GAAR of the Anti-Tax Avoidance Directive

– INTERPRETATION AND EFFECTS ON THE FINNISH GAAR OF VML SEC. 28

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Tiivistelmä/Referat – Abstract

General anti-abuse rules (GAARs) are seen as effective tools in the battle against tax avoidance and aggressive tax planning exercised by multinational enterprises (MNEs). The open-ended design of GAARs allows tax authorities to keep up with the ever changing landscape of international tax planning.

As MNEs engage eminently in cross-border activities and make use of the differences in tax systems of different jurisdictions efficient tools are called for both in the international and in the EU context. In the global scene the OECD has been the initiator in the fight against base erosion and profit shifting with the BEPS action Plan. Accordingly, EU has answered to this increasing international pressure with several legislative initiatives, the most recent of which is the Anti Tax Avoidance Package including the Anti Tax Avoidance Directive (ATA Directive), which also entails a formulation of an EU wide GAAR in the Article 6 (ATAD GAAR). The new ATAD GAAR represents an unprecedented approach in the field of European direct tax law since it creates a detailed anti-abuse provision with the objective of harmonizing the national general anti-abuse rules. The tension from the Community law on national legal systems is twofold: on the one hand, it constitutes the requirement of positive action for the Member States. A Member State lacking a GAAR will be required to stipulate one in order to comply with the Community law. However, the Community law does not only require member states for action, but also sets limits for the national legislation i.e. requires the Member States to refrain from restrictive legislation.

The ATAD GAAR is a manifestation of the anti-abuse doctrine formed in the case law of the European Court of Justice. It reflects the three tests that are also included in the anti-abuse provision of the Parent Subsidiary Directive, namely the main purpose test, the conflict with object and purpose test and the artificiality test. On the one hand the rule is necessary to allow Member States to protect their tax bases against the most creative and novel tax planning structures that are not yet addressed through specific provisions. On the other hand, however, the GAAR poses concerns regarding the principles of legality and legal certainty, as it stretches the competence of courts and tax administrations in interpretation of tax avoidance cases. In the EU context also the requirements caused by the Union primary law, namely the fundamental freedoms protecting the smooth functioning of the internal market have to be taken into account.

The Finnish tax system already entails a GAAR that applies both to domestic and cross-border situations (VML Sec. 28). The compatibility of the Finnish rule with the ATAD GAAR is not evident. As the two rules differ both in their wording as well as in their scope of application, the compatibility of the Finnish rule as well as the interpretation doctrine concerning its application need to be systematically analyzed. As the ATA Directive stipulates only the minimum level of protection that the domestic rules have to attain, the Finnish rule can be stricter from the perspective of the taxpayers. However, the Union primary law sets the upper limit for the application of the rule. For the VML Sec. 28 to be compatible with the requirements caused by the Union law, the constituting elements of the ATAD GAAR need to be reflected in the application of the VML Sec. 28.

Avainsanat – Nyckelord – Keywords
European Tax Law, the Anti Tax Avoidance Directive, Tax Avoidance, Tax Abuse, Tax Planning, General Anti-Abuse Rule, Veron kiertäminen, Verotusmenettelylaki

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Tiivistelmä/Referat – Abstract

Veron kiertämistä ehkäisevät yleislausekkeet soveltuvat hyvin veronkierron torjumiseen kansainvälisissä tilanteissa joissa suuryritykset pyrkivät käyttämään hyväkseen eri verojärjestelmistä aiheutuvia eroja alentaakseen verotaakkaansa. Yleislausekkeiden yleinen soveltamisala mahdollistaa puuttumisen veronkiertotilanteisiin nopeasti muuttuvissa kansainvälisissä tilanteissa, joissa erityisiä veronkiertosäännöksiä ei ole vielä säädetty.

Tutkielmassa tarkastellaan EU:n Veronkiertodirektiivin 6 artiklan sisältämää yleistä veronkiertolauseketta. Direktiivin tarkoituksena on veron kiertämisen vastaisen vähimmäissuojan luominen kaikkialla Unionissa. EU oikeuteen ei kuitenkaan sisälly kattavaa veronkierron määritelmää, vaan se on joustava käsite, joka on kehittynyt Euroopan Unionin tuomioistuimen oikeuskäytännössä suhteessa taloudellisiin perusvapauksiin. Tuomioistuimen oikeuskäytännössä on kehittynyt puhtaasti keinotekoisten järjestelyiden kriteeri, joka heijastuu myös uudessa yleisessä veronkiertosäännössä. Sääntö sisältää samat elementit kuin Emo-tytäryhtiö direktiivin veronkiertosäännös. Artikla 6 edustaa uudenlaista aktiivista lähestymistapaa veronkierron estämiseen positiivisen harmonisaation saralla. Taustalla on Euroopan unionin tarve vahvistaa säännöt, joilla lujitetaan keskimääräistä suojaa sisämarkkinoilla aggressiivista verosuunnittelua vastaan.

Yleislausekkeet ovat tehokkaita välineitä veronkierron estämisessä, sillä veronkierron ja hyväksyttävän verosuunnittelun välistä rajaa on hankala ennalta määrittää. Yleislausekkeiden käyttöön liittyy kuitenkin ongelmia: Erityisesti vero-oikeudessa korostuneessa asemassa oleva legaliteettiperiaate sekä oikeusvarmuuden periaate vaikuttavat epäyhteensopivilta joustavan yleislausekkeen kanssa. Myös EU oikeudesta johtuvat taloudelliset perusvapaudet rajoittavat yleislausekkeiden käyttöä. Yritysten toimintaan puuttuminen ennakoimattomalla tavalla saattaisi aiheuttaa esteitä sisämarkkinoille. Tutkielmassa etenkin veronkierron estämisen ja sijoittautumisvapauden ristiriitainen suhde on tarkastelun kohteena.

Suomen verojärjestelmässä veronkiertoa ehkäisevällä yleislausekkeella (VML 28 §) on pitkät perinteet. Lausekkeen yhteensopivuus uuden EU säännön kanssa on tutkielmassa tarkastelun kohteena. Jotta Suomen yleinen veronkiertosäännös olisi tulevaisuudessa EU oikeuden vaatimusten mukainen, sen soveltamisessa tulee ottaa huomioon EU:n veronkiertosäännöksen asettamat vaatimukset jotka kuvaavat EU:n primäärioikeuden soveltamisrajoja. Suomen oikeuskäytäntö myös havainnollistaa yleislausekkeen joustavuuden ja mukautumisen uudenlaisiin kansainvälisiin verosuunnittelutilanteisiin.

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C-168/01 Bosal Holding

C-422/01 Skandia and Ramstedt

C-9/02 de Lasteyrie du Saillant

C-255/02 Halifax & others

C-319/02 Manninen

C-442/02 CaixaBank France

C-531/03 Commission v Germany

C-456/03 Commission v Italy

C-32/03 Fini H

C-110/03 Belgium v Commission

C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas

C-341/04 Eurofood IFSC

C-344/04 IATA and ELFAA

C-524/04 Thin Cap Group Litigation

C-451/05 ELISA

C-308/06 Intertanko

C-157/07 Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt

C-231/05 Oy AA

C-321/05 Kofoed

C-112/05 Commission v. Germany

C-414/06 Lidl

C-352/08 Modehuis A. Zwijnenburg

C-311/08 SGI

C-337/08 X Holding

C-126/10 Foggia

C-318/10 SIAT

C-371/10 National Grid Industries

C-503/14 Commission v. Portugal

C-646/15 Trustees of the Panayi Settlements v HMRC

List of Abbreviations

ATP	Aggressive Tax Planning
ATP Recommendation	Commission Recommendation of 6.12.2012 on aggressive tax planning
BEPS	Base erosion and profit shifting
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled foreign corporation
ECJ	European Court of Justice
EESC	European Economic and Social Committee
EU	European Union
EVL	Laki elinkeinotulon verottamisesta
GAAR	General anti-avoidance rule
KHO	Finnish Supreme Administrative court
MNE	Multinational enterprise
OECD	Organisation for Economic Cooperation and Development
OECD BEPS	OECD/G20 Base Erosion and Profit Shifting Project
PSD	Parent Subsidiary Directive
SAAR	Special anti-avoidance rule
SME	Small and medium-sized enterprise
The Council	Council of the European Union
VML	Verotusmenettelylaki, Act on Assessment Procedure

1 Introduction

1.1 Background

General anti-abuse rules (hereinafter GAARs) are seen as effective tools in the battle against tax avoidance and aggressive tax planning exercised by multinational enterprises (hereinafter MNEs). The open-ended design of GAARs allows tax authorities to keep up with the ever changing landscape of international tax planning. Even though the acute need for GAARs in the fight against tax avoidance is widely acknowledged, the acceptability of these rules is under pressure.[1] As open-ended, general rules by definition, GAARs pose severe risks on the certainty and predictability of tax systems. However, as the tolerance against tax avoidance has decreased in the aftermath of the financial crisis of 2008, legislators are more prone than ever before to accept these risks. Effective tools are called for both in the international and in the EU context. In the global scene, the OECD has been the initiator in the fight against base erosion and profit shifting (hereinafter BEPS) with the BEPS action Plan.[2] Accordingly, EU has answered to this increasing international pressure with several legislative initiatives, the most recent of which is the Anti Tax Avoidance Package including the Anti Tax Avoidance Directive (hereinafter ATA Directive), which also entails a formulation of an EU wide GAAR in the Article 6 (hereinafter ATAD GAAR).[3]

The concept of an EU wide GAAR represents a completely novel concept in the EU tax law. Member States have maintained their sovereignty in the area of direct taxation and direct taxation belongs to their exclusive competence. The ATA Directive, however, reflects yet another step in the positive harmonization process concerning direct taxation. As MNEs engage eminently in cross-border activities, the need for common rules and international cooperation against abusive practices has become indispensable.[4] Harmful tax competition between states in trying to attract business in their jurisdiction has been widely condemned.[5] However, it should also be kept in mind that too aggressive of an approach from the part of the Union to combat aggressive tax planning within the internal market might steer the EU countries in a disadvantageous position in the global scene. The Union area would hardly attract investments if MNEs deem the internal market as a volatile environment where tax ramifications of operations are

[1] Freedman 2014 p. 167.
[2] OECD, Action Plan on Base Erosion and Profit Shifting, 19.7.2013, OECD/G20 Base Erosion and Profit Shifting Project 2015 Final Reports
[3] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, adopted by the Council on 20 June 2016.
[4] The corporate tax systems in place today were conceived to a large extent in the aftermath of World War I, when multinational enterprises were mostly industrial companies. The change in the business models and increased cross-border activities call for redesign in the corporate tax systems. COM(2015) 302 final, p. 3.
[5] See 98/C 2/01 the Code of Conduct for business taxation. Further, Commission has taken an active role in the fight against harmful tax competition by defining the tax benefits received by two Irish incorporated companies of the Apple group as illegal state aid. See Commission decision C(2016) 5605 final.

unpredictable. The inclusion of GAARs into tax systems can thus be seen as a manifestation of tension between two competing values: the certainty of the tax system on the one hand and the protection of a country's tax base on the other.[6]

As tax planning structures are becoming ever more intricate, the need for comprehensive rules that have the capability to attack structures that are not covered by specific rules is evident. The use of loopholes created by the differences in tax systems of different jurisdictions offers the taxpayer countless opportunities to mitigate their tax burden. For example, the use of holding company structures gives the MNEs possibilities to shift their profits to countries with the most favorable tax treatment.[7] Use of complicated group structures can lead to situations of non-taxation as well as to situations where the taxpayer can enjoy double deductions. However, in crafting the legislation it should be ensured that the effective tools aimed at counteracting abusive practices won't end up in creating unreasonable tax burden for taxpayers in creating situations of double taxation. Furthermore, the interpretation doctrine should promote legal certainty as the general wording of the rule gives a wide discretion to tax authorities in its application. The GAAR should not result in the rule of law having to yield in the name of practical needs of the state.[8]

1.2 Research Questions and the Outline of the Study

This study aims at providing an answer on how the new GAAR introduced in the ATA-Directive will be interpreted, how does it comply with requirements of Union primary law and what kind of effects it will have on the Finnish GAAR expressed in the Section 28 of the Finnish Act on Assessment Procedure (hereinafter VML). The study comprises of five main chapters. The first chapter introduces the different methods of interpretation used in the study. The second chapter presents the framework in which the study will be conducted. For this aim, first, the effects of the EU law to national tax systems will be presented. This sets out the broad scope also for the ATAD GAAR in explaining the obligations for member States to transpose the provisions of a given directive, as well as the upper limit of national tax law provisions formed by the Union primary law. Further, in this chapter the wording of the ATAD GAAR will be presented along with the ATA Directive. The utility of GAARs in general as well as their limitations will be discussed.

The third chapter seeks to answer the first research question on the interpretation of the ATAD GAAR. For this purpose the elements of the ATAD GAAR are systemized and analyzed in the light of preparatory material concerning the GAAR and ECJ case law concerning limitations to national anti-abuse measures. Due to the open-ended formulation of the ATAD GAAR its meaning is not univocal. Even though the ATAD

[6] Prebble 2011, p.372.
[7] Perdelwitz 2015, chapter 10.1.
[8] Prebble 2011, p. 372.

