law in order to implement them in the Public Law. In other words, to condensing into one questioned European Theory of abuse of Law some

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2 The legislature and revenue authorities simply cannot keep on peace on a prospective basis with the army of tax experts continuously engaged in the never-ending design of new tax avoidance transactions. See M. McMahon, Comparing the Application of Judicial Interpretative Doctrines to Revenue Statutes on Opposite Sides of the Pond, in Comparative Perspective on Revenue Law Essays in Honor of John Tiley 74 (J. Avery Jones et al. eds, Cambridge University Press 2008).
6 See B. de la Feria, Prohibition of Abuse of Community Law: The Creation of a New General Principle of EC Law through Tax, 45
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of the solutions that the ECJ has given in some tax issues linked with the exercise of the freedoms protected by the EU Treaty.

Moreover, the imperative need of a harmonized EU Corporate Tax is also another classic theme on the European Tax Law that still does not reach fruition. From the oldest Reports elaborated by the European Commission (Ruding, Monti, Segreb, and so on) to the project of a CCCTB Directive approved with a large majority – 473 positive votes, 174 negatives and 30 abstentions- by the European Union Parliament, the Member States still cling to their own tax sovereignty as a cornerstone of their tax competitiveness.

In accordance with Protocol nº 2 on the application of the principles of subsidiarity and proportionality, the National Parliaments may, within eight weeks from the date of transmission of a draft Legislative Act (in this case the proposal of the CCCTB Directive) send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating if they consider that the draft in question complies or does not comply with both principles. In this frame, before the expiration date, Bulgaria, the Slovak Republic, Ireland, Malta, the Netherlands, Poland, United Kingdom, Romania, Sweden, Lithuania and the Czech Republic submitted their reasoned opinion to the European Parliament stating that the CCCTB Directive does not meet with the principles of subsidiarity and proportionality. In addition, the National Parliament of other Member States had taken a dubitative position and has suggested continuing to clarify many unanswered questions raised by the proposal, for example, Denmark, Belgium, Germany or Slovenia. On the contrary, many Mediterranean Member States, like Spain, Italy and Portugal expressed a positive position with the proposal. Seeking to solve two issues with one single action, the Directive draft includes a proposal for a future CCCTB-GAAR. Paragraph 1 of Article 80 of the original proposal was modified in April 2012 and we don't know yet whether it will be changed again; however, independent of its final wording, we will try to see what would happen if the European Union decides to adopt a common GAAR, or better, if this decision would be merely rhetorical or a satisfactory option.

2 OVERVIEW OF THE LEGAL AND JURISPRUDENTIAL ASYMMETRIES UNDERLYING

The CCCTB-GAAR draft cannot be analysed in an isolated manner without looking at the current rules in each Member State of the European Union. This obvious fact, would not have great significance if it were not concerning a project to harmonize only 'one of the elements' required for tax quantification (the base). Therefore it is not intended to adopt a common tax structure (as was done in the VAT) or establish a European Corporate Tax (EUCIT, in Gammie words).

This means that the Member States will continue to maintain their competencies as regards their corporate tax physiognomy (for example, if they establish different regimes for specific companies), to complete the tax quantification process (select the tax rate, choose the mechanisms to avoid domestic and international double taxation, grant tax incentives, etc.), to apply the tax itself (formal requirements and other issues linked to the tax levy administration) and, of course, to protect its own tax revenue collection. For that reason, the CCCTB-GAAR, is not and cannot be a 'general rule' but rather a 'particular rule' (although it is not a 'specific rule' as in thin-capitalization or the transfer pricing norms) because it is not applied to corporate tax as a whole but merely to one of the structural elements necessary to corporate tax quantification.

As it is not a general rule (despite its name) the Member States may continue using their anti-avoidance domestic mechanisms provided in the tax system of each one of them. Let us briefly show how tax anti-avoidance is regulated in some countries of the European Union:

1. The United Kingdom, until recently, has not had a GAAR although there are many TAARs (Targeted Anti-avoidance Rules), and this is an irony if we take into consideration the big influence of this country on the adoption of others GAARs like for example, genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts.

2. The amendment nº 28 to the Art. 80, para 1, approved by the European Parliament, establish: Artificial transactions carried out mainly for the purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base. The first paragraph shall not apply to the purposes of calculating the tax base.

3. In this article we will not discuss the problematic about specific anti-avoidance tax rules. Furthermore, only tangentially we will make reference to the links between tax avoidance and tax treaties.


5. Proposal for a Council Directive on a Common Consolidated Tax Base (CCCTB) SEC (2011) 121final (16.3.2011), Art. 80 (General anti-abuse rule): 'Artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base. The first paragraph shall not apply to the purposes of calculating the tax base.'
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Australia (one of the oldest)\textsuperscript{31} or New Zealand,\textsuperscript{16} and also Canada or South Africa.\textsuperscript{27} In fact, the debate about the adoption on a UK-GAAR has been another proof of classic tax literature on tax planning (fairness, the concept of ‘tax advantage’). As was already shown, many academics, including the same Tiley. The newly released UK ‘General anti-abuse rule’\textsuperscript{21} – in force from 17 July 2013 – has not intended to eliminate – although it might slow down – the introduction of news TAARs,\textsuperscript{22} and its scope is quite broad (income tax, corporation tax, capital gains tax, inheritance tax, petroleum revenue tax, stamp duty land tax, and the annual residential property tax). Its aim essentially consists in counteracting the ‘tax advantages’\textsuperscript{23} of some abusive arrangements, in the event that there is not a priority rule (specific rule) or when the latter is insufficient.\textsuperscript{24} Then it has priority over any other part of the legislation applying to the taxes covered by it.

The ‘tax arrangements’\textsuperscript{25} are abusive if they are arrangements the entering into or carrying out of which cannot reasonably be regarded ‘as a reasonable course of action in relation to the relevant tax provisions’, having regard to all the circumstances including: whether the substantive results of the arrangements are consistent with any principles on which those provisions are based as well as the tax policy objectives of those provisions, whether the means of achieving those results involves one or more contrived or abnormal steps, and whether the arrangements are intended to exploit any shortcomings in those provisions. Furthermore, where the tax arrangements form part of any other arrangements, attention must also be paid to those other arrangements.