GAAR is the first "pure" GAAR of the EU tax law, there are other anti-abuse provisions related to certain directives that can offer some help in interpretation of the rule. As the formulation of the ATAD GAAR follows the formulation of the GAAR included in the Parent Subsidiary Directive, this rule can provide some guidance on the interpretation. The subjective and objective elements contained in the ATAD GAAR will be assessed in the light of EU primary law. Case law of the ECJ will be examined in order to understand the different concepts included in the wording of the Article. In the second part of this chapter the second research question concerning the compatibility of the ATAD GAAR with Union primary law, i.e. fundamental freedoms and general principles of Union law, will be assessed.

Furthermore, the study seeks to answer whether the Finnish GAAR manifested in the VML Sec. 28 is compatible with the ATAD GAAR. Consequently, chapter four aims to provide an answer to the last research question in examining the VML Sec. 28 in the light of the new ATAD GAAR. The interpretation and application of the rule in the Finnish Supreme Administrative Court (hereinafter KHO) will be examined to see whether the interpretation doctrine it is in line with the requirements stemming from the EU law. As Member States' tax laws are experiencing an ever increasing impact of the EU tax law, there exists tension between the national and the European case law concerning taxation.[9] As the Finnish tax system has entailed its own version of a GAAR for a long time, it is interesting to consider what kind of pressure the new EU provision builds on it.

The tension from the Community law on national legal systems can be seen as twofold: on the one hand, it constitutes the requirement of positive action for the Member States. A Member State lacking a GAAR will be required to stipulate one in order to comply with the Community law. However, the Community law does not only require member states for action, but also sets limits for the national legislation i.e. requires the Member States to refrain from restrictive legislation. This other side of the impact of community law will thus be under scrutiny in this study. As Finland already fulfils the requirement of having a GAAR in its tax assessment act, the study concentrates on the limits of the existing GAAR. What kind of limits does the community law introduce to the application of GAARs? How is the Finnish rule formed compared to the new Article 6, and should it be amended in order to better correspond to this new rule? Furthermore, the GAAR of the ATA Directive is seen as a part of the broader discussion on the new theory of the EU wide anti-avoidance measures. Can the new GAAR be seen as a new standard for the national anti-avoidance measures in a sense that stricter provision than the EU GAARs could be viewed as potential infringements to primary EU Law?[10] Finally, the last chapter concludes the findings of the study.

[9] Määttä 2014, p.31.

[10] Tavers & Bogenschneider 2015, p.484-485.

1.3 Research Methods

The method used in this study to examine the ATAD GAAR is the dogmatic legal method. Answers to the research questions are provided after the analyzing of the norm and its wording as well as the motivations of the legislators in imposing such a rule. The legal method consists of the examination of legal texts. The methods used are first and foremost the different methods of interpretation. The aim being reached by these methods is to uncover the meaning behind the provision or the piece of legislation. For the purposes of this study it is imperative to understand that interpreting language is never clear cut, but it has always multiple meanings and underlying intentions. It is not possible to objectively describe the meanings of the norm sentence, i.e. the norm behind the sentence.[11] Consequently, the interpretation is not about uncovering the meaning of a particular provision, but rather finding out the meaning that is given to the norm by the authority applying the norm. Interpretation thus concerns rather about giving meaning, not about discovering it.[12] The relevant methods of interpretation are the grammatical interpretation, the systemic method, and the teleological interpretation. In principle EU tax law is interpreted following the same methods as domestic tax legislation.[13] Some differences nevertheless exist, and they will be pointed out in the following pages.

The basis of the interpretation of tax law is the grammatical approach. This method of interpretation entails the interpretation to start on the wording of the provision. This is required by the principle of legality.[14] The grammatical interpretation also stipulates that the expressions used in legal texts should not be given different meanings depending on the context without good reasons. Further, the text should not be interpreted in a way that part of the text would remain meaningless.[15]

It is noteworthy that interpretation of tax law in anti-avoidance cases relates to the more general discussion on the relation between private law and tax law, which also affects the interpretation. The starting point is that the concepts of private law such as transaction or a dividend, are taken as such in taxation. Hence, the facts constituting the transaction under private law, and the legal impact originated from this transaction, forms the legal facts under tax law, upon which the taxation of the transaction is to be based on. This relation is the presumed starting point and it can be deviated from only in three different occasions. Firstly, tax law can specifically stipulate that a concept holds a different meaning under tax law than in private law.[16] Second, tax law can be interpreted following the principle of normal interpretation.

[11] Hirvonen 2011, p.36.
[12] Makkonen 1981, p.132.
[13] Helminen 2016b, p. 60.
[14] Sec. 2(3) of the Finnish Constitution.
[15] Hirvonen 2011, p.39.
[16] Myrsky and Räbinä give the concept of immovable propoerty (TVL 6) as an example. Myrsky & Räbinä 2015, p. 344.

This means that the norm is interpreted in light of the purpose of the tax law. The third situation in which the starting point of the private law can be deviated from is the application of a tax avoidance provision. This means that that the private law form is ignored in taxation. [17]

In the EU context the ECJ has vocalized the principle corresponding to grammatical interpretation according to which the wording of the articles should be the basis for the interpretation. National courts are required to interpret their national law in the light of the wording and the purpose of the directives in order to achieve the result referred in the applicable directive.[18] However, the ECJ has a significant role in the interpretation of the EU tax law. This special characteristic of the EU tax law results from the fact that the directives are rather undetailed in their formulation, so the strict grammatical approach would not offer sufficient support for interpretation.[19] Furthermore, limitations related to the multinational nature of the Union system have to be kept in mind. These constraints are especially visible in grammatical interpretation of directives. Often the interpretation of legal texts is not unambiguous even in domestic situations, and in the multi-language context of the ECJ the interpretation is even further complicated.[20] As the rules are translated into more than twenty different national languages the uniformity of the system doesn't seem very plausible.

In more complicated cases the courts cannot rely solely on the wording of the articles, but other means of interpretation are needed. As flexible norms by nature, GAARs inevitably lead into more complicated cases of interpretation. As tax law provisions are never applied in a vacuum outside the context of other rules, the systematics of a particular tax law can help in interpretation of an individual rule.[21] In systematic interpretation the norm is analyzed taking account of other norms, general principles of the field of law in question, the logic of the legal order and the legal order as a whole.[22] As the aim for a good tax system can be seen that it forms a coherent and logical structure it is understandable that the KHO has taken the systemic approach of interpretation in several of its judgements in taking account of the systematics of the Income Tax Act in interpretation of an individual tax provision.[23] Further, the systematics of the directives has been referred to in the Finnish Supreme Administrative Court.[24] Teleological interpretation, in turn, means that the provision of tax law is interpreted in the light of the legislator's intention. First, the objectives underlying the specific provision must be uncovered. Second, the consequences of different

[17] On the discussion on the relation between public and private law, see Myrsky & Räbinä, 2015, p. 344.
[18] See for example Case 14/83, von Colson ja Kamann v. Land Nordrhein-Westfalen, para 26.
[19] Helminen 2016b, p.60.
[20] Piantavigna 2011, p.136.
[21] Määttä 2014, p.107.
[22] Hirvonen 2011, p.39.
[23] For example KHO:2012:23, KHO:2013:45, KHO:2012:16.
[24] In KHO:2013:61 the Court took account of the aims and systematics of the VAT directive.

interpretations are being assessed. Finally, the interpretation that best furthers the objectives of the piece of legislation in question is chosen.[25] The sources of law in this regard are typically the preparatory legislative work that can be seen as expressing the intent of the legislator. Teleological interpretation is especially useful when it comes to application of flexible norms such as GAARs.[26] It should be kept in mind that the vaguer the norm, the more power an individual judge has in its interpretation.[27]

In the domestic context the preparatory work such as Government proposals, committee reports and other material are considered as weakly binding sources of law.[28] The effects of the Government proposals to the interpretation of a specific tax law provision can be described as complimentary.[29] However, the teleological interpretation should not go pass the written form of the provision in question as this would result in infringement of the principle of legality.[30] In EU tax law, however, teleological interpretation has much more significance than in a purely domestic situation.[31] The emphasized relevance of the legislator's intention derives from the fact that the directives are often formed in an open-ended manner entailing only general principles. Member States have their own competence to implement directives as they see most fit. The common nominator thus is the intention of the Directive: despite the different formulations of articles in different member states, all of them still aim at the same objective expressed in the preparatory work of the directive.

2 Impact of the EU Law to National Tax Systems

2.1 Member State's Sovereignty and its Limitations

It is an uncontested principle of the EU law that the Community law has primacy over Member states' legislations.[32] In the field of taxation, however, Member States have assigned only limited competences to the EU. According to the principle of conferral competences not conferred to the Union remain within the competence of the Member States.[33] The competence to levy taxes is at the core of Member States' sovereignty. The Union still has effect on Member State's national tax systems through two different processes. First, secondary Union law creates positive obligations for action in the form of directives that the Member States are obliged to transpose into their national tax systems. Further, the Union primary law, in the form of obligations flowing from the Treaty, imposes negative obligation for the Member States' to refrain from imposing legal acts that would contradict those obligations. Especially the fundamental

[25] Hirvonen 2011, p.40.
[26] Määttä 2014, p.162
[27] On the psychological aspects of interpretation, see Myrsky 2016, p. 25-26.
[28] See the classification of the weakly binding sources of law, Määttä, 2014, p. 160.
[29] See for example KHO:2013:67
[30] Määttä 2014, p.161.
[31] Helminen 2016b, p. 61.
[32] C-6/64 Costa v. ENEL.
[33] See Article 5(2) of the TFEU.

freedoms entailed in the Treaty as well as the principle of non-discrimination restrict Member States in the imposing of anti-abuse norms.

Direct and indirect taxation are in contrasting positions regarding the degree of harmonization: harmonization in the field of indirect taxation has been addressed in greater depth than that of direct taxation. Despite the fact that the area of direct taxation has not been fully harmonized, there nevertheless exists both positive and negative harmonization in this field. Subsequently, the effects of the EU law to the prevention of tax avoidance can be divided into two processes: The influence of the primary EU law leads to the so-called negative harmonization process. The negative harmonization entails the Member States to refrain from action in order to respect the demands of the primary community legislation. Traditionally, due to Member States' sovereignty the harmonization process in the field of direct taxation has leaned heavily on the negative side. [34] Positive integration, on the other hand, happens through secondary EU law, i.e. imposing directives.[35]

Positive harmonization in the field of direct taxation can be argued to be still marginal and currently it does not include common definitions for such significant concepts as a taxable person or the tax base.[36] The adoption of secondary legislation in areas that belong to the sovereignty of the Member States is not self-evident. In the field of direct taxation legal acts are not decided on the ordinary co-decision process between the Parliament and the Council,[37] but on the grounds of Article 115 of the TFEU which requires for unanimity in the council for the legal act to be accepted. Further, only directives, that require the transposition into national systems before they can produce legal effects, can be imposed on the account of Article 115, as opposed to the immediately enforceable regulations.[38] Hence, the scarcity of positive integration in the field of direct taxation is easy to conclude to be the result of the difficulties of the Member States to reach agreement on tax issues due to their diverse tax systems.[39] There are different types of directives of which the most common type is the minimum directive. The text of a minimum directive lays down principle-based rules and leaves the details of their implementation to Member States,

[34] Knuutinen 2014a, p. 49.

[35] Examples of positive harmonization include the Parent subsidiary Directive, Merger Directive, Interest Royalties Directive, Savings Directive and Mutual assistance Directive.

[36] As pointed out in the in-depth analysis of the TAXE 2 Committee 2016 p. 10.

[37] The ordinary legislative procedure is also known as the codecision procedure, which gives the same weight to the European Parliament and the Council of the EU in the legislative process.

[38] Recommendations can and have also been used in the field of direct taxation, but they do not include legally binding obligation for implementation for Member States.

[39] Terra & Wattel 2012, p. 13 and Szudoczky 2013, p.326.

on the understanding that Member States are better placed to shape the precise elements of the rules in a way that best fits their corporate tax systems.[40]

Moreover, it should be noted that even in the absence of positive harmonization in certain areas, the principle of reconciliatory interpretation requires national administration and courts to apply national law in the light of community law. However, this principle has its limits. The principle of justified expectations prohibits the completely new mode of application of a provision of national law. Further, the principle of legal certainty stipulates that individuals must be able to rely on national law as long as their respective countries have not clearly and correctly implemented contrary Directives.[41]

The aim of the fundamental freedoms is to ensure the smooth functioning of the internal market. According to the Art. 6(3) of the TEU Fundamental Freedoms shall constitute general principles of the Union's law. As general principles, these freedoms are protected by the European Court of Justice (hereinafter the ECJ).[42] The fundamental freedoms form the upper limit for the interpretation of secondary Union legislation as well as national law. Despite direct taxation remains non-harmonized area, the Community law has to be taken into account by Member states also in this field. This position is famously formed in the Schumacker case in 1995: "Although direct taxation is a matter for the Member States, they must nevertheless exercise their direct taxation powers consistently with Community law".[43] The internal market seeks to guarantee the free movement of goods, capital, persons, and the freedom to establish and provide services by the four freedoms entailed in the TFEU.[44] Regarding direct taxation, the ECJ has dealt with several cases linked with the economic freedoms protected by the EU primary law, as the secondary legislation concerning direct taxation is scarce. Moreover, the few directives concerning direct taxation have rarely troubled the ECJ.[45] The impact of the fundamental freedoms in taxation cases often results into positive outcomes for the taxpayer.[46] Regardless, it should be kept in mind that the task of the Commission in enforcing the fundamental freedoms is not the protection of the taxpayer's interests *per se*, but rather to ensure the full realization of the internal market.[47] Considering anti-abuse measures

[40] This derives from the principle of subsidiarity, a general principle of Union law that functions as guaranteeing that action is taken at local level when necessary. Legal basis of the principle is Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
[41] Terra & Wattel 2012, p.170.
[42] Articles 3-6 of the TEU.
[43] C-279/93 Schumacker, para. 21.
[44] Free movement of goods, Articles 26 and 28-37 TFEU; free movement of persons Article 21 TFEU; free movement of capital, Article 63; Freedom to establish and to provide services, Articles 49 to 55 (establishment) and 56 to 62 (services).
[45] Lyal 2015, p. 5.
[46] Wikström 2006, p.27.
[47] Lyal 2015, p. 14.

included in Member States' tax legislation, the fundamental freedoms work as restricting the application of these measures in a way that would imply risks for the smooth functioning of the internal market.

The most relevant aspect of the fundamental freedoms regarding the tax planning activities of MNEs and this study is the freedom of establishment enshrined in the Article 49 of the TFEU. This provision has often been considered in relation to taxation cases by the ECJ.[48] Article 49 stipulates that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. The provision explicitly states that such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Further, freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions that are laid down for the nationals of the country where the establishment is effected. As the choice of establishing their business in a country of their choosing creates several tax planning possibilities for group companies, the freedom of establishment consequently entails the risk of being abused by the taxpayers.

In addition to the fundamental freedoms, national tax provisions and the Union secondary legislation have to be in accordance with the prohibition of discrimination. It should be noted, however, that fundamental freedoms are primary in respect of the principle of non-discrimination, and thus cases concerning taxation are more often judged in applying the fundamental freedoms rather than the principle of non-discrimination.[49] The principle of non-discrimination is enshrined in the Article 18 of the TFEU. Article 18 stipulates that within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. This prohibition of discrimination applies to both direct and indirect discrimination.[50] Direct discrimination is the result of discrimination based on nationality. Indirect discrimination, on the other hand, is originally based on other factors, but in the end results into discriminatory effects according to the taxpayer's nationality.[51] Principle of non-discrimination requires comparable situations to be treated similarly.[52] Despite the principle of non-discrimination, Member States have the right to apply the relevant provisions of their tax law, which distinguishes between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. Furthermore, Member States are allowed to take all measures necessary to prevent infringements of national law and regulations,

[48] For example, cases C-81/87 Daily Mail; C-196/04 Cadbury Schweppes; C-503/14 Commission v. Portugal; C-646/15 Trustees of the Panayi Settlements v HMRC.
[49] Helminen 2016b p. 68.
[50] Dahlberg 2005, p. 67.
[51] Dahlberg 2005, p. 93-94.
[52] Bammens 2012, p. 9.

in particularly in the field of taxation and the prudential supervision financial institutions.[53] Due to the effect of fundamental freedoms, taxation does not have to be discriminatory in order to be in infringement of the TFEU. The restriction of the exercise on the fundamental freedoms is enough for the tax treatment to be infringement of the EU law.[54] Hence, discrimination between purely domestic and cross-border operations is not needed for the national provision to be in conflict with the Union law – if the measure is making cross border activities less appealing, restriction is at hand.[55]

In addition to the effect of the fundamental freedoms and the principle of non-discrimination, national legislative acts are also confined by the principle of Union loyalty. This principle of loyalty explicitly requires Member States to account for the objectives of the Union law.[56] Following this principle, the Member States must interpret their national legislations in light of the objectives of the Union.[57]. The principle of loyalty has both positive and negative dimension corresponding to the positive and negative dimensions of harmonization.[58] The overarching effects of the principle of Union loyalty makes it one of the key principles of Union law. The principle of Union loyalty draws the primary law together in creating the obligation for solidarity for the Member States in expressing the Member States obligation to "ever be faithful to the Union and their Commitment to its success."[59]

2.2 The Abuse of Law Doctrine and Rule of Reason

As discussed above, regardless Member States' sovereignty in the area of direct taxation, they are however obliged to use their legislative power so as not to form obstacles to the exercise of the rights and freedoms guaranteed by the provisions of the Treaty.[60] Respectively, taxpayers cannot rely on these freedoms in abusive manner.[61] The doctrine concerning abuse of law has been developed over the course of years in ECJ case law. The abuse of law doctrine prevents a person from relying on a right stipulated in a provision where such a reliance would constitute abuse of that right. [62]

[53] TFEU Art. 65.
[54] See for example case C-81/87 Daily Mail.
[55] C-55/94 Gebhard, para. 37.
[56] Article 4.3 of the TEU.
[57] Referred to for example in case 14/83, von Colson ja Kamann v. Land Nordrhein-Westfalen, para. 26.
[58] Määttä 2014 p.183, see also Äimä 2014, p. 54.
[59] Wittock 2014, p. 188.
[60] Case C-279/93 Schumacker, para. 12:*"the powers retained by the Member States must nevertheless be exercised consistently with the EU-law".* Further, see cases 120/78 Cassis de Dijon para. 8; and case C-112/05 Commission v. Germany para. 29.
[61] See cases; C-255/02 Halifax and Others para. 68; Case C-367/96 Kefalas and Others para. 20; Case C-373/97 Diamantis para. 33; and Case C-32/03 Fini H para.32.
[62] For example cases C-110/99 - Emsland-Stärke; 33/74 Van Binsberge; and C-212/97 Centros.

Abuse can be divided into two different categories, 'abuse of law' and 'abuse of rights'.[63] Albeit abstract, this distinction is useful in understanding the two different contexts in which the ECJ has applied the principle of abuse. Following Piantavigna, 'abuse of law' refers to a situation in which a person seeks to rely on a European legal right in order to circumvent or displace national law. The object of abuse is the provision belonging to national tax system, which is circumvented by mistreating the provisions of the Treaty. 'Abuse of rights' on the other hand, refers to a situation in which a person seeks to take advantage of a right in European law, but in a manner running contrary to it spirit. The object of abuse is provided by a Community directive. 'Abuse of law' can be seen as being illegitimate from the instrument point of view as the taxpayer improperly uses legal tools aiming to avoid national tax effects. Conversely, 'abuse of rights' is illegitimate regarding the result: the tools used are legal, whereas the fiscal end of tax reduction is illegal.[64]

The Court has held in its case law that the circumvention of a Member State's rules by an abusive exercise of rights under Community law is inadmissible.[65] In Emsland-Stärke the Commission claimed abuse to consist of three elements.[66] First, an objective element is required, meaning that evidence needs to be provided that the conditions for the grant of a benefit were created artificially. That is to say, that a commercial operation was not carried out for an economic purpose but solely to obtain the financial aid which accompanies that operation. Second, a subjective element is required, namely entailing that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rules. The third and final element is a procedural law element relating to the burden of proof, stipulating that the burden must fall on the relevant national administration.

ECJ has recognized that national courts can take account of abuse or fraudulent conduct of the persons and deny them the benefit of the provisions of the Community law. However, this determining of conduct as being abuse of Community rights should happen on a case by case basis and be grounded on objective evidence. Further, national courts should asses such conduct in the light of objectives pursued by those provisions, on which the person is seeking to rely on.[67] For example, when the freedom in question is the freedom of establishment, the objective of this provision is to allow for companies and citizens to establish themselves in any Member State and exercise business activities therein. If the use of this provision results

[63] Piantavigna 2011, p. 137. This distinction can be seen in case C-212/97 Centros, para. 20*: "A Member State is entitled to take measures to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law."*

[64] See for example case C-110/99 Emsland Stärke. Further, Piantavigna 2011, p. 137.

[65] C-110/99 Emsland Stärke, para. 66. Concerning circular arrangements see case 229/83 Lecrec, para. 27; and case C-39/86 Lair para. 43.

[66] C-110/99 Emsland-Stärke, para. 39.

[67] C-212/97 Centros, para. 25.

in a situation in which the company has not genuinely been established in another Member State, abuse may be deemed to be at hand. This refers to a situation in which the taxpayer operates only a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State. This could be the case in particular in the case of a 'letterbox' or 'front' subsidiary.[68]

Where the Treaty provisions on the fundamental freedoms are in question, these provisions are interpreted broadly by the ECJ, whereas the exceptions to these freedoms are constructed narrowly. This approach results from the fact that provisions on the freedoms are fundamental to the attainment of the internal market.[69] Abuse is not present merely based on the fact that the taxpayer seeks to gain more beneficial treatment from the legislation of another Member State.[70] This kind of construction of abuse would mean that it would be against the main objective of the establishment of an internal market with the aim of achieving the optimal allocation of resources and production factors within the Community. Moreover, free competition in the internal market does not imply only free competition between private economic operators, but also free competition between legal systems, as long as such systems are not harmonized within the Community.[71]

To sum up, Member States are not allowed to impose national rules that would cause a restriction on the fundamental freedoms, unless the taxpayer is relying on the freedoms in an abusive manner. To determine whether the national measure restricting fundamental freedoms can be justified, the ECJ operates the rule of reason test.[72] This test works as promoting practicability and legal certainty, as it gives guidelines to apply all four Treaty Freedoms in an uniform manner.[73] The common features are expressed in the rule of reason test that is applied for all Treaty Freedoms according to the four criteria found in the Gebhard judgement.[74] Following the paragraph 37 of the judgement, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions in order not to be considered as infringement of the community law. First, they must be applied in a non-discriminatory manner. Second, they must be justified by imperative requirements in the general interest. Third, they must be suitable for securing the attainment of the objective which they pursue. Fourthly, they must not go beyond what is necessary to attain their objective. The restrictive national measures often pass the first criteria of the test, but fail on the last one of proportionality.[75] A national measure restricting

[68] See cases C-196/04 Cadbury Schweppes, para. 68; C-341/04 Eurofood IFSC, para. 34-35.
[69] De Broe 2008, p. 776.
[70] See for example case C-212/97 Centros, para. 27; and case C-167/01 Inspire Art, para. 96.
[71] De Broe 2008, p. 776.
[72] Formed in ECJ's jurisprudence concerning the case C-55/94 Gebhard.
[73] Terra & Wattel 2012, p.43.
[74] Case C-55/94 Gebhard, para. 37.
[75] For example case C-196/04 Cadbury Schweppes.

freedom of establishment may be justified on the ground of prevention of abusive practices, where it specifically relates to wholly artificial arrangements.[76]

As discussed above, the Union law poses a twofold pressure on national tax systems. On the one hand primary law prohibits Member States from imposing national tax rules that would result in discrimination or restrictions of the fundamental freedoms. On the other hand, taxpayers cannot rely on the freedoms guaranteed by the Treaty in an abusive manner. This tension caused by the EU law requirements is especially visible in the anti-abuse provisions. Next, the latest developments in the area of positive harmonization will be discussed.

2.3 Anti Tax Avoidance Directive

2.3.1 Background of the Directive, Scope and Purpose

ATA Directive was adopted by the Council on 20 June 2016. As opposed to the negative harmonization process presented in the previous pages concerning the abuse doctrine, the ATA Directive is an example of the positive harmonization in setting obligations for action for the Member States. ATA Directive is reflection of the BEPS action plan in the EU level. It includes the recommendations given in the BEPS final report released on 5th October 2015. The Council welcomed the BEPS report on 8th December 2015. The Council emphasized the need to find common, yet flexible, solutions at the EU level consistent with OECD BEPS actions. Further, the Council supported an effective and coordinated implementation of the anti-BEPS measures at the EU level. Directives were considered the preferred vehicle for implementing OECD BEPS conclusions at the EU level.[77]

As the short timeframe between the release of the BEPS final report and the adoption of the ATA Directive shows, there seems to have been strong political will in implementing the BEPS measures as soon as possible. The Dutch Presidency in the Council of the European Union was adamant in reaching agreement on the ATAD during their six-month term by giving the directive high priority in their work.[78] Adoption of such controversial rules in such a short timeframe is no less than an impressive effort.[79] Furthermore, the implementation of the directive in Member States is encouraged to happen in the same swift manner. The European Economic and Social Committee considered the three-year deadline set by the ATAD proposal to be excessive. Consequently, it recommended that given the damage done to Member States' tax bases by aggressive tax planning, the Commission and the Member States should set as short a deadline as

[76] See case C-196/04 Cadbury Schweppes para. 55. Artificiality has been referred to before this ruling in Cases C-264/96, ICI, para. 26; C-324/00 Lankhorst-Hohorst para. 37; De Lasteyrie du Saillant, para. 50; and C-446/03 Marks & Spencer, para. 57.

[77] Council conclusions on corporate taxation – base erosion and profit shifting, 8 December 2015.

[78] See Precidency of the Council of the European Union, BEPS: Precidency roadmap on future work of 19 Feb. 2016 6039/16.

[79] Boulogne 2016, p. 810.

possible for implementing the directive in respect of those elements which are in line with commitments made in the BEPS process as part of the OECD/G20 agreements.[80] Accordingly, the deadline was set shorter and the Member States are obliged to apply the measures laid down in the Directive as from 1 January 2019.