Moreover, it is an indication that the tax arrangements might be abusive if the arrangements: (a) Result in an amount of income, profits or gains for tax purpose that is significantly less than the amount for economic purposes; (b) Result in deduction or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes; and, (c) Result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid. So, if the tax arrangements are abusive, the ‘tax advantages’ that would arise from the arrangements are to be counteracted by making the respective adjustments including those that impose the tax liability in cases where there would be no liability. Nevertheless, the application of the anti-abuse rule is conditional on the previous fulfilment of detailed procedural requirements including, in some cases, the opinion of the ‘GAAR Advisory Panel’ in order to see if the tax arrangement is a ‘reasonable’ course of the action in relation to the relevant tax provisions.\textsuperscript{16}

Furthermore, as we mentioned before, the U.K. have many TAARs (more than 200) and these rules are expressed in various different terms. Regarding that, Eden\textsuperscript{27} is critical and explains that: Some TAARs use the concept of ‘purpose’ to gain a ‘tax advantage’. Sometimes the rules hold if the ‘purpose’ is to obtain a reduction in ‘tax liability’ or if it is ‘tax avoidance’. In most provisions, the ‘tax avoidance’ purpose must be the ‘main purpose’ or one of the ‘main purposes’. Other times, instead of ‘tax avoidance’, the TAAR is triggered where the purpose is to create a specific tax benefit. Some TAARs look to the ‘purpose of the taxpayer’ or refer to the ‘purpose of the scheme or transaction’. On occasions, there must be a ‘scheme’ or ‘arrangement’ before the TAAR operates, in others no scheme or arrangement is required. Finally, some TAARs contain no test of

\begin{enumerate}
\item AU: Income Tax Assessment Act, 1915, Sec.53, National Legislation IBDF.
\item NZ: Land and Income Assessment Act, 1900, Sec.82, National Legislation IBDF.
\item AU: Income Tax Assessment Act, 1915, Sec.53, National Legislation IBDF.
\item UK: HMRC, A General Anti-abuse rule, Consultation document, 12 Sep. 2012.
\item UK: Finance Act 2013, chapter 29, Part 5, section 206 to 2015. National legislation IBDF.
\item In Sandra Eden opinion, although the UK does not have a GAAR, the Country has multiples TAARS (over 200 TAARs) which have similar effect to a GAAR, and in practice, there is a considerable amount of power in the hands of HMRC to regulate tax avoidance. See S. Eden, United Kingdom, in A comparative Look at Regulation of Corporate Tax Avoidance 319–321 and 323–324 (K.B. Brown ed., Springer, 2012).
\item UK: Finance Act 2013, chapter 29, Part 5, section 206 to 2015. National legislation IBDF.
\item The concept of ‘tax advantage’ includes relief or increased relief from tax, repayment or increased repayment of tax, avoidance or reduction of a charge to tax or an assessment to tax, avoidance of a possible assessment to tax, deferral of a payment of tax or advancement of a repayment of tax, and avoidance of an obligation to deduct or account for tax. Financial Act 2013, Chapter 29, Section 208. National legislation, IBDF.
\item The intention is that the UK GAAR will not apply to the centre ground of tax planning. See Clifford Chance “Tackling tax avoidance: a comparative study of general anti-abuse rules across Europe”, June 2013.
\item UK: Arrangements are considerate ‘tax arrangements’ if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one
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of the main purposes, of the arrangements. Financial Act 2013, Chapter 29, Section 207, para. 1. National legislation, IBDF.


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purpose: instead, a list of transactions is provided which would otherwise give rise to a reduction in tax.

Obviously, this normative confusion should engage with the new general ‘anti-abuse’ rule, and also with the UK tax jurisprudence. It is too early to know which new provision will engage with the control of ‘tax avoidance’ by way of the judicial doctrine (Ramsay v IRC; Furniss v Dawson; McGuchan v IRC; MacNiven v Westmoreland Investments Ltd.; Barclays, etc.), and especially how and to what extent the premises of the case IRC v Duke of Westminster will affect it. According to this important case, in applying tax legislation to the facts, the Courts must have respect for the legal rights the parties have created, even if those rights were created for tax avoidance purpose.

In any case, the Financial Act 2013 stated that in determining any issue in connection with the general ‘anti-abuse rule’, the Court or Tribunal must take into account the guidelines approved by the GAAR Advisory Panel and their opinion about the arrangement. However, as indicated by either Tiley, the nature of Common Law is such that the process of development of judicial doctrine is anything but smooth and much depends on the nature of the case, the Court and the particular judges. We have to wait in order to see if this ‘anti-abuse rule’ has been able to confront avoidance schemes as specific forms of abuse or not.

2. In Austria, the Bundesabgabenordnung contains a General anti-avoidance rule in Article §22 together with the economic approach lay down in Article §21, both provisions are included in the ‘substance over form’ section (Wirtschaftliche Betrachtungweise).

Despite the freedom of taxpayers to arrange their matters in a tax efficient manner, the §22(1) BAO provides that abuse of legal forms and arrangements under Civil Law cannot ‘reduce or circumvent tax liability’. If such abuse exists, under §22(2) BAO taxes must be levied in accordance with a legal structure appropriate to the economic transactions, facts, and circumstances.

Moreover, the interpretation of §22 BAO have resulted in two main schools of thinking. The prevailing opinion in legal scholarship argues that §22 BAO is merely an expression of an economic approach of taxation, leading to a specific focus on systematic and teleological interpretation (so-called Aussentheorie). Under this view, §22 BAO really adds nothing to the principles of income attribution, which are already based on an economic concept that applies independently to the formal structuring of a transaction.

Most academics believe in a less strict adherence to the wording and argue for a rather systematic and teleological interpretation. According to this approach, the §22 BAO does not have a normative meaning of its own, but is used only as a reference for interpretation. Furthermore, §22 BAO is closely linked to the ‘economic approach’ of §21 BAO. In other words, that means that abolishing §22 BAO without substitution would not have any normative consequences.

The contrary position is taken by the Austrian Tax Administration and Austrian Courts, interpreting §22 BAO as a provision that explicitly allows taxation of a hypothetical transaction and has to be applied to supplement the attribution of income principles (so-called Aussentheorie). Thus, even if on a first level income were attributed to one taxpayer under general principles, §22 BAO might allow for reattribution of income to another taxpayer on a second level if a tax planning structure or series of transactions was unusual, inadequate, and solely aimed at tax avoidance, for example, where no non-tax reasons for a specific structure or transaction existed and it could only be explained for the purpose of avoiding Austrian taxes.