It is clear from the speedy implementation of the BEPS measures that the Union is very adaptive to use the guidance given by the OECD to tackle tax avoidance. The need for the adoption of the ATA Directive is stated in its preamble. According to the preamble it is necessary to lay down rules in order to strengthen the average level of protection against aggressive tax planning in the internal market[81] and to lay down rules against the erosion of tax base in the internal market and the shifting of profits out of the internal market.[82] In EU law the objectives of the measures need to be extremely clear in order to avoid distortions among Member States.[83] No doubt coherent global measures are needed to counter the abusive tax practices of MNEs. On a more cynical note, however, it can be argued, that the measures going beyond the BEPS measures recommended by the OECD will put EU in a competitive disadvantage compared with rest of the world. If adopting a more aggressive attitude against BEPS than other jurisdictions the anti-abuse measures might actually lead to decrease of the European tax revenue.[84]

The ATAD is a minimum directive creating a minimum level of protection against corporate tax avoidance. Article 3 of the ATAD states that the Directive shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases. While it is stated in the ATAD that common rules are needed to strengthen the protection against aggressive tax planning, it is admitted that these rules will have to fit in 28 separate corporate tax systems. Thus they should be limited to general provisions and leave the implementation to Member States as they are better placed to shape the specific elements of those rules in a way that best fits their corporate tax systems. Hence the implementation of the ATAD will undoubtedly differ from jurisdiction to jurisdiction. It has been discussed whether the minimum directive is the most effective way to collectively combat tax avoidance as it leaves the door open for distortions between Member States.[85] However, the scope is narrowed down due to the influence of EU primary law, that prohibits the Member States to impose however strict rules to combat abusive practices. Thus, there seems to be a rather narrow scope of possible transposition left for the Member States, which would minimize disparities between different jurisdictions. Furthermore, in order of preventing the rules from hindering the efficiency of the internal market, the new

[80] COM(2016) 26 final — 2016/0011 (CNS).
[81] Recital 3 of the ATA Directive.
[82] Recital 5 of the ATA Directive.
[83] Boulogne 2016, p. 810-814.
[84] Boulogne 2016, p. 810.
[85] See Boulogne 2016, p. 814.

rules should not give rise to any form of double taxation. Consequently, if the same item of income is taxed more than once, Member States should grant relief for the taxes already paid in other Member States.[86]

The ATAD applies to all taxpayers that are subject to corporate tax in a Member State. The directive applies also to permanent establishments, that are residing in the Union area, of entities that are residing in a third country.[87] However, it is not seen as advantageous to extend the scope of this Directive to entities which are not subject to corporate tax in a Member State. Hence, transparent entities, for example, do not belong under the scope of the ATAD Directive.[88] As the ATAD is intended to counter aggressive tax planning and tax avoidance, the meaning of those concepts is attempted to be clarified next.

2.3.2 The Concepts of Tax Avoidance and Aggressive Tax Planning

The principal aim of the ATAD is to create minimum level of protection in the Union against tax avoidance practices.[89] The provisions of the directive are referred to as 'measures against tax avoidance'. The term tax avoidance, however, is not determined in the directive. The Directive also refers to 'aggressive tax planning'. The difficulties in defining these terms will be presented next.

In order to understand the meaning of tax avoidance the concept has to be examined in relation to the concept of tax planning. Whereas the line between tax avoidance and evasion is clear[90], the boarder between tax avoidance and tax planning remains blurred. In general the problem of tax avoidance and abusive practices stems from the fact that tax systems are not coherent structures, but have formed over time under volatile political aspirations and objectives. As such, there exists discontinuities in the systems that give leeway for taxpayers to organize their business and take advantage of the system.[91] What makes tax planning possible is the generally accepted notion guaranteeing the freedom of taxpayers, within the limits of the law, to arrange their business operations as they see fit. The authorities are bound by the legal form adopted by the taxpayer, unless a specific justification, which permits to overlook the legal form used is applicable in the given situation.[92] This notion of freedom of the taxpayers to arrange their business as

[86] ATAD para. 5.
[87] Article 1. It is noteworthy, that the EESC suggested the measures laid down in the ATAD to be applicable only to MNE's: *"Given that aggressive tax planning is largely carried out by large multinational corporations, the EESC considers that the anti-tax-avoidance directive and the directive on administrative cooperation should not apply to SMEs."* Opinion of the EESC on Anti-tax Avoidance Package, recital 1.8.
[88] Recital 4.
[89] Recital 3.
[90] As tax evasion corresponds to tax crime, see Myrsky & Räbinä 2015, p.346. Further, the Commission stresses the need to distinguish tax avoidance from tax fraud which involves deliberate unlawful behavior which is generally punishable by law, see Commission MEMO/07/558.
[91] Knuutinen 2014, p. 3.
[92] This kind of provision would be for example the ATAD GAAR or the Finnish GAAR of VML 28.

they see fir has been recognized both in the EU context[93] as well as in the Finnish domestic tax practice.[94] In principle, the taxpayer can freely choose to arrange their business as they see most convenient. The arrangement cannot be categorized as being tax avoidance (i.e. abuse) merely on the basis that the mode of operation chosen by the taxpayer leads to tax benefits.[95]

Tax planning or tax mitigation is the permissible action that aims at mitigation of the tax burden within the legal boundaries. It means that the taxpayer examines the tax consequences of different modes of operation and takes them into account in planning their business activities.[96] In Finland tax authorities have explicitly emphasized the taxpayer's right to mitigate their taxes by tax planning.[97] Individual taxpayers, for example, can mitigate their tax burden by taking advantage of the different deductions that the tax system has to offer. The individual taxpayer's chances for tax planning, however, are miniscule compared with the MNEs' possibilities.[98] In fact, tax planning is no less than indispensable for MNEs in their international business operations in order to avoid the most adverse tax consequences caused by the operation in different jurisdictions.[99] The line between acceptable tax planning and condemnable tax avoidance can be clarified in arguing that permissible tax planning reflects the purpose intended by the legislator: the legislator uses tax incentives, for example, to create certain kinds of business activities.[100] Taking account of these incentives in the planning of business operations as well as in tax planning is hence encouraged by the legislator. Tax avoidance, however, goes beyond this aiming at more favorable treatment than what the legislator intended.[101] Regardless, tax avoidance still falls within the limits of the law.[102] Consequently, in order to separate tax avoidance from tax planning, the aim of the legislator should be solved.

Tax planning can be further divided into 'aggressive tax planning' and 'regular' or 'acceptable' tax planning. Especially the distinction between tax avoidance and aggressive tax planning is ambiguous. According to Knuutinen, aggressive tax planning can be described as extensive use of financial and legal tools, establishments in foreign tax havens and so forth. Even though the concept of aggressive tax planning has been widely discussed in recent years, it is not a legal concept and there is no legal definition attached to

[93] See for example cases C-255/02 Halifax & others, para. 73; C-4/94 BLP Group plc, para. 26; C-167/01 Inspire Art para. 96; C-196/04 Cadbury Schweppes. Further, para. 51 of the Opinion of Advocate General Léger in case Cadbury Schweppes.
[94] See for example cases KHO:2013:44; KHO:2016:115; and KHO:2017:5.
[95] C-196/04 Cadbury Schweppes, para. 37.
[96] Myrsky & Räbinä 2015, p.340.
[97] See chapter I,: Instruction of the tax administration 2.8.2016, A126/200/2014.
[98] Wikström 2006, p.82.
[99] Myrsky & Räbinä, 2015 s.340
[100] For example, tax incentives to promote R&D activities are used in several jurisdictions.
[101] Knuutinen 2014a, p.5.
[102] COM(2015) 136, p.2.

it. Aggressive tax planning thus relates more to moral acceptability of the measures taken by the MNEs, which of course cannot, on the account of legality principle, be a basis for consequences in a legal sense.[103] Regardless the lack of legal definition, several OECD and EU soft law instruments use the concept of aggressive tax planning.[104] In the Preamble of the ATA Directive, for example, the measures defined in the articles are specifically targeted at protecting the internal market against aggressive tax planning.[105] Logically deduced the concept of aggressive tax planning could be seen as one type of tax planning, as a more active form of tax planning that borders more closely to tax avoidance. However, aggressive tax planning has also been constructed as an umbrella term covering gaps and mismatches between different legal systems as well as tax avoidance.[106] As such, the concept of aggressive tax planning is a more general concept than the principle of abuse, which refers to abuse of a specific provision.

The ATP Recommendation further illustrates the concept of aggressive tax planning.[107] In the ATP Recommendation aggressive tax planning is said to consist of taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purposes of reducing tax liability.[108] Furthermore, the Recommendation accords that aggressive tax planning can take a multitude of forms. According to the Recommendation aggressive tax planning can lead to double deductions as well as double non-taxation. However, it is impossible to define exhaustively the concept of aggressive tax planning.[109] Thus, the definition can be seen merely as giving some illustration on what the concept might entail in practice.[110] The Recommendation is based on the ATP Study,[111] which defines seven different aggressive tax planning structures.[112]

Aggressive tax planning thus seems to be a more flexible term compared with tax avoidance with the capability to cover more situations that tax authorities might deem as unwanted. As such it seems to go beyond the concept of abuse formed in the ECJ case law.[113] Aggressive tax planning can be seen as referencing to activities taken by the taxpayer that are not 'abusive' in the classical meaning, as tax

[103] Knuutinen 2014b, p.37.
[104] For example the BEPS action plan and C(2012) 8806 ATP Recommendation.
[105] Recital 3.
[106] Dourado 2015, p. 48.
[107] C(2012) 8806 final Commission Recommendation on Aggressive Tax Planning.
[108] This is also the definition given to aggressive tax planning in the ECON Committee Report, 2. May 2013.
[109] C(2012) 8806 final Commission Recommendation on Aggressive Tax Planning.
[110] In recital 8 of the ATP Recommendation it is recognized that tax planning structures are ever more elaborate making it difficult for authorities to react to them.
[111] Rambol Management Consultancy 2016.
[112] 1. Offshore loan ATP structure; 2. Hybrid loan ATP structure; 3. Hybrid entity ATP structure; 4. Interest-free loan ATP structure; 5. Patent box ATP structure; 6. Two-tiered IP ATP structure; 7. ATP structure based on IP and cost contribution agreement. Commission working document of the ATAD Package, 5636/16 ADD 1.
[113] See Panayi 2015a, p. 179.

avoidance is constructed to be. As such, it seems to set a lower threshold for the unwanted action by the taxpayer. Not only are classical abuse situations covered by the concept, but it may include also tax mitigation activities that are carried out for the purpose of lowering the overall tax burden.[114] According to Cordewener, this lack of the 'abusive' element is particularly visible in the definition given to aggressive tax planning by the ECON Committee.[115] According to this definition: "*Tax avoidance -- is legal but improper utilization of the tax regime to one's own advantage to reduce or avoid tax liabilities and thus requires a different set of actions. It is closely linked with the concept of aggressive tax planning, where large corporations undertake extensive tax planning, artificially shifting profits to minimize their effective tax rate and reduce their tax liabilities*."[116]

In the EU context as there previously have been no provisions aimed at countering tax avoidance, the concept has been defined in relation to the abuse of rights doctrine. In the jurisprudence of the ECJ tax avoidance reflects the principle of abuse of rights. However, ECJ's application of the terms 'tax avoidance' and 'abuse' is a source of confusion. When expressed Community norms exist, the Court interprets those norms. In absence of explicit norms, the Court turns back to the principle of abuse of rights. This approach of separating the principle of abuse of rights and tax avoidance causes further confusion in the jurisprudence concerning tax avoidance.[117] In conclusion, no preset definition can be awarded to tax avoidance or aggressive tax planning. The final demarcation on whether or not the taxpayer has crossed the line between permissible tax planning and unacceptable tax avoidance is for the Court to decide. In Finland this quorum is left ultimately to the Supreme administrative court. Consequently, the definition of tax avoidance in the Finnish context can be found in the SAC decisions.

2.4 GAAR of the Anti Tax Avoidance Directive

2.4.1 Background and wording of the ATAD GAAR

Article 6 of the ATAD entails the EU wide GAAR aimed at tackling tax avoidance and abusive practices. This Article is the first EU wide GAAR entailing a legal obligation for Member States for national implementation.[118] It evidently includes elements derived from the previous GAAR recommendations and proposals, as well as SAARs entailed in EU tax law.[119] As a norm it is formed in an open-ended manner. The current GAAR setting the legal obligation for Member States to include the provision in their legislation is stated as follows:

[114] Cordewener 2017, p. 61.
[115] Cordewener 2017, p. 61.
[116] 2013/2060(INI) ECON Committee Report, 2. May 2013.
[117] Karimeri 2011, p. 296.
[118] The PS Directive also entails an anti-abuse provision referred to as GAAR, but compared to ATAD GAAR its scope is limited.
[119] Article 1 of the Parent Subsidiary Directive, GAAR proposed in the ATP Recommendation of 2012.

> 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.

The defining elements of GAARs can be identified to be present in the provision at first sight. First, it is a flexible norm. As a flexible norm the wording does not give clear instructions on how the provision should be interpreted, but delegates legislative power from the legislator to the one applying the norm.[120] Accordingly, the norm is a competence norm giving the tax authorities and courts the competence to bypass the arrangement made by the taxpayer and calculate the tax liability in accordance with national law. Tax law can be divided into the formal and the material part. Formal tax law deals with the taxation procedure and appeal on tax issues. Conversely, the material tax law addresses the questions on the tax-object, i.e. from what and on what grounds the tax is due.[121] A GAAR is situated in the boarder between these two sides of the law and in fact functions as a bridge between the formal and the material law.[122] As a competence norm it belongs to the sphere of formal law, but on the other hand it crosses over to material side for example in intervening with the amount of taxable income in a specific case.

The idea of introducing an EU wide GAAR is by no means a self-evident evolution in the EU direct tax law harmonization process.[123] The first proposal for a GAAR in EU tax law was the Article 80 of the CCCTB Proposal in 2011. The CCCTB, however, was too ambitious of an effort for Member States at that stage and the proposal was not adopted due to opposition of some Member States.[124] The ATP Recommendation proposed a GAAR in Member States' legislation in 2012. Despite recommendations are not legally binding acts as such, the ATP Recommendation prompted some Member States to adopt a GAAR into their national tax systems.[125] As the ATAD GAAR is based on the GAAR of the Commission

[120] Määttä 2014, p.45.
[121] Myrsky 2009 p. 182.
[122] Knuutinen 2014a, p.45.
[123] Seiler argues that the lack of GAAR prior to the Commission Recommendation of 2012 can be derived from the framework set by the EU law concerning taxation. See Seiler 2016 p. 208.
[124] The adoption would have required unanimity of the Member States, but namely UK and Ireland opposed the proposal. COM/2011/0121 final. In October 2016, however, the Commission re-launched the CCCTB, COM(2016) 685 final. The new proposal for CCCTB also includes a formulation of a GAAR in the Article 58, which is almost identical with the formulation of ATAD GAAR.
[125] UK for example adopted a GAAR corresponding to the formulation found in the ATP Recommendation.

Recommendation,[126] the formulation and explanations found in the Recommendation can be used as guidance in the interpretation of the ATAD GAAR. Further, the ATAD GAAR is a reflection of the principal purpose test (hereinafter referred to as the PPT) of the action 6 of the BEPS plan.[127] This kind of principal-purpose approach can be seen as more typical in the EU context than the limitation of benefits clauses that are typical in US legislation.[128] Indeed, the action 6 of the BEPS plan includes both of these approaches. PPT offers some inspiration for the interpretation of the ATAD GAAR, even though the ATAD GAAR can be seen as a further reaching measure in comparison with the principal purpose test. On the one hand the GAAR can be seen as the embodiment of the anti tax-abuse doctrine of the ECJ.[129] On the other hand, it seems that the GAAR is targeted precisely against aggressive tax planning, and not against tax-avoidance/abuse in the strict sense of the concept that has formed in the ECJ case law.

2.4.2 GAAR in Relation to SAARs and other Anti-Abuse Measures

Anti-abuse rules can be divided into two categories: they may be shaped to address specific types of abuse, or they may be designed in a broader sense to be able to cover abusive behavior more widely. Whereas a GAAR functions as broadening the competence of the tax authority, in the application of SAARs there is no need to go beyond the normal interpretation of the law. SAARs are thus strictly based on statutory requirements whereas a GAAR is formed in the interplay between statutory requirements and judicial interpretation. The other anti-avoidance measures included in the ATAD are SAARs. These norms thus include interest limitation rules, exit taxation, rules concerning hybrid mismatches and CFC-rules.

According to Freedman, a GAAR should fulfil two prerequisites: first, the general rule should entail principles that go beyond the normal interpretation of law, that can be applied in a sufficiently objective way. Second, the reasoning behind the provision needs to be clear enough. This requires the purpose of the legislator to be explicit.[130] The nature of the GAAR is explicitly described in the preamble of the ATA directive: the GAAR is designed to cover gaps that may exist in a country's specific anti-abuse rules against tax avoidance. As such, it entails the element needed to go beyond the normal interpretation of law. As tax planning schemes evolve at a fast rate and are becoming more elaborate than ever, the tax legislation has a hard time in keeping up with this evolution. It is impossible for tax legislation to include all necessary specific defenses to tackle all possible tax avoidance schemes. A GAAR can then allow abusive practices to be captured despite the absence of a specific anti-avoidance rule.[131] Further, the Commission has previously attempted to tackle tax avoidance by introducing anti-avoidance provisions to different

[126] SWD(2016) 6 final p.28.
[127] SWD(2016) 6 final p.17.
[128] Debelva & al. 2015, p. 133.
[129] See de Carolis 2017, p. 170, concerning the 'reverbation effect' on Italian tax law.
[130] Freedman 2014, p. 168.
[131] Recital 11.

Directives. These previous norms have in some texts been referred to as GAARs,[132] but from the point of view of this study these norms are rather limited GAARs as their scope of application is limited to only the respective directive.[133] Conversely, the article 6 of the anti tax avoidance Directive represents a "pure" GAAR in a sense that its scope of application is truly unlimited and unforeseeable in the field of corporate taxation. These other anti-abuse measures included in EU law can however offer a useful point of comparison for the interpretation of the ATAD GAAR.

It can be noted from the other GAARs included in Union legislation that they are formulated in a similar manner than the GAAR of Article 6. In fact, in the course of the legislative process concerning the ATAD, the GAAR was changed to correspond to the formulation used in the PS Directive. The common nominator is that they aim at tackling behavior that is not genuine and has as the purpose the avoidance of taxes. Indeed, the difference of GAARs and SAARs is not their purpose or wording, but rather their scope of application. The other anti-abuse measures refer to denying or withdrawing a tax benefit, whereas the ATAD GAAR consist of *ignoring* an arrangement.[134] For example the anti avoidance provision introduced by the PS directive applies only to situation dealing with dividends between parent companies and their subsidiaries, and the GAAR then works as denying the tax benefit offered by the same directive. The difference between a GAAR and a SAAR is that the GAAR is an independent norm whose applicability is not completely foreseeable. It can be applied to myriad of situations.

From the ATA Directive it can be concluded that the application of the GAAR is secondary in relation to the SAARs and other anti-abuse measures. According to the preamble concerning the GAAR it is specifically stated that the GAARs function is to "tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions." Further, the preamble proceeds to clarify that "*GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules*."[135] This is supported by the general principle of interpretation of laws, *lex specialis derogat legi genrali*. Thus, the GAAR can be described as the last resort for courts and tax authorities when no other anti abuse provisions apply but the arrangement has been carried out to gain tax purposes.[136] However, as it is difficult to foresee the interplay between the various anti-abuse provisions included both in EU law as well as to national tax systems, the overlap and friction between the different GAARs and SAARS can be seen as causing

[132] See for example Weber 2016.
[133] Immonen and Lindgren also refer to these other anti-abuse measures as SAARs. EATLP Report 2016, p.2.
[134] PS Directive article 1(2): "Member States shall not grant the benefits of this Directive—"merger Directive Article 15(1): "A Member State may refuse to apply or withdraw the benefit—".
[135] Recital 11.
[136] The other requirements for application are that the arrangement has to b non-genuine and it has to defeat the purpose and objective of the otherwise applicable tax norm.

uncertainty in taxpayers who have the purpose to mitigate their tax burden rather than avoid tax.[137] As the EU law already includes GAARs in other directives, the scope of the new provision is not clear. The scope of application of the ATAD GAAR is general in comparison with the PSD GAAR, but it could be considered whether the ATAD GAAR could be applied for example in cases falling under the scope of the Merger Directive. At least In Finnish case law the GAAR of VML Sec. 28 has been deemed as applicable in a situation where the anti-abuse provision concerning business restructurings of EVL 52 h did not apply.[138]

The benefit of a GAAR compared to SAARs is that the constant introduction of new SAARs designed to tackle new schemes is making the tax system more complex, which can in the end paradoxically create new loopholes for tax-avoidance.[139] The GAAR has also been argued to be molding the tax avoidance mentality of the taxpayer through monitoring. In this view the taxpayer is gradually pushed to change their tax avoidance mentality to more acceptable direction so that they finally no longer need the control of the system but it would be easier to work in a lawful manner and not try to test the boundaries of acceptable tax planning.[140] Following this logic it seems that the GAAR has also kind of an deterrent effect in fuzzying the lines between acceptable tax planning and avoidance practices. Even though the efficacy of GAARs compared to SAARs is widely acknowledged, some constitutional constraints have to be considered regarding their application.

2.4.3 Limitations of GAARs: Principle of Legality and Legal Certainty

GAARs can be seen as an essential part of modern tax systems giving administrations and courts an invaluable tool against most flagrant and novel tax avoidance schemes.[141] Despite the practical usefulness of GAARs from the perspective of the tax authority, there exists limits for their application. It is paradoxical that the open-ended formulation that makes the GAAR such an effective tool also brings about judicial concerns regarding its application, namely concerning the principles of legal certainty and the rule of law.[142] These principles protecting the taxpayers against arbitrary measures from the part of the authorities can be found in the national tax system of Finland as well as from the EU context. It should be noted that whereas taxpayers might attempt to avoid taxes through abuse of norms of the tax law, tax authorities might abuse the GAAR, by applying it to increase tax liability beyond the liability envisaged in the substantive law.[143] That is why clear restrictions to its use are needed.[144]

[137] See Aramayo 2016, p.15, concerning the problems caused by the CCCTB GAAR proposal.
[138] KHO:2014:66.
[139] Knuutinen 2014a, p. 10.
[140] Loutinsky 2011, p. 128.
[141] Freedman 2014, p.167.
[142] Loutinsky 2011, p.103.
[143] Lang & al. 2016, chapter 1.6.
[144] Benefit of the doubt should be given to the taxpayer, see Leblanc-Leduc 2013, p.36.

In the EU context the principle of protection of the rule of law is enshrined in the Article 2 of the TEU. The importance of the rule of law stems from the common constitutional traditions of all Member States.[145] The rule of law requires a "system where laws rule and not men."[146] The principle of legality can be pointed out as the single most important principle also in Finnish tax law.[147] In the Finnish system the principle is enshrined in Sec. 2(3) of the Finnish Constitution according to which "*the exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed*." The principle of legality regarding expressly taxation is enshrined in the Sec. 81(1): "*The state tax is governed by an Act, which shall contain provisions on the grounds for tax liability and the amount of the tax, as well as on the legal remedies available to the persons or entities liable to taxation.*"[148] The principle of legalism stipulates that the application of rules is not left to the discretion of tax authorities or courts, but the wording of the rule itself has to be clear enough for just application. Conversely, according to some authors, the potentially wide interpretation of GAAR is in clear conflict with the principle of legality.[149]

Legalism is present in tax law in all three phases of the life cycle of a legal act: First, legalism is present in the imposing of tax norms, which requires that taxes must be based on law.[150] Second, in the application of norms the principle of legality requires that tax law must provide support for all the elements of the tax norm in question. In the interpretation of tax norms the principle of legality imposes the interpretation to be based on the grammatical approach i.e. the wording of the norm.[151] For the purposes of this study the demands of the principle of legalism are considered particularly in the interpretation of tax law. This means that the interpretation of the GAAR should start on the wording of the provision. The emphasized significance of legalism derives from the unique position of tax law in between public entity on the one hand and on the private person on the other. This is the defining feature that sets tax law apart from other legal fields.

A defining element of the GAAR is its informal nature. This informality is an anomaly in tax law that raises some concerns in otherwise highly formalistic field of tax law. GAARs constitute an exception in the context of tax legislation. By definition, a general anti avoidance rule is anti-formalist and substantive.[152] Nevertheless, it should be noted that a rule intended as un-formal and open-ended general rule might be

[145] COM(2014) 158 final.
[146] Sellers 2016, p. 3.
[147] Knuutinen 2015, p. 813.
[148] Concerning municipality tax, see Sec. 121(3) of the Constitution.
[149] Lang 2014, p. 660.
[150] Regarding the separation of power, the imposing of norms belongs into the area of legislature, and thus cannot be done by executive or judiciary powers. See Wikström, Ossa, Urpilainen 2015 p.34.
[151] It should be noted that even though important, the wording of the norm is not the only basis of argumentation. See Wikström, Ossa, Urpilainen 2015 p.36.
[152] Prebble 2011, p.382.

formalized and emasculated in the course of its application.[153] When it comes to the interpretation of open-ended rules in courts, the principle of legalism stipulates that the interpretation be formal, thus highly legalistic and following the text of the legal act. Paradoxically, as a vague norm the GAAR does not offer much substance to go by for the interpreter. The applier is thus forced to use the realistic interpretation doctrine in applying the provision.[154] The formal interpretation gets an economic substance when the tax administration gives out guidance on the interpretation of the norms. The interpretation is thus moved from the formalism more to the realistic method of interpretation.[155]

There exits some concerns in the relation of flexible norms such as GAARs and the requirements of legalism and the principle of rule of law. On the one hand, it has even been suggested that rules governing anti avoidance should not be too clear-cut in order to be able to stave off persons attempting to go round them.[156] This kind of view poses a problem in regards with the legality principle: Choosing between alternative courses of action for acquiring a subsidiary, for instance, the taxpayers should have the opportunity to evaluate the acceptability of their arrangements beforehand and get the certainty of the right course of action by consulting the law. If the determination of whether or not abuse is present is left for the court to decide, the taxpayer in reality has no possibility to choose beforehand the lawful option. On the other hand, the rules concerning tax avoidance can be formulated using open-ended and abstract legislative techniques precisely for the requirements of legality. A GAAR has been considered to be able to intervene in abusive practices without infringing the legality principle. For example in Finland the GAAR of VML Sec. 28 has a very general wording attempting to cover all possible situations constituting tax avoidance not covered by the specific anti-avoidance provisions elsewhere in the statutes. While in some countries this abstract technique has been considered as the most useful solution to the problem of tax avoidance, other states have considered the very principle of legality as preventing the possibility for such general anti-avoidance rules.[157] A GAAR can indeed be argued both to promote the principle of legality and to be against it. According to Knuutinen, the meaning and relevance of the principle of legality is depend on the context.[158]

Another principle protecting the taxpayer from arbitrary use of GAARs is the principle of legal certainty which is closely related to legalism. The principle of legal certainty is not explicitly enshrined in the legal texts of the Union.[159] The principle of legal certainty is generally deemed as requiring predictability for the

[153] Concerning the Australian anti-avoidance rule, see case Cridland v Comissioner of Taxation, 1977.
[154] Määttä 2014, p.4.
[155] Tikka 1972 p. 127-128.
[156] Knuutinen 2015, p.820.
[157] Knuutinen 2015, p.820.
[158] Knuutinen 2015. p.813.
[159] Raitio 2016, p. 292.

application of provisions.[160] It also includes expectation of legal protection, which can be divided into two elements: First, it entails the prohibition of arbitrary application of law. Second, legal decisions must correspond to the settled values of the legal culture in question.[161] In the EU context it has formed in the ECJ case law and it is a general principle that requires legal acts to be clear and precise so that legal subjects can be certain about their rights and obligations and conduct themselves accordingly.[162] As a flexible provision the GAAR raises some concerns regarding the principle of legal certainty. The purpose of the clarity and preciseness of the rules is to guarantee legal certainty and predictability of the whole tax system. Taxpayers are supposed to be able to trust in the tax treatment of their arrangements. It would no doubt be detrimental for businesses to undertake arrangements whose tax ramifications they would not be able to foresee. Thus, the unpredictability of the tax system might lead up to hindering economic activity.