On the other hand, some scholars like Obermair and Weninger believe that the Austrian Tax Authorities are holding onto the Aussentheorie, which

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28 UK Inland Revenue Commissioners v Duke of Westminster 19 TC 490 [1936], National Case Law IBDE
31 AT §22 BAO: (1) Durch Mißerbruch von Formen und Gestaltungsmöglichkeiten des bürgerlichen Rechtes kann die Abgabepflicht nicht umgangen oder gemindert werden. (2) Liegt ein Mißerbruch (Abs. 1) vor, so sind die Abgaben so zu erheben, wie sie bei einer den wirtschaftlichen Vorgängen, Tatsachen und Verhältnissen angemessenen rechtlichen Gestaltung zu erheben wären. National Legislation IBDE
32 AT §21 BAO: (1) Für die Beurteilung abgabenrechtlicher Fragen ist in wirtschaftlicher Betrachtungsweise der wahre wirtschaftliche Gehalt und nicht die äußere Erscheinungsform des Sachverhaltes maßgebend. (2) Vom Abs. 1 abweichende Grundsätze der Abgabenordnungen bleiben unberührt. National Legislation IBDE
34 See G. Kofler, note 33, p. 210 et seq.
36 See G. Kofler, Austria, in Conflicts in the attribution of income to a person, Cahiers de Droit Fiscal International Vol. 92B at 89 (Kluwer International Law 2007).
37 See W. Gassner, Austria, in Form and substance in Tax Law, Cahiers de Droit Fiscal International Vol. 87A at 119 et seq. (Kluwer International Law 2002).
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means that taxation can be based separately on §22 BAO in addition to other tax provisions. According to this focus, §22 BAO has to be seen as a separate legal basis for taxation, to be applied in addition to other substantive provisions of Tax Law. Its applicability is dependent on whether or not the definitional element of abuse according to of the §22 BAO is fulfilled. This happens when a construction is to be considered abusive, that is, if it is unusual and inadequate and solely aims at tax avoidance. Of course, this perspective involves some difficulties at the time of qualifying a legal construction as ‘unusual’. In any case, the Aussentheorie has a clear impact in the Austrian Administrative Court’s jurisprudence, though the Innentheorie can be found in some decisions as well. For example looking at the Dublin Docks (I and II), Hong Kong and Jersey (I) cases, in relation to which the Austrian Supreme Administrative Court has taken the position that shifting income to a foreign subsidiary for tax saving and without a valid non-tax reason is abusive under §22 BAO and that income will be reattributed to the Austrian shareholders, irrespective of whether an applicable Tax Treaty contains an explicit anti-abuse provision or whether a company resident in another EU Member State is concerned. Likewise, in the Jersey (II), Guernsey (I and II), and Luxembourg cases, the Court applied the §22 BAO in order to make a reattribution of income in cross-border transactions. From the point of view of the Court, Austria is entitled to protect itself against the unjustified use of Tax Treaties and the mere existence of a Treaty will not restrict the application of domestic anti-abuse provisions.

3. As in other countries, in Germany it is easy to distinguish between tax evasion or Steuernachrichtung (illegal means of reducing the tax payable) defined in the §370.1 of the Abgabenordnung (German General Tax Code) and ‘tax mitigation’ or Steuerberatung (the taxpayer is free to alleviate his liability for tax), expressly allowed by the Federal Constitutional Court since 1959. However, it is not so easy to draft the precise cross-borders differences between ‘tax mitigation’ (legitimate transaction) and ‘tax avoidance’ or Steuerumgehung (characterized by abuse).

For more than ninety years the German Tax Law included a ‘General anti-avoidance rule’ whose roots are found in the §5 of the Reichsabgabenordnung or RAO (General Tax Code of the Reich) enacted in 1919. The first version of the §42 Abgabenordnung (AO) of 1977, headed ‘abuse of legal arrangements’, established that it shall not be possible circumvent tax legislation by abusing legal options for tax planning schemas; and, if there is such an abuse, the taxpayer shall be taxed as if he had chosen an adequate legal arrangement. The problem was that it was left to jurisprudence to define the term ‘abuse’ and this issue significantly facilitated tax avoidance. The Courts have failed to perform this task, and thus for example, according to the judgments of the Bundesfinanzhof, the General anti-avoidance rule has not been applied alongside the targeted anti-avoidance rules. As a result of the above, the Legislator tried to counteract this case law by adopting the §42.2 Abgabenordnung to allow that the GAAR should apply ‘unless its applicability was expressly excluded by law’.

Thereafter, the Jahressteuergesetz of 2008 (Annual Financial Law) introduced a new GAAR with a legal

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33 See G. Koller, Austria in Tax treaties and Tax avoidance provisions, Cahiers de Droit Fiscal International Vol. 95A at 102 (Kluwer International Law 2010).

41 DE: Bundesverfassungsgericht [BVerfG], 14 Apr. 1959, 9 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 237 (250) National Case Law, IBFD.


definition of ‘tax abuse’ as a clear signal of the legislature’s distrust in Tax Jurisprudence, especially because, for a long time, the GAAR was not applied in such a case in the field of Corporate Tax Law.\textsuperscript{50} However, some scholars\textsuperscript{51} believe that the main reason for the amendment of §42 AO was to try and resolve a long-term controversy between the Bundesfinanzhof (Federal Tax Court) and the Tax Authorities regarding the relationship of §42 AO and the special anti-avoidance provisions, particularly CFC rules. In that sense, under the new §42 AO, Paragraph 1, special anti-avoidance provisions always have to be tested as a first step.\textsuperscript{52} Only if no such special anti-avoidance provision applies, a transaction is tested against §42 AO, Paragraph 2.\textsuperscript{53}

Regardless of the above, the new GAAR has been subject to serious criticism. According to the wording of the original draft, an abuse would be deemed to exist where an unusual legal structure which leads to ‘tax advantages’ was selected; however due to the objections raised by the German Association of Tax Advisers, the Finance Committee of the Bundestag changed the definition of abuse and replaced the term ‘unusual’ by ‘inappropriate’ with the Parliament approval. So, the Bundesfinanzhof has established that the word ‘inappropriate’ describes any legal structure where two unrelated and reasonable parties would not have chosen to achieve a specific business goal. In essence, inappropriate structures are, in the view of the Court, ‘complex, complicated, and artificial’.\textsuperscript{54}

In any case, the burden of proof as to whether or not a structure is inappropriate rests with the Tax authorities in that it must compare the ‘tax consequences of an appropriate structure’ with the ‘tax consequences of an inappropriate structure’. However, once the authorities find a structure inappropriate, the burden of proof rest with the taxpayer who must give and prove the existence of relevant non-tax reasons for the selected structure. If the latter results in a tax advantage for the taxpayer or a third party, the tax authorities must further examine whether or not this tax advantage is stipulated for the particular applicable provision.\textsuperscript{55} In that context, some scholars think that the legal definition of the term ‘abuse’ in the new §42 AO seems like a capitulation as to providing one since ‘nobody knows which tax advantage is “unintended” by the law’.\textsuperscript{56}

4. The first Swedish GAAR appeared in 1980 after a long and intense debate that had lasted for more than fifty years. The Law has since then been a topic of much controversy and it was in fact abolished between 1 January 1993 and 1 July 1995. The official Reports and the changes of the Law were many, and the Law was criticized severely. Some scholars\textsuperscript{57} maintained that the Law was not efficient, that it was not in accordance with the Rule of Law, or that it was unnecessary. On the other hand, the advocates of the legislation claimed that the GAAR was necessary for preventive reasons and to avoid the need for repetitive patching of the Tax System to counteract new types of tax planning. Despite of all of this, the GAAR was reintroduced in 1995 and since then has been amended, the last time in 2011.

Its Tax Law (Lag 1975:575) modify by the Lag 2011:1372) allows to the Swedish Tax Agency and the Courts to disregard for tax purposes any transaction which meets all of four criteria: (a) the transaction is part of a procedure which renders the taxpayer a substantial tax benefit; (b) the taxpayer has been involved in the transaction, (c) the ‘tax benefit’ can be expected to have been the predominant reason for the procedure; and (d) recognizing the transaction for tax purposes would be in violation of the spirit or purpose of the law.\textsuperscript{58}

Nevertheless, the Tax Agency (Skatteverket) cannot apply the anti-avoidance rule on its own accord,\textsuperscript{59} on
the contrary, it has to request the Courts to do so. Although there is some controversy as to the extent and existence of the substance over form doctrine, it is clear that the Courts are not limited by the formal structure of the transaction, and are in a position to disregard entirely documents and transactions that are mere shams or pseudo-events.

The applicability of the GAAR implies that a transaction may be disregarded for tax purposes. According Gustafsson Myslinski, if the rule is applied, three different possibilities for assessment exist: (1) The taxpayer will be assessed as if the transaction had not been made; (2) If the scheme appears to depart from the normally expected procedure to achieve the same economic result – apart from the tax benefit – the taxpayer will be assessed according to such procedure; or (3) if it is not possible to make an assessment of tax according to the above two alternatives or the result of such an assessment is unreasonable, the basis for assessment shall be reasonably determined.

Moreover, Swedish Tax Law counteracts tax avoidance not only with the GAAR but also with the substance over form doctrine. Both concepts are applicable in purely domestic as well as international contexts. In this respect, the application of the GAAR in an international situation has been examined for the Supreme Administrative Court, for example, in a case concerning transactions below market value between an individual and a foreign entity and in other cases concerning the ownership of private companies via non-Swedish unit linked insurance arrangements. The doctrine also was invoked by the Sweden Tax Agency in the Trebolit case regarding an assignment of shares by a foreign entity.

On many occasions, the Court had used the look-through approach (genomsyn or verklig innebörd), declaring the transactions valid according to Private Law but making a recharacterization on account of the tax effect, which was considered to be in conflict with the object and spirit of the Tax System. Also, the Supreme Administrative Court has indicated that taxation must be based on the true meaning of all contracts involved in a transaction and cannot be based on fictitious contracts. Despite the above, the status and scope of the substance over form doctrine in Swedish Tax Law is not entirely clear, and is constantly subject to debate.

In France, the principal statutory anti-abuse provision is the general rule of abuse of law (abus de droit) regulated by section 64 of the Livre des Procédures Fiscales (LPF) (amended in 1982, 1987, 2004, 2008 and 2009). The abuse of droit may apply to both domestic and international arrangements and since its encoding –by the Law of 13 of January of 1941- its scope has been extended notably by the Conseil d’Etat (the Supreme Administrative Court in France).
France regarding matters of direct taxation) case law\textsuperscript{72} and nowadays is the favourite tool available to the French Tax Authorities at the time of questioning cross-border transactions.\textsuperscript{73} This often covers the majority of French taxes like transfer taxes (registration duties and land registration taxes), taxes on transactions, wealth tax, business tax, and of course, taxes on profits and income.\textsuperscript{74} Well know Civil Law academics defined the ‘abuse of rights’ as ‘the use of a right to an end that is contrary to that defined by the legislator’.\textsuperscript{75} In that context, the two basic elements that are characteristic of such an ‘abuse of rights’ (abuse de droit) have emerged from French Civil Law theories: an objective element, for example an abnormal or excessive use of a right, and a subjective or intentional element, which is often inferred from the presence of the first.\textsuperscript{76} Moreover, French Law uses the term ‘abuse de droit’ when referring either to an abuse of private rights or to avoidance of the Law. However, when referring to avoidance of the Law, it may be more accurate to use the term ‘fraude à la Loi’.\textsuperscript{77}

Originally, the abuse de droit was applied by Gallic Courts only to fictitious arrangements; however after 1981 the Conseil d’Etat has determined that the ‘abuse of Law’ may also apply to transactions which, without being fictitious, were designed solely to avoid tax.\textsuperscript{78} De Broe et al\textsuperscript{79} explain that under the French Tax Law, the abuse de droit may include not only fictitious acts and sham transactions, but also acts that comply with the letter of the Statute but defeat its purpose, as they are made for the sole purpose of reducing the normal tax burden.\textsuperscript{80}

In that context, Article 64 LPF allows the French Tax Authorities to challenge any arrangements which are either fictitious or genuine but designed solely to avoid or evade tax liability that would have normally been borne.\textsuperscript{81} Furthermore, in order to establish to a certain degree the taxpayer’s protection, it is possible, before the tax is collected, to refer the issue to the Conseil consultatif pour la répression des abuse de droit (CCRAD) whose decision alters the burden of proof; nevertheless, if the taxpayer is found to have committed an abuse of rights, they can impose a penalty equal to 80\% of the additional tax assessment.\textsuperscript{82}

Moreover, the abuse of law does not mean that the taxpayers cannot structure actual transactions in a tax efficient manner; on the contrary, a taxpayer may seek to tax plan if transactions are real with a business purpose, even if this is secondary. The French Court has repeatedly held that Article 64 LPF does not prohibit the taxpayer from choosing the legal form that he considers more favourable from the tax point of view to achieve a specific operation. Opting for the most advantageous tax treatment does not mean an abuse of law if the legal acts on which it is based are true and genuine.\textsuperscript{83}

In the Janfin case\textsuperscript{84} relating to tax credit arrangements, the Conseil d’État extended the meaning of the abuse of law concept.\textsuperscript{85} At this time, it could only apply to abusive transactions aimed at reducing the taxpayer’s taxable income and not, for instance, to tax credit transactions\textsuperscript{86} which do not permit to reduce the taxable base. The Court held that the Tax Administration could disregard an action with legal consequences on the basis of the general abuse of law principle in situations where the specific provision of section 64 LPF could not be applied. In other words, the general principle, which is based on case law, could be applied if the sole purpose of the transaction was to benefit from the literal application of legal provisions in order to ‘avoid or diminish a tax burden’. To invoke this general principle, the Tax Administration must establish that the transaction or act has a fictitious character.\textsuperscript{87}

The above mentioned case involved a certain type of transaction, called ‘transaction around the coupon’ (opération autour du coupon), which was quite common when the avoir fiscal tax credit still existed. According to the facts of the case, the transaction was part of aggressive tax plan because the company, having liquidated almost all its assets had substantial amounts of cash available. The Janfin shares were


\textsuperscript{75} See Leqlerq, note 74, p. 235.