However, the effectiveness of the GAAR as a means of tackling tax avoidance derives from the very uncertainty it creates. As Knuutinen points out, the whole problem of uncertainty created by the use of GAARs has to do with the ambiguity of the concept of tax avoidance. If tax avoidance was a clear cut phenomenon it would be possible to counter it with a clear cut norms: if it was possible to comprehensively define the concept of tax avoidance, the whole problem of unambiguous provisions against it would not even exist.[163] The open-ended application of the rule typically renders it more effective in the sense that the broader the terms, the greater the authority granted to the judicial authorities to interpret it, and hence the greater the insecurity introduced which results in less room for manoeuver and possibilities of aggressive tax planning for the taxpayer.[164] Conversely, it can also be argued that GAARs in fact increase legal certainty. The uncertainty can be claimed to be always present when the courts cannot rely on the pure literal interpretation of the tax law provisions. The GAAR then offers some guidance on the interpretation and the legislation may be interpreted more narrowly than in a situation where the system did not include a GAAR, where the court might be tempted to extend the interpretation of the wording of the article.[165]

In conclusion, it can be stated that the GAAR aims at justice in material sense: taxation should happen on the basis of the actual substance of the arrangement rather than the legal form. The rule of law and the principle of legal certainty, conversely, require the taxation to be based on the form of the arrangement.

[160] See Frände 1989, p. 164 and Raitio 2016, p.292.
[161] See Aarnio 1987, p. 158–229.
[162] See cases C-308/06 Intertanko para.69; Case C-110/03 Belgium v Commission para 30; and case C-344/04 IATA and ELFAA, para. 68.
[163] Knuutinen 2014a, p.299.
[164] Tavares & Bogenschneider 2015, p.489.
[165] Freedman 2014, p.167.

The problem boils down to this balancing between justice and the principles of legality and legal certainty. The tension between the principle of legality and justice is especially confused in cross-border situations where the taxpayer has interface with several different jurisdictions. However, the purpose of the principle of legality is precisely to protect legal certainty required by international investment and business activities.[166]

3 Interpretation of the ATAD GAAR

3.1 General Remarks

As there has not existed a pure GAAR in the Union law prior to the ATAD GAAR now in question, there correspondingly is no unequivocal definition on what is actually meant by the terms used in the provision. Even the practices it is supposed to function against, i.e. tax avoidance and abuse, have no exact meaning. In the EU context tax avoidance has mainly been referred to as a justification on restricting the fundamental freedoms. However, the terms used in the wording of the GAAR of the ATA Directive have featured in the ECJ jurisprudence in relation to other anti-abuse provisions. Consequently, the case law has to be examined in order to uncover the meaning of the new GAAR. Same terms should not be given a different meaning in different contexts.[167] Regarding the GAAR the ATA Directive proposal explicitly stated that the GAAR, in compliance with the acquis, is designed to reflect the artificiality tests of the CJEU where it is applied within the Union.[168] The use of matching terms as used in the GAAR of the PSD, for example, promotes uniformity of the interpretation and legal certainty.[169] The ATAD GAAR is explicitly advised to be considered from two perspectives. First, the design of the GAAR must be suitable to obtain the aims for which it has been formulated. This means that tax administrations must be able to effectively apply it. Further, the application of the GAAR must be predictable and certain enough for taxpayers. Finally, the GAAR must be able to tackle abusive practices. The second point relates to the legality of the GAAR: it must be compatible with the limitations set by the CJEU to prevent it from being successfully challenged by taxpayers. [170]

Following the ECJ case law concerning direct taxation the analysis of the ATAD GAAR can be divided into the interpretation of the subjective elements on the one hand, and the objective elements on the other. According to case law, in order to constitute that an abusive arrangement is at hand, "*there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the*

[166] Knuutinen 2015, p. 820.
[167] Hirvonen 2011, p.39.
[168] Preamble of the ATAD proposal p. 9. (however, it is noteworthy, that no reference to the artificiality tests is made in the final directive.)
[169] Hoor, O'Donnell, Schmitz-Merle 2016, p. 195.
[170] Following the Discussion paper on General Anti-Abuse Rules (GAAR), Platform for Tax Good Governance, 2014.

objective pursued by freedom of establishment has not been achieved".[171] However, the line between the subjective and objective elements is not clear. As the subjective and objective elements are intertwined in various ways, the division between them is somewhat flexible. In the following pages the subjective test shall comprise of the main purpose test, that is complemented by the arrangement test. The obtainment of tax advantage is considered as part of the subjective test, as the obtainment of the tax advantage is the aim of the arrangement. The purpose and object test along with the artificiality test represent the objective part in the logic of the provision. The artificiality test can also be seen as bringing the objective and subjective elements together as an 'objectified intentions test'.[172] It should be noted, that the utility of the subjective tests has been questioned by several authors.[173]

3.2 Subjective test

3.2.1 Main Purpose Test

The main purpose test represents the subjective part of the analysis of the ECJ concerning anti-abuse doctrine. According to the first paragraph, the ATAD GAAR applies to *arrangements or a series of arrangements that have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage.* In broader terms this test can be defined as the 'motive test'.[174] Following other anti-abuse provisions and Commission Recommendations it could also be referred to as a 'principal purpose test'[175] or an 'essential purpose test'.[176]. The common nominator for the motive tests is that they are a reflection of the prohibition of abuse of rights.[177] Nevertheless, the ATA Directive does not include a definition of the 'main purpose or one of the main purposes'. At first sight, the attribute 'main' seems an ambiguous expression on the degree of tax avoidance purpose needed. Support in interpreting this element can be found in the case law concerning other anti-abuse provisions included in the ECJ case law as well as from the ATP recommendation.

It is noteworthy that in the directive proposal for ATAD the term 'essential purpose' was used instead of 'main purpose'. According to the Directive Proposal, non-genuine arrangements or a series thereof carried

[171] See for example, cases C-196/04 Cadbury Schweppes para. 64; Case C-110/99 Emsland-Stärke, para. 52 and 53; and case C-255/02 Halifax and Others para. 74 and 75.
[172] Weber 2016, p. 113-115.
[173] See for example Almendral 2005, p. 567 concerning the Spanish GAAR and Seiler 2016, p. 307-308, and
[174] Motive test as part of the UK CFC rules, see O'Shea 2007, p. 20.
[175] See Article 15 of the Merger Directive, according to which abuse can be seen to be at hand if the operation has as its principal objective or as one of its principal objectives tax evasion or tax avoidance. Also Action 6 of the OECD Action Plan, according to which in order for the operation to be regarded as abusive it must be undertaken for the principal purpose of obtaining a tax benefit.
[176] See anti-abuse rule of the Parent Subsidiary Directive, Article 1(2), according to which in order for the operation to be regarded as abusive it must be put into place for the main purpose or one of the main purposes of obtaining a tax advantage.
[177] Regarding the 'principal objective' mentioned in the Merger Directive, see Kemmeren 2014, p.193.

out for the *essential* purpose of obtaining a tax advantage could be deemed as belonging under the scope of the GAAR. The 'essential' purpose was Commission's choice of wording also in its ATP Recommendation of 2012. It is not clear why in the end the 'main purpose' was chosen over the 'essential purpose' for the final directive. Nevertheless, this choice has to be applauded, as it strengthens the coherence of the anti-avoidance doctrine. It can be justified on the basis of consistency in the use of terms, as also the anti-abuse clause of the PS-Directive uses the concept of 'main purpose'. It can thus be concluded that the Commission may have strived for consistency in the interpretation of the main purpose and that the jurisprudence concerning the PS-directive would give some lead in the interpretation of the GAAR of the ATA Directive.

It is however interesting to consider if there exists some differences in the terms 'main' end 'essential'. The 'main purpose' seems like logical choice, as it would have been questionable from the point of coherence of terminology to choose a different term for the ATAD GAAR than what is used in the PSD GAAR, for example. It defends the cohesion of the different anti-abuse provisions to use similar formulations of the rules. Had the 'essential purpose' been chosen for the ATAD GAAR this would have seemed to indicate that the subjective elements in these two anti-avoidance provisions were meant to differ in some way. However, this would have been understandable, as the scope of the PSD anti-abuse provision is narrow compared to the potentially unlimited scope of the ATAD GAAR. As a flexible norm with wider possibility to interfere with individuals business operations, the application of the ATAD GAAR should be expected to be more stringent. In the final Directive adopted by the Council, however, the wording corresponding the PS Directive's "main purpose or one of the main purposes" is used, and it seems thus to refer to the same amount of tax avoidance purpose as is required in the anti-abuse provision of the PSD. Further, it should also be noted that the GAAR of the ATA-directive proposal mentioned only 'essential purpose', compared to the 'main purpose or one of the main purposes' of the accepted ATAD.[178] The threshold for the satisfaction of the motive test in the accepted GAAR thus seems to be lower, as it is enough that the attainment of tax benefits is only one of the 'main' purposes. This also suggests that the Commission originally meant the threshold for application the proposed GAAR to be higher, i.e. the amount of tax avoidance purpose to be higher, than in the other anti-avoidance provisions using the 'main purpose or one of the main purposes' formulation. Again, the 'essential purpose' was rejected in the favor of the 'main purpose'. The before mentioned conclusion on the more stringent application of the ATAD GAAR can hence no longer be made on the basis of the purpose test.

[178] Also 'main purpose or one of the main purposes' in the PS Directive as well as the 'principal purpose or one of the principal purposes' in the Merger Directive.

In normal language the 'main' and 'essential' purpose have somewhat same meaning. Thus the ATP Recommendation's clarification on the meaning of the 'essential purpose' can be used to uncover the meaning of the 'main purpose' of the ATAD GAAR. In the ATP Recommendation a given purpose is to be considered essential *"where any other purpose that is or could be attributed to the arrangement or series of arrangements appears at most negligible, in view of all the circumstances of the case."*[179] The essential purpose is thus described reversely in relation to the other purposes of the arrangement: The purpose of obtaining a tax advantage is essential when other purposes appear to be insignificant compared to it. Further, this formulation seems to purport the view that an arrangement can acceptably have tax purposes, as long as other purposes are prevailing the tax reasons. This position has been confirmed also in the case law of the ECJ.[180] It could also be argued that not too much should be red into this wording of the motive test with the use of the term 'main' instead of 'essential' or 'principal'. The application of the motive test will probably be, if not exactly the same, very close to the motive tests of other anti-abuse provisions. What is important is that this different wording in principle creates a different possible interpretation of the motive test.

In analyzing the main purpose it should also be determined whose purpose it is to obtain the tax advantage in order for the arrangement to be abusive. Namely, is the purpose that of the *taxpayer*, or that of the *arrangement.*[181] This tension relates to the discussion whether or not the purpose test actually refers to subjective or objective circumstances. It can be derived from the ECJ case law the purpose does not refer to the state of mind of a person, but rather the activity in question objectively speaking has no other justification besides the tax advantage obtained.[182] No inquiry into the motives of the taxpayers who set up the arrangement is needed but the artificiality of the arrangement actually reveals its final purpose - the intent of the parties must be derived from objective circumstances, namely the artificial arrangement.[183] According to this reasoning the purpose test seems to be superfluous to the artificiality test.

Resulting from this additional nature of the main purpose test the significance of the test has been discussed. Seiler sees several reasons justifying the rejection of the purpose test. First, he sees the purpose test as unnecessary as its application is only adding to the objective test. He also sees the purpose test as destructive for the legal culture. This adverse effect is caused by giving too much power not only to tax authorities and courts, but to taxpayers as well. Seiler points out that the referral to the subjective

[179] Commission Recommendation, 2012 point 4.6.
[180] C-126/10 Foggia, para. 35.
[181] Following the logic of Seiler, 2016 concerning the GAAR of the Commission Recommendation of 2012, p.294-295
[182] C-255/02 Halifax & others, opinion of the Advocate General, para. 70.
[183] De Broe 2008, p. 774.

intention of the taxpayer leaves the door open for the taxpayers to argue that the reason behind the transaction in fact was not to obtain tax advantages. This also puts taxpayers in an unequal position, giving preference to those taxpayers receiving the best advice on how to present their intentions in a justifiable way. Put simply, the purpose test brings about the risk of making it possible for the taxpayers to rebut the claim of abuse despite the transaction defeating the statutory requirements. [184]

For the courts, the main purpose test can be seen as entailing a risk of further widening the broad scope of the ATAD GAAR.[185] The fact that the purpose test refers to main purpose or *one of the main purposes,* seems to be a relatively easy test for the tax authorities to pass in order to apply the provision.[186] The attribute 'essential' would probably have meant higher degree of implication of the taxpayer's purpose and thus higher threshold for the application of the provision. Further, it might seem appealing for tax authorities to put more emphasis on the ambiguous 'purpose' of the arrangement and overlook the statutory requirements: an arrangement might be deemed as defeating the statutory requirements on the sole basis of the taxpayer's tax avoidance intentions. For these reasons Seiler claims in his analysis of the ATP Recommendation GAAR that the purpose can only be taken into account at the level of facts. This should be the starting point also for the ATAD GAAR. In this sense, the purpose test of the ATAD GAAR seems somewhat superfluous and as getting its relevance only in connection to the objective elements.