\textsuperscript{77} See Austry & Collet, note 73, p. 314.

\textsuperscript{78} FR. Conseil d’Etat, 10 Jun. 1981, case no. 19079. National Case Law, IBFD.

\textsuperscript{79} See Leqlerq, note 74, p. 235.

\textsuperscript{80} See H. Leherissel, France in Form and substance in Tax Law, Cahiers de Droit Fiscal International, Vol. 95A at 311 (Kluwer Law International 2010).

\textsuperscript{81} See Leqlerq, note 74, p. 235.

\textsuperscript{82} See Austry & Collet, note 73, p. 314.

\textsuperscript{83} See Prebble et al., note 77, pp. 23–24.
acquired by another entity of the same group, which used the first company as a vehicle for financial transactions whose returns were basically tax-related. So, the taxpayer bought shares for a value of 100 just a few days before the company was to pay a dividend of 20, thereby generating an *avoir fiscal* tax credit of 10. After the dividends were paid, the shares were resold for eighty. From a financial standpoint, therefore, the operation was neutral but from a tax standpoint, the company used the *avoir fiscal* tax credit to pay the corporate tax it owed on its other operations during the same financial year.88

According to the French Court, the Tax Authorities are empowered to challenge instruments which, seeking the benefit of a literal application of the laws to the detriment of the objectives sought by their makers, could not have been motivated by any purpose other than that of escaping or reducing the tax liability which, but for these instruments, the interested party would normally have borne in light of its actual situation and activities. In that sense, in reality the French Court extended the meaning of Article 64 LPF and strengthened the conditions under which a transaction should be found abusive.

Indeed, the two traditional tests were that the arrangement under review was either fictitious or established solely for the purpose of reducing the taxpayer's taxable base. Even if the first test continued uncontested, the *Conseil d'Etat* expressly indicated that the second one is fulfilled only if, in addition to being solely motivated by a tax purpose, the 'tax benefit' sought result from a literal application of a rule that is in contradiction with its author's objectives.89 Thus, a transaction should not be considered abusive even if it seeks only a tax benefit that results from a fair application of French Tax Law.

In this context, since 2009 there are two alternative criteria for identifying the abuse of law under the French anti-avoidance rule: (1) A purely objective one: the legal arrangement is 'fictitious' or 'artificial'; and (2) A more subjective (or hybrid) the second, generally referred to as *fraus legis*: the sole motivation of the legal arrangement is to avoid or reduce the tax burden of the taxpayer and, in addition, the taxpayer seeks to benefit from a literal application of legal provisions or decisions in contradiction to the objective set forth by the legislator.

Some scholars like Robert and Tof90 believe that the notion of substance is reflected in either of these two-mentioned criterion. For example, under the 'artificiality' criterion, the Tax Authorities will have to demonstrate that a based-company located abroad is purely artificial due to lack of substance in the host State. Under the *fraus legis* criterion, it is obvious that any lack of substance in the foreign-based Company will also support a determination that the taxpayer seeks to benefit from a literal application of the legal provisions in contradiction to the objective set forth by the legislator.

Nonetheless, the substance requirement has only recently been integrated into French positive Law. Even if it has never been codified, as such, by Statute, the concept has been deduced from the wording of certain anti-abuse provisions91 like the same Article 64 LPF which empowers to French Tax Authorities to disregard any legal arrangement that is 'artificial' or 'seeks to benefit from a literal application of legal provisions or decisions in contradiction with the objective set forth by the author of such provisions and, thus, motivated by the sole purpose of avoiding or alleviating the tax burden of the taxpayer'.92

It is, therefore, agreed amongst French practitioners that the concept of substance is a negative concept, that is, a *contraire* definition of the notion of 'artificiality': the absence of the former constitutes a conclusive indication of the characterization of the latter.93 In that context, Fouquet, a prominent Judge in France, considers that, 'a structure lacks substance if it is based on an artificial arrangement which is not justified by any economic reason'. In other words, in contrast to the concept of 'artificiality' (or fictitiousness), the 'substance threshold' was indirectly devised under the French legal order by the action of the Judge.94

Thus, for example, the substance requirement had a significant application in the *Pléiade* case95 concerning a foreign resident Company that held a percentage of shares in a Luxembourg 1929 Holding Company with the assistance of a Luxembourg Bank and a subsidiary of this Bank in the Cayman Islands. The shares of the French Company were sufficient to demonstrate that a based-company located abroad is a significant application in the CFC regime (in respect of the dividends received) and to fall outside of the scope of the existing CFC regime (in relation to the profits derived by the Luxembourg Company).

The Tax Authorities looked through the base company and denied the participation exemption

88 See *Leqlerq*, note 74, p. 235
91 See note 69
92 See E. Robert & D. Tof, note 100, p. 436
93 See O. Fouquet & C. Charpentier, LBO et abus de droit, 15 Droit Fiscal 41 (2011)
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regime on the ground of the GAAR. The taxpayer claimed that the structure was motivated by valid business considerations, such as the more flexible terms and lower brokerage fees available in Luxembourg; however, the Court decided that the holding company situated in Luxembourg ‘was devoid of substance’. The factor that convinced the Court was that the activities transferred to the Base Company in Luxembourg (i.e. assets, functions and risks) were controlled and partly administered by third parties (i.e. the Luxembourg Bank and its Cayman Islands subsidiary). In a similar way, in the Sagal case96 the French Supreme Court considered that a Luxembourg Company did not have any substance based on legal (the shareholders were not present during the statutory meetings) and economic considerations (the structure was under the dependence of a Bank, the structure had no independent technical competence and no independent management justifying its intermediation). The Conseil d’Etat ruled that a Company cannot be formed solely for tax purposes, where it lacks substance corresponding to the economic reality. Additionally, in this decision, the Court had also to address the issue of the abuse of law restricting freedom of establishment within the EU. From its point of view, since the abuse of law was only designed to prevent a purely artificial arrangement, this objective could justify the restriction of freedom of establishment in the EU because tax avoidance can be considered an overriding justification for public interest reasons.37

In a reverse situation but always linked with the substance requirement, also is relevant the Alcatel CIT case98 regarding a French holding Company that increased the share capital of its Belgian subsidiary that was acting in the Host State as a Coordination Centre for the group. The cash so contributed was subsequently made available by the Belgian subsidiary to other entities of the group by way of loans. After that, the Belgian subsidiary distributed to the French Holding Company the interest received from the other members of the group. This investment structure, permitted the repatriation on of foreign-source passive income into France and applied two successive exemptions: (a) for the interest derived from the financial activities at the level of the intermediate Company (by virtue of the Coordination Center regime in Belgium), and (b) for the dividends received at the level of the Holding Company (by virtue of the participation exemption regime in France). The Tax Authorities tried to deny the application of the participation exemption because they considered that the intermediate Belgian subsidiary was solely used to convert foreign-source taxable interest into foreign-source exempt dividends and, as such, it was abusive. However, the Supreme French Court rejected this claim on the ground that the Belgian subsidiary was able to prove a minimum level of substance in the Host State by way of the existence of staff assigned to the entity (forty-eight employees) and the existence of a genuine economic activity (finance pooling and hedging functions were effectively performed by the foreign entity for other members of the group and that economic activity generated a significant amount of turnover). In this opportunity, the level of substance precluded the equity-capital increase provided by the French Holding Company from being viewed as a purely artificial arrangement that could fall under the GAAR.

In summary, the application of the anti-avoidance rule in France depends on a case-by-case analysis99 and on whether the French Tax Authorities are able to demonstrate the artificiality and/or a lack of substance in some controversial arrangements. Obviously, identify if a transaction is substantial not always is a easy work because which some French scholars marks, there are as many ‘substances’ as there are ‘types’ of Companies.100

3 INTERACTION BETWEEN A COMMON GAAR AND DOMESTIC GAARS

3.1 Tótum Revolútum of GAARS

Article 115 of the Treaty on the Functioning of the European Union (TFUE) requires unanimity among Member States for the adoption on a legislative measure like the CCCTB Directive. Complying with this requirement is simply unrealistic because some Member States do not want to concede more of their sovereignty to the European Union. This being the situation, some Member States could adopt the CCCTB Directive under the enhanced cooperation procedure101 according to

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97 The French Court considering that the application of Section 64 Livre des Procédures Fiscales (20 Dec. 2012) ‘is strictly limited to cases in which the tax authorities have demonstrated that the instrument through which a taxpayer establishes itself abroad is of a fictitious or artificial nature or, failing which, could not have been motivated by any other purpose than that of escaping or reducing the tax liability which, but for this instrument, the interested party would normally have borne in light of its actual situation and activities; that, in light of the objective sought, which specifically consists of excluding purely artificial schemes whose sole aim is to circumvent French tax law from the benefit of favorable tax provisions, as well as the conditions of their implementation, the above-cited provisions of Article L 64 of the TPC cannot be regarded as imposing a restriction on the freedom of establishment.’
98 FR: Conseil d’Etat, 15 Apr. 2011, case no. 322610, 862 (Alcatel CIT) National Case Law, BDF.
99 See Austry & Collet, note 73, p. 317.
100 See Robert & Tol, note 90, p. 443.
101 See L. Bettendorf et al, Corporate Tax Consolidation and Enhanced Cooperation in the European Union, Oxford University Centre for
Articles 326 to 334 TFUE. If this possibility becomes effective, ‘CCCTB jurisdictions’ and ‘non CCCTB tax jurisdictions’ would coexist. On the other hand, even if one Member State agrees to adopt the CCCTB Directive, the regime is optional for its resident Companies and for some of the PEs operating in its territory. This means that ‘companies and PEs that opted to be out of the CCCTB regime’ and ‘companies and PEs that opted to be in the CCCTB regime’ would also coexist.102

In this possible context, the application of the CCCTB-GAAR would become very problematic because, on the one hand, the Companies and PEs conduct their transactions and commercial relations not only with Companies and PEs who choose to be in the CCCTB regime but also with Companies and PEs who choose to be out of the CCCTB regime; and on the other hand, these Companies will perform their activities not only with Companies and PEs situated in CCCTB jurisdictions but also with Companies an PEs situated in non-CCCTB jurisdictions. Obviously, for dogmatic, technical and operative reasons it is not possible to cut up and separate the CCCTB-GAAR application. The complexity of the business activity that characterized globalization economy could make these rules inefficient.

The European Commission has not indicated if the CCCTB-GAAR would apply in the same way to non-CCCTB Member States and some scholars believe that is necessary to clarify this issue first.103 In reality the project of the Directive assumes that the twenty-eight Member States would adopt the CCCTB and today this is unrealistic. Moreover, the draft of CCCTB-Directive neither expresses a hierarchy between the CCCTB-GAAR and the CCCTB-SAARs like the CFC rules, thin capitalization and other rules regarding the interest deductibility, switch-over clauses from exemption to credit system, rules to avoid double deductions (double dips) in a sandwich situation, rules to re-characterize the sale of shares as the sale of assets in order to avoid the abuse of the consolidation rules and so on.

Some CCCTB preparatory works, like the CCCTB/ RD/004104 do not include any discussion on how these rules were to apply to Companies in a Member State that opted to be out of the CCCTB, nor was there any debate about the potential overlap between domestic anti-avoidance rules and CCCTB-GAAR. Nevertheless, in a previous document, the European Commission indicated that ‘establishing only a general anti-abuse rule would provide Member States with a flexible tool to combat abusive practices, but at the same time it may be a difficult provision to apply, it could be understood differently in different Member States, and it could therefore introduce uncertainty’, and for this reason, ‘if the CCCTB-GAAR is established in combination with other more specific anti-abuse provisions (thin capitalization, switch over, CFC...) the immediate question will be the scope that this general anti-abuse rule has’.105

As if this were not enough, the future of the hypothetical CCCTB-GAAR will overlap with another GAARs that exists in the secondary EU legislation like the specific provisions included in the EU Merger Directive, the Parent-Subsidiary Directive or the Interest and Royalties Directive; and also with the ECJ case law concerning the interpretation of the mentioned Directives (for example, cases like Leur-Bloom,106 Kofed,107 A T,108 Zwijnenburg109 or A Oy110 regarding the EU Merger Directive). In spite of that, neither these Directives nor the ECJ case law nothing say anything about exactly what we should understand for ‘tax evasion’ or ‘tax avoidance’, instead of that, the ECJ talks of ‘abuse’, ‘abuse of rights’ and ‘abusive practices’ that seem to cover ‘avoidance’ and ‘evasion’.111

Moreover, the CCCTB-GAAR is completely different from the anti-abuse rules that we find in the various Tax Directives;112 indeed, its immediate consequences consist of ‘ignoring’ the transactions whilst the EU Merger Directive says that the Member State ‘may refuse to apply or withdraw the benefit of all or any part of the provisions’, the EU interest and royalties Directive indicate that the Member States may ‘withdraw the benefits of the Directive or refuse to apply the Directive’, and the EU Parent-Subsidiary Directive establish that the Directive ‘shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse’. Obviously the EU Tax Law uses different terms with unclear limits instead of clear