In conclusion, it is safe to say that this definition of the main purpose is not very clear and leaves a lot of room for interpretation. It remains to be determined by the ECJ case law whether the main purpose test of the GAAR will be applied in line with the other motive tests, or will the Court give it an independent meaning. The choosing of the term "main purpose" over the original "essential purpose" of the directive proposal suggests that the interpretation is meant to be in line with the motive test of the PSD GAAR.

3.2.2 Arrangement

The first paragraph of the ATAD GAAR refers to an *arrangement or a series of arrangements,* that the Member States are invited to ignore when the requirements of the provision are fulfilled. Thus, the first condition for the application of the provision is that the taxpayer's conduct must show *an arrangement*. Hence, for the interpretation of the ATAD GAAR the content of the term arrangement must be examined. Next it will be discussed how the choice of specifically the term 'arrangement' influences the application of the provision.

The term 'arrangement' has been used also in other anti-abuse clauses as well as in the ATP recommendation. According to the ATP Recommendation, an arrangement means *any transaction,*

[184] See Seiler 2016, p.296-298.
[185] Seiler 2016, p. 297.
[186] See Kok 2016, p. 412.

scheme, action, operation, agreement, grant, understanding, promise, undertaking or event.[187] The choice of words of 'arrangement', instead of 'transaction', for example, is not an accident. As abusive schemes might demonstrate themselves in a myriad of different ways, it seems that the legislator did not want to limit itself to the more narrow term of 'transaction'.[188] Especially the term 'event' used in the ATP Recommendation can cover seemingly limitless amount of situations that do not correspond to the more traditional 'transaction'.[189] 'An arrangement' is an umbrella term covering several different operations and as such, it is a vague and flexible term.

The vagueness of the term 'arrangement' seems to set the bar of application low. It seems unlikely that the application of the ATAD GAAR would be refused on the basis that the taxpayer's conduct does not manifest itself in a form of an arrangement. In fact, it is unlikely that the aspect would even be explicitly assessed in court; rather, any form of action leading to the obtainment of a supposedly unfounded tax benefit would simply be termed as an 'arrangement'. The very broad scope of the term arrangement seems to render it almost meaningless. In effect, what matters on the applicability of the provision is not the 'arrangement' as such, but the fact that the arrangement lacks commercial substance.[190] Furthermore, the wording of the ATAD GAAR regarding the arrangement is in a passive form not including a link to the taxpayer. This suggests that the rule can also be applied against a detached taxpayer, a minority shareholder for example, who does not have an active role in the arrangement.[191] This passive formulation combined with the seemingly limitless contents of the word 'arrangement' warrants that this aspect of the provision won't stand in the way of tax authorities applying the rule. Nevertheless, the obligation to assess the acceptability of an arrangement on a case by case basis promotes its significance: arrangement should not be given an exact meaning because a certain type of arrangement deemed as abusive in one situation may be acceptable in another situation.[192]

In the wording of the ATAD GAAR it is explicitly stated that an arrangement may comprise more than one step or part. This seems to refer to the fact that when applying the provision the arrangement is to be taken into consideration as a whole. In its case law ECJ has also considers the circumstances of a case as a whole.[193] This implies the possibility for the tax authorities to consider the existence of abuse from very

[187] ATP Recommendation 2012, para. 4.3.
[188] Seiler 2016, p. 299-300.
[189] According to Weber, the making of election or writing-off of an asset is also an 'event' in this sense. Weber 2016, p. 300
[190] See cases C-321/05 Kofoed para. 38; and C-126/10 Foggia para. 50.
[191] Regarding the PSD, see for example Weber 2016, p. 110 and Debelva & Luts 2015.
[192] C-28/95 Leur-Bloem para. 41.
[193] See for example C-321/05 Kofoed para. 31.

broad perspective even beyond the legal boundaries of the legal forms, as the authority can almost freely decide which ensemble is to be considered as an arrangement.

3.2.3 Tax Advantage

According to the wording of the ATAD GAAR the purpose of the arrangement has to be the attainment of *a tax advantage* that defeats the object or purpose of the applicable tax law. The ATAD GAAR, as GAARs in general, is intended to deny the taxpayer an unfounded tax advantage. Hence, for the application of the rule to become into question there must be a tax benefit obtained by the arrangement. In the case where the GAAR is applied, these benefits are denied by the tax authority. The ATA Directive does not make an attempt to describe the advantage in detail or enumerate the situations considered as creating such an advantage. This seems arguably a wise choice, as an exhaustive list of advantages covered by the provision might create opportunities for the taxpayer to claim the nonexistence of an advantage and consequently the non-applicability of the GAAR. It is also one defining element of a GAAR to function as possibly denying a wide range of different tax benefits. Next it will be discussed what kinds of benefits are covered by the ATAD GAAR and how such an advantage may be determined to be at hand.

In the ATP Recommendation, in order to determine whether a tax advantage has incurred or not, national authorities are invited to compare the amount of tax due by a taxpayer, with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement. This requires the tax authority to coin up a fiction of the correct form of the arrangement to which the actual arrangement used by the taxpayer is compared with.[194] Furthermore, the ATP Recommendation advises to consider whether one or more of the following situations occurs: an amount is not included in the tax base; the taxpayer benefits from a deduction; a loss for tax purposes is incurred; no withholding tax is due; foreign tax is offset. This list of the ATP Recommendation does not seem to be exhaustive thus leaving the door open for other kinds of tax advantages to be relevant in the application of the GAAR. The Recommendation explicitly states that it is 'useful' to consider these situations. Hence it is not in no way required to consider exactly these situation, but other situations not included in the list might be relevant as well.

Seiler sees the requirement of a tax advantage as serving dual purpose. First, it is a separate prerequisite for the application of a GAAR. Secondly, the "tax advantage" also entails an element of subjectivity. This is because the determining of a tax advantage is depended on the process of comparing the actual arrangement in question to the fictitious arrangement the taxpayer supposedly would have used in the absence of the abusive arrangement. Thus, the unfounded tax advantage is generated as a difference of this comparison. [195] However, it could also be argued that no tax advantage can be unfounded, as the tax

[194] See Seiler 2016, p. 299.
[195] Seiler 2016, p.298.

liability is based solely on tax law. As taxation is always based on law, a transaction rendered non-taxed through interpretation of the said law cannot create an "unfounded benefit".[196]

AS the ATA Directive itself does not grant any tax benefits whose denial the GAAR would be targeted to, it is relevant to consider what kinds of tax advantages could trigger the application of the provision.[197] The special character of the GAAR in relation to SAARs is particularly evident in this sense. While the anti-abuse provision of the PSD, for example, is specifically targeted to deny the benefits of the directive in a given situation, i.e. considering certain profit distribution as not subject to withholding tax, the ATAD GAAR does not refer to a specific form of tax advantage. The ATAD does not include benefits to which it could refer to, only restrictive measures. Concerning other anti-abuse measures included in Union secondary legislation it is clear that their application may only come to play when the tax benefit is the benefit offered by the Directive, not to other taxes that could be avoided through the arrangement.[198]

As the ATAD GAAR is applied *for the purposes of calculating the corporate tax liability,* and the directive covers *taxpayers that are subject to corporate tax* the tax advantage to which the provision is targeted to is a form of corporate income tax. It is interesting to consider if there are any taxes that would not be covered by the provision, hence attaining a tax advantage in some other form of tax than corporate tax, could the GAAR still apply. It is clear that the ATAD is only targeted to the avoidance of direct taxation, and thus it is not applicable in the area of indirect taxation. However, the applicability is not as clear when it comes to other forms of direct tax, individual income tax, withholding tax, or real estate tax, for example. The ATP Recommendation, for example, specifically refers to withholding tax. The anti-abuse provision of the PS Directive, however, already functions as denying the taxpayer the benefit of exemption of withholding tax related to dividend distributions between parent companies and their subsidiaries. Regarding existing anti-abuse measures of the Union law, they have not been seen as applicable to deny other tax benefits than what are granted by the directive in which they are included in. Regarding the anti-abuse measure of the Merger Directive, for example: "there is nothing in that directive to suggest that it intended to extend the benefit of those favorable arrangements to other taxes, such as that at issue in the main proceedings, which is a tax levied on the acquisition of real property situated in the Member State concerned."[199]

The ATAD GAAR Thus seems to work as fixing loopholes in the EU context due to its capability to intervene in a wide range of unfounded tax advantages. For example, the anti-abuse provision of the Merger

[196] Knuutinen 2016, p.811.
[197] Compared with the anti-abuse provision of the PSD for example, which is cleraly targeted to denial of tax benefits entailed in the directive itself.
[198] Case C-352/08 Modehuis A. Zwijnenburg. Concerning the advantages created by the Merger Directive.
[199] C-352/08 - Modehuis A. Zwijnenburg, para. 52.

Directive could not be applied in a case where the benefit obtained through a merger was the avoidance of a transaction tax of a given country.[200] As the scope of the ATA Directive is the corporate income tax it is clear that the tax advantage realized that would create the prerequisite for the application of the provision must be an advantage that is created by lowering the corporate income tax due for the company. An advantage in the form of withholding tax, for example could be denied with the application of the GAAR where the anti-abuse provision of the Parent Subsidiary directive is not applicable. In this situation then the ATAD GAAR could be applied given that the other conditions of its applications were fulfilled. The broadness of the ATAD GAAR stems largely from its general scope of application and the fact that the advantage to which it refers to is not as limited as in the case of SAARs and limited GAARs.

3.3 Conflict with Object and Purpose

According to the wording of the ATAD GAAR the tax advantage obtained must *defeat the object or purpose of the otherwise applicable tax provisions* in order for the arrangement to be regarded as abusive. This wording reflects the conflict with object and purpose test that can also be described as the norm test[201] or as the objective test.[202] The object and purpose test has been expressed also in the ATP Recommendation, where it is explained that the purpose of an arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply. Accordingly, the objective test is fulfilled when an "arrangement" is "avoiding taxation".[203] Whereas the main purpose test works in the favor of the tax authorities, the objective and purpose test provides some relieve to the taxpayer in referring to the object and purpose.[204]

Regarding the *object and purpose* of the otherwise applicable provision it needs to be determined what is meant by the object and the purpose. At first sight, the 'object' and the 'purpose' of the provision seem to be synonyms. However, it would be a curious choice to pick synonymous terms to illustrate the point, as general principles of interpretation of legal texts requires that no expression in a legal test is not without a meaning.[205] Based on this it can be assumed that the both the object and the purpose have independent meaning. Whether or not there is a difference in meaning it probably doesn't have practical relevance to the interpretation of the Article as a whole.[206]

[200] Transaction tax of Netherlands in the case C-352/08 Modehuis A. Zwijnenburg.
[201] Weber, 2016 p.112.
[202] Seiler 2016 p. 224.
[203] Seiler 2016, p. 269.
[204] Concerning the test in PPT, see Kok 2016 p. 409-412.
[205] Hirvonen 2011 p.39.
[206] Concerning the PPT, see Kok 2016, p. 409.

It has been argued that the biggest contribution of the conflict between the object and purpose test is that it is a reminder of the obligation to properly interpret the law.[207] The test offers the court tools to take into account the purpose of the law, i.e. to lean onto teleological interpretation. This can be a valuable provision especially in jurisdictions in which the interpretation tradition does not originally recognize purpose-driven interpretation.[208] In this vein, the conflict with objective and purpose test merely requires the court to ascertain whether or not the facts of the case are covered by the respective provision, properly interpreted.[209] The conflict with object and purpose test can thus be seen as ascertaining the scope of the application of the provision whose abuse is in question.

It is again useful to compare the ATAD GAAR to other anti-abuse provisions in order to uncover the meaning of the object and purpose test. When it comes to the object and purpose test, the ATAD GAAR differs from the PSD anti-abuse rule regarding the norm whose object or purpose is being defeated. In the Article 1 of the PS Directive it is clearly expressed that the arrangement must not defeat the object or purpose of 'this Directive', referring to the PS Directive itself. In contrast, ATAD GAAR does not refer to any specific piece of legislation. Rather, it refers to 'otherwise applicable tax provisions'. Consequently, the norm whose object and purpose is in question is not predetermined. This broad scope of application of the ATAD GAAR is its most distinguishing feature that truly sets it apart from the other anti-abuse provisions of the EU law.