102 In the Commission Services view a combination – between GAAR and SAAR – would provide the Tax Administrations with easily and straight forward specific rules to combat specific and well known cases of abuse and a general rule could be applied to combat possible abuse that was not foreseen when designing the common rules. European Commission, Directorate General Taxation and Customs Union, Common Consolidated Corporate Tax Base Working Group (CCCTB WG), Anti-abuse rules, CCCTBWP/09/Doc/en (26 Mar. 2008) p. 3
103 NL. ECJ, 17 Jul. 1997, Case C-28/95 A. Leur-Bloom v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, ECJ Case Law IBFD
104 NL. ECJ, 5 Jul. 2007, Case C-321/05, Hans Marcus Kofed v Statteministeriet, ECJ Case Law IBFD
106 NL. ECJ, 20 May 2010, Case C-352/08, Modhus A. Zwijnenburg BV v Staatssecretaris van Financien, ECJ Case Law IBFD
107 NL. ECJ, 19 Jul. 2012, Case C-48/11, Vereeniging Oudeherdenvantoulhuibv v A Oy, ECJ Case Law IBFD
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definitions, and in the same context, for example, the CCCTB 'anti-abuse rule' designed to prevent 'avoiding taxation' increases a legal promiscuous terminology as if the latter were an expression or variety of the first, or better, in order to indicate that Article 80.1 of the CCCTB Directive project doesn't cover all types of artificial transactions, for example, it cannot include any provision to prevent the manipulation on the apportionment of the consolidated tax base.

Beside the above, the twenty-eight Member States have their own double Tax Treaties net with countries that are in and outside the European Union. Even now, the lack of political will is also expressed in the lack of a Common Model of double Tax Treaties to allow a certain degree of harmonization of the current conventional rules. At the present, according to a recent OCDE study there are more than 3,000 bilateral Tax Treaties which help to encourage the cross-border avoidance and an relevant part of these Tax Treaties are signed between EU countries or are signed between Member States of the EU and third countries. In any case, relatively few Tax Treaties contain general anti-avoidance rules. However many Tax Treaties contain specific anti-avoidance rules and the problems related to the interaction of the Tax Treaties with the domestic anti-avoidance rules or with respect to the interpretation of the Tax Treaties itself, are frequent.

In order to solve this typology of juridical problems the OECD Commentaries have a fundamental role, specially part E (intended for the improper use of the Convention) included in the Commentary on Article 1 that starts by saying 'it is also a purpose of tax Conventions to prevent tax avoidance and evasion' (Article 1, §7). Obviously, despite the fact that the purpose of these agreements is to cut and limit the tax avoidance, an important number of indicators show that the tax practices of some multinational companies have become more belligerent so much that the OCDE itself has an 'aggressive tax planning directory' with more than 400 schemes that often use Tax Treaties to take advantage of the asymmetries between domestic and international tax rules. We will not deal with this issue because it is not the subject of this article but we want to highlight a future overlap among the CCCTB-GAAR and the application and interpretation of the conventional rules.

This shows that in order to fight tax avoidance, Member States of the EU could apply domestic GAARs and SAARs, specific anti-avoidance rules included in their Tax Treaties, GAARs included in some EU Directives and the hypothetical CCCTB-GAAR. Further, more as in many cases avoiding or circumventing the tax rules entails interpretative issues, the Member States will also have to take into account a judicial approach, that is, the ECJ case law, the jurisprudence of each of the twenty-eight domestic Tax Courts, international and relevant case laws, and other hermeneutical tools. The problem is the overlap and friction between this GAARs and SAARs cocktail characterized by vague concepts, confused terminology and unsatisfactory jurisprudence, which generate different solutions in each one of the Member States and the fact that it generates uncertainty in taxpayers that are seeking tax mitigation instead of tax avoidance. Nor do we understand the current levels of base erosion and profit shifting (BEPS) that frighten the G-20 with all this authentic arsenal of GAARs and SAARs . . . obviously, this puzzle of rules is unsatisfying, expensive, problematic and inefficient.

3.2 Structure and Function of the CCCTB-GAAR

The CCCTB-GAAR has been designed like an ‘anti-abuse rule’ which applies in ‘artificial transactions’ carried out for the sole purpose of ‘avoiding taxation’, in which case the transaction ‘shall be ignored’. Some scholars have emphasized that it is not a typical GAAR and could do more harm than good, as it doesn’t seem to be a very powerful provision in terms of putting limits on taxpayers who want to reduce their tax burden, is problematic, and superfluous. In fact, the purpose of any GAAR is to promote taxation in accordance with the purpose of a Tax Law and, in order to do so, facilitate for Tax Law purposes the reconstruction of the true dealings. Thus, it is inconceivable that other areas of potential abuse (distinguishing debt from equity, timing differences between corporate reductions, indirect transfer of unrealized gains or losses, crystallization of losses trough disposals to associated entities, etc.) are not foreseen.

Obviously, from the perspective of a typical GAAR, the term ‘artificial’ looks inadequate because most GAARs are trying to apply their provisions to ‘authentic’ transactions whose tax consequences are the ones that

112 See Lang, note 112.
113 OECD, Addressing Base Erosion and Profit Shifting 8 (2013).
114 In relation to the changes were made in 2003 to the Commentary on Art. 1 of the OECD Model Tax Convention on Income and on Capital which deals with the improper use of double tax Conventions see C. Elliffe, Cross Border Tax Avoidance: Applying the 2003 OECD Commentary to Pre-2003 Treaties, British Tax Review 3 (2012), p. 307 et seq.
116 OECD, note 115, p. 15.
118 P Harris believes that the three core elements of a typical GAAR are a reference to legislative intent, abuse by the taxpayer and a counterfactual comparison. See Harris, note 119, p. 279.
119 See Harris, note 119, pp. 271–279.
the taxpayer wants to elude by circumventing the Tax Law. That is to say that the GAARs apply not only in false situations (for example, nonexistent corporate losses) but also in real situations (like, corporate losses overvaluation). On the other hand, in our opinion, the taxpayer purpose of ‘avoiding taxation’ is not the object of the CCCTB-GAAR but rather the effect derived from the misuse or abuse of the EU freedoms. The CCCTB-GAAR is not intended to combat the tax avoidance in the EU, among other things, because the EU cannot do it because the proposal of the CCCTB Directive does not harmonize ‘any tax’ (only the base) whose avoidance is necessary to protect.

In first place, the provision has to be understood against the backdrop of all case law developed by the ECJ in recent years regarding the abuse of law and its many faces. The doctrine of abuse of the ECJ has been used to block the circumvention of domestic rules by way the EU Treaty freedoms in artificial situations like fictive marriages (Surinder Singh), false sickness (Paletta), U-turn constructions (General Milk), false documentation (Suat Kol), fictitious exportations (Leclerc ‘Au blé vert’), and also in order to circumvent domestic regulations (Knoors, Bouchnicha, TV 10). In all these types of situations the ECJ ‘deny’ the benefits of the provisions of the Community Law because it is a false use of the EU Treaty freedoms. However, the ECJ has never recognized the existence of a Principle on abuse within the Community Legal Order, on the contrary, especially in the earlier cases; such an existence has been expressly denied. Despite this, during the last years some scholars believe in a uniform theory of abuse of law in progress.

So it is not surprising that the European Commission indicates that ‘the notion of tax avoidance is however limited to “wholly artificial arrangements aimed at circumventing the application of the legislation of the Member States concerned.” In order to be lawful, national tax rules must be proportionate and serve the specific purpose of preventing wholly artificial arrangements’. In this context, when a domestic tax rule is analysed by the ECJ and is presented as an anti-avoidance measure, the assessment is likely to be conducted using the strict criteria of artificial arrangements. However, if the national rule is presented as a general protection of the national tax base, where the pretention of tax avoidance is one among several purposes, the ECJ is more likely to make an overall assessment of several justifications and the requirement of artificial arrangements is not maintained in cases where multiple justifications are thought to apply.

In this context, Vanistendael has highlighted how the ECJ has ‘denationalized’ the concept of abuse and ‘Europeanized’ this concept by putting the focus on its effectiveness in the internal market and not in the national market. Therefore there is an abuse of Community Law when transactions are wholly artificial constructions which do not reflect economic reality in the internal market context. So, when the latter objectives of the fundamental freedoms are fulfilled, there can be no tax avoidance from a Community point of view, even when the reduction of the tax burdens would be the only purpose in the transaction. In other words, the national anti-avoidance provision can only be accepted in a cross-border context when it fights to prevent abuse of Community Law which is not necessarily the same as abuse of national law (for example, the different meaning of the ECJ case law of abuse of law and the UK notion of abusive tax arrangements).

From our point of view, the CCCTB-GAAR can be understood better using the BOBBIO construction regarding structure and function of the juridical rules. In fact, the CCCTB-GAAR has the structure of an atypical GAAR which provides minimum protection of the corporate tax base because its function is only to block the artificial use of the EU Treaty freedoms and not safeguard the tax revenue collection of the Member States. It is a ‘strange’ rule because this GAAR is not a GAAR and its anti-abuse provision only protects the fictitious use of the EU Treaty freedoms but not the whole abuse of a hypothetical harmonized corporate tax base.

The aforementioned dichotomy reflects the problem of abolishing ‘borders’ but not ‘tax borders’ and also the troubles of ensuring the free movement of capital, goods and persons without taking into account the tax revenue collection of the Member States. The European Commission Recommendation on aggressive tax planning confirms the same line since Brussels encouraged the Member States to introduce the following clause in their national legislation: ‘An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these

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arrangements for tax purposes by reference to their economic substance'. Again it seems that the overlap between the concept of abuse at the EU level whose consequences consist of ‘ignored’ tax result and, at the same time, the EU guidelines on domestic treatment of cross-border transactions characterized by the ‘lack of commercial substance’ in accordance to their ‘economic substance’; notions that at least in part seem contradictory and sometimes also include non fictitious dealings. Furthermore, it is important to remember that el ECJ rejected a general presumption of the existence of abuse and it must be determined on a case-by-case basis in a very narrow area characterized by vague and undefined concepts which in many cases makes the fight against the abuse into something rhetorical.

4 Final remarks

The theoretical construction of one EU-GAAR entails many unsolved problems: the difficult relationship between Private Law and Tax Law, the interaction among form and substance, the differences between tax avoidance and tax mitigation, the limits on what constitutes a ‘direct tax restriction on free movement’ and so on; but above all it is a clear expression of the impossibility of the EU to simultaneously satisfy the capital import neutrality (CIN) and capital export neutrality (CEN) without harmonizing the corporate tax structure and specially the tax rates. In our opinion, the labyrinth which derives from the principle of non-discrimination on which the ECJ is trapped is also the labyrinth which has trapped the cross-border application of the Member States GAARs and SAARs.

Moreover, the failure and low efficiency of the domestic GAARs are also the failures of the ‘case-by-case approach’ that after so many years still have not been able to build strong and unambiguous concepts, nor establish a clear line between tax avoidance and tax mitigation: it is impossible to know where tax planning begins and where it ends. This jurisprudential inconsistency harms the principle of juridical security, increases the GAARs mistrust, creates uncertainty for taxpayers, encourages the profit shifting to jurisdictions without a GAAR or with a more lenient GAAR, distorts the market, and at the same time, does not efficiently protect the tax revenue collection of each Member State.

The analysis shows a judicial decision-making process which is excessively discretionary and shows how domestic Courts have arrived at opposite results on similar facts. The national Courts have a different previous jurisprudential background that conditions in their decisions. The judges employ a different methodology and assume distinct approaches on fundamental issues. In our opinion, this situation can be significantly improved with a much better and more detailed regulation which helps to reduce the excessive discretionality: the national Courts cannot and should not replace the legislature. As long as there is no change in the main factors that have contributed to the increase in the tax avoidance during the last twenty years, the tension between ratio and wording of the tax rules will remain.

The CCCTB-GAAR proposal is an anti-abuse rule and not an anti-avoidance one, regardless of the fact that in certain cases both goals can overlap. In addition, the anti-abuse ECJ jurisprudence is not seeking to protect the tax revenue collection of the Member States. Instead it aims to eliminate national protectionist rules, and obviously, try to cut and reduce the artificial use of the EU freedoms. Its objective is not to fight the improper cross-border use of the twenty-eight national tax systems. This latter issue is not part of the EU responsibilities; at least, not yet. Despite this, combating the abuse of the EU Treaty freedoms, sometimes involves, fighting the tax circumvention, however it is not always like this.

Moreover, it is not advisable to introduce a CCCTB-GAAR until the EU adopts a common tax structure – not only on corporate income but also in relation to individuals, partnerships and non-residents – with the same fringe of tax rates. It is necessary to remove the ‘tax barriers’ between Member States and change the current structure based on the principles on source and residence taxation and adopt a harmonized double taxation Convention with similar tax conditions in relation to third countries. Also, it would be desirable to create an EU tax anti-avoidance Agency to support the domestic tax administrations in order to obtain tax information quickly and without hesitation.

For all these reasons, if structural changes are not implemented we will continue turning around the same unresolved issues (new studies, workshops and proposals lacking of political will, and of course, new GAARs, SAARs, recommendations and contradictory jurisprudence) as if in a perpetuum mobile or musical piece which can repeat infinitely.

129 For the European Commission ‘an arrangement or a series of arrangements is artificial where it lacks commercial substance’. See note 128.