Provisions whose object and purpose have to be taken into consideration in determining the applicability of the ATAD GAAR are thus all the Member States' tax norms that create benefits and that can be abused by the taxpayers. As the ATA Directive does not create any benefits but merely envisages anti avoidance measures, the purpose and objective to be taken into consideration is thus not the purpose and objective of the ATA directive, but the purpose and objective of the respective national tax provision that is being abused. For example, if the EU GAAR was applied in a case dealing with interest deductions, the purpose and objective of the Finnish tax norms concerning the deductibility of interest expenses was to be considered.[210] Hence, the uncovering of the purpose and object of a tax provision needs to happen on a case by case basis depending on the tax rule in question. Compared with the purpose and the objective test of the anti-abuse provision of the PS Directive, for example, this is not a simple task. In the PS directive the objective of the directive is clearly expressed as to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double

[207] Seiler 2016 p. 255.
[208] Seiler 2016, p.260.
[209] Seiler 2016, p. 259.
[210] Sec. 7 of the Act on Taxation of Business Profits.

taxation of such income at the level of the parent company.[211] This aim has been confirmed in the case law as seeking to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at Community level.[212] To examine the satisfaction of this test the tax authority or the court must then discover the object and purpose of the respective national tax law provisions.

Despite the guidance that the objective test offers in the interpretation of law, it has been pointed out that the test can result in a situation in which similar cases are decided differently depending on the Member State.[213] This is of course the case, as the directive only requires minimum standard of protection and the Member States have the sovereignty in choosing the method of implementation. Consequently, member states can always opt for higher degree of protection than what is provided for in the ATA Directive. However, even if all the Member States would implement a GAAR exactly following the wording of the Article 6 the application would still not be identical. This results from the different methods and techniques of interpretation used in different Member States. The selection of techniques of interpretation might be wider in some countries than in others. Some jurisdictions may allow for a multitude of interpretation techniques, such as analogical interpretation or teleological reduction. Some jurisdictions, on the other hand, rely heavily on the more traditional methods of grammatical, systemic, teleological and historic interpretation.[214] In fact, according to Seiler, the value of the objective test lies specifically in reminding judges that the statutory construction of the GAAR involves more than the so called conventional methods of interpretation.[215]

3.4 Artificiality Test

3.4.1 Artificial Arrangement

The artificiality test is expressed in the first paragraph of the ATAD GAAR as stating that "*Member State shall ignore an arrangement or a series of arrangements which -- are not genuine having regard to all relevant facts and circumstances."* Compared to the objective test also referred to as the 'norm test', presented in the previous chapter the artificiality test can be described as the 'substance test'.[216] This test requires for a certain amount of substance in order for the arrangement to avoid the classification as

[211] Council Directive 2011/96/EU, Recital 3.
[212] Case C-294/99, Athinaiki Zithopiia, para. 25.
[213] Seiler 2016, p. 258.
[214] Seiler 2016, p.258.
[215] See Seiler, 2016 p.259, regarding the objective test of the GAAR introduced in the Commission 2012 ATP Recommendation.
[216] Weber 2016, p. 113.

'artificial', i.e. 'non-genuine'. The artificiality test requires the arrangement to lack substance in addition to the fulfillment of the other two elements in order the GAAR to apply.

In the ATA Directive proposal the case law of the ECJ concerning the artificiality tests was especially mentioned concerning the application of the GAAR.[217] It is noteworthy, however, that this explicit reference is lacking from the adopted ATA directive. Moreover, the Article 6 refers to non-genuine arrangements, instead of artificial arrangements typically used in the ECJ case law. Consequently, it is interesting that the 'lack of substance' is described by non-genuineness and not by artificiality in the ATAD GAAR. 'A wholly artificial' arrangement is a settled concept in the ECJ case law, so it would no doubt have been more cohesive of an approach to choose the term 'artificial' instead of 'non-genuine'. The term 'non-genuine', however, is not a novel one in the EU's legal texts. It is worth noticing that also the anti-abuse provision of the PS Directive uses the term non-genuine instead of the more settled 'artificiality'.[218] This has been regarded as a curious choice in literature.[219] Nevertheless, as the preamble of the ATAD proposal as well as the ATP Recommendation explicitly imposed the artificiality tests of the ECJ to be considered in the GAAR's application, the 'genuine' may be interpreted as having the same meaning as the 'non-artificial'.

Reversely, it can be deduced from this formulation that the ATAD GAAR does not apply to genuine arrangements. Consequently, an arrangement put up for valid commercial reasons reflecting economic reality is a genuine arrangement. Abuse is not at hand when the arrangement has valid commercial reasons and it reflects economic reality. The artificiality test can also be described as the objectified intention test.[220] This means that the subjective intention of tax avoidance[221] has to be shown through objective facts and circumstances. Regardless, the ATAD does not explicitly refer to 'objective analysis' of all relevant facts and circumstances, unlike the preamble of amending the PS Directive.[222] However, the ATAD GAAR stipulates that the genuineness must be evaluated "having regard to all relevant facts and circumstances".

The meaning of the non-genuine arrangement is further explained in the ATP recommendation.[223] The Recommendation also refers to 'artificial' instead of 'non-genuine' arrangement. As the preamble of the ATA Directive states that the Article 6 should be applied following the artificiality test of the ECJ, it can be

[217] ATAD proposal p. 9.
[218] See Article 1 of the PS Directive.
[219] Weber 2016, p.114.
[220] Weber, 2016, p.114.
[221] See essential purpose test above.
[222] See Council Directive (EU) 2015/212 of January 2015:"when assessing whether an arrangement or a series of arrangements are abusive, Member States' tax administrations should undertake an objective analysis of all relevant facts and circumstances"
[223] Commission recommendation of 6 December 2012, para. 4.

argued that the terms 'artificial' and 'non-genuine' are interchangeable and refer to the same phenomena. Hence the ATA Directive proposes a general anti-abuse rule where 'non-genuine' is explicitly equated with 'wholly artificial' arrangements. The final ATAD GAAR, however, is more specific than the original GAAR formulated in the Recommendation. According to the Commission Recommendation an arrangement or a series of arrangements is artificial where it lacks commercial substance. In determining whether the arrangement or series of arrangements is artificial, national authorities are invited to consider whether they involve one or more of the following situations:

a) the legal characterization of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;

b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct;

c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other;

d) transactions concluded are circular in nature;

e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows;

f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.

ECJ case law gives guidance on the interpretation of artificiality of an arrangement, notably in the case Cadbury Schweppes. In this case, the main concern from the point of view of artificiality is whether or not the freedom of establishment was actually exercised. The purpose to mitigate tax burden did not have an effect on the acceptability of the arrangement.[224] The arrangement is to be considered as genuine when the entity in question really exercises business activities in the country of establishment. Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there.[225] The threshold for the artificiality test thus is rather high, as only a small amount of substance can suffice in protecting the arrangement from being deemed as tax avoidance.[226]

3.4.2 Economic Reality and Commercial Reasons for the Arrangement

In the ATAD GAAR the non-genuineness is further explained in the second paragraph of the Article 6, according to which "*an arrangement shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."* This formulation corresponds to the wording used in the PSD GAAR. Furthermore, the concepts of 'valid commercial reasons' as well as

[224] C-196/04 Cadbury Schweppes, para. 75.
[225] C-196/04 Cadbury Schweppes, para. 54
[226] Urpilainen 2008, p. 541.

'economic reality' have featured widely in the ECJ case law where they have been used as constituting artificiality.[227]

Valid commercial reasons seems to refer to the economic substance of the matter as it requires "more than the attainment of a purely fiscal advantage."[228] The amount of substance needed for the arrangement to fall outside the scope of the anti-abuse provisions has not been clear in the ECJ case law. Consequently, the economic substance can be determined in different ways depending on the facts of the case. Having a certain amount of substance can be regarded as relevant in one case, and irrelevant in another.[229] In Cadbury Schweppes, for example, the substance was showed by submitting evidence of the physical existence of the subsidiary in terms of premises, staff and equipment. Conversely, in Think Cap GLO the economic substance was determined by whether there were any commercial reasons for the arrangement.[230] There are several cases in ECJ case law where the Court has taken stance on the validity of commercial reasons. For example, restructuring carried out in the form of an exchange of shares involving a newly-created holding company which does not have any business may be regarded as having carried out for valid commercial reasons. Further, it might be commercially justified to restructure companies which already form an entity from the economic and financial point of view. The creation of a specific structure for a limited period of time and not on a permanent basis may also be carried out for valid commercial reasons.[231]

The concept of valid commercial reasons has been elaborated in relation to the Merger Directive. According to the anti-abuse provision of the Directive an operation can be presumed to have abusive purpose if the operation has not been carried out based on valid commercial reasons, "*such as the restructuring or rationalization of the activities of the companies participating in the operation*".[232] The lack of valid commercial reasons for the arrangement thus creates the presumption of tax avoidance. It is clear from the wording of the Article 15 of the Merger Directive that 'valid commercial reasons' has to involve something more than mere fiscal advantages. This has also been confirmed by the case law of the ECJ.[233] A merger by way of exchange of shares having only fiscal motivation cannot therefore constitute a valid commercial reason within the meaning of the anti-abuse provision of the Merger Directive. In Foggia the Court stated that "*a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are*

[227] C-196/04 Cadbury Schweppes, para. 61.
[228] C-126/10 Foggia, para 34.
[229] Weber 2016, p. 118.
[230] C-524/04 Thin Cap GLO, para.82.
[231] C-28/95 Leur-Bloem, para. 42.
[232] See Art. 15(1)a of the Directive 2009/133/EC.
[233] C-28/95 Leur-Bloem, para. 47.

not predominant in the context of the proposed transaction."[234] Restructuring carried out in the form of the acquisition of a company that does not carry on activities and that does not contribute assets to the acquiring company may, nevertheless, be considered by the latter company to have been carried out for valid commercial reasons.[235] Further, valid commercial reasons may be at hand when acquiring a company holding losses, as the Community law explicitly authorizes taking over an acquired company's losses which have not yet been exhausted for tax purposes.[236]

It derives from the case law that the arrangement can have other reasons, including tax considerations, in addition to commercial reasons and still not be regarded as tax avoidance. The commercial reasons, however, have to be the main reason for carrying out the operation. For example, even though cutting down management costs undeniably constitutes a valid commercial reason for an operation, tax avoidance can still be regarded to be in question if the economic benefit resulted from the cutting down those management costs is minor compared with the tax benefits obtained by the operation.[237] Thus, the relation between the potential tax reasons and commercial reasons has to be analyzed to be able to determine whether the valid commercial reasons have in fact been the predominant motivator for the operation. In conclusion, even though the lack of commercial reasons leads to the presumption of tax avoidance purpose, the arrangement cannot be deemed as tax avoidance merely on this basis. In determining whether an operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination.[238]

The reasons for the arrangement can be deemed as valid when they reflect economic reality. In the ECJ's case law the concept of 'economic reality' seems to be the counterpart to the concept of 'wholly artificial arrangement'. According to the jurisprudence of the ECJ, "*in order for a restriction on the freedom of establishment to be justified on the grounds of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory*."[239] This formulation raises the question whether the wholly artificial arrangement is an arrangement not reflecting the economic reality, or is the economic reality an additional criterion besides the artificiality. From the formulation of the ATAD GAAR it seems plausible that the economic reality is an concept offering a description of the non-genuineness rather than an

[234] C-126/10 Foggia, para. 35.
[235] C-126/10 Foggia , para. 40 .
[236] C-126/10 Foggia, para. 41, see Article 6 of Directive 90/434.
[237] C-126/10 Foggia para. 49.
[238] C-28/95 Leur-Bloem, para.41.
[239] Cadbury Schweppes, para. 55.

independent criterion. To sum up, it seems that there are multiple factors which count for the economic reality of the arrangement. Further, it is clear that the national law cannot include provisions which would set up predetermined criterion for the non-genuineness that would lead to automatic denial of benefits.[240]

3.4.3 'To the Extent' Approach

The Article 6(2) stipulates that "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". Following Weber's[241] analysis on the anti-abuse provision of the PS Directive, the GAAR of the ATA Directive also entails the "to the extent" approach in determining the consequence for the abusive actions of the taxpayer. The formulation is identical to the one in the anti-abuse provision of the PS Directive.

This 'to the extent' approach is explicitly justified in the preamble of the PS Directive.[242] The ATA directive, however, makes no explicit reference to the 'to the extent' approach. Nevertheless, regarding the requirements of consistency in use of terms in the EU law it can be expected that the "to the extent" approach is the same for the ATA Directive as it is for the PS Directive. This is also justified by the interpretation principle stipulating that no expressions in legal texts should remain without meaning. Hence, it is logical to conclude that the phrase "to the extent" corresponds to other similar anti-abuse provisions i.e. the anti-abuse provision of the PSD. In the preamble of the PSD it is acknowledged that while Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may also be cases where single steps or parts of an arrangement are, on a stand-alone basis, not genuine.[243] The preamble proceeds to state that Member States should be able to use the anti-abuse clause also to tackle those specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. The 'to extent' approach is seen as maximizing the effectiveness of the anti-abuse clause while guaranteeing its proportionality.[244] The preamble of the PSD gives as an example of a situation in which the entities concerned, as such, are genuine but where shares from which the profit distribution arises are not genuinely attributed to a taxpayer that is established in a Member State. In other words, the arrangement based on its legal form transfers the ownership of the shares but its features do not reflect economic reality.

Subsequently, the 'to the extent' approach can be seen useful also as guaranteeing the proportionality of the ATAD GAAR. The case law of the ECJ has also gravitated towards assessing the proportionality of

[240] See cases C-28/95 Leur-Bloem, para. 44; and C-451/05 ELISA, para. 91.
[241] Weber 2016, p.126.
[242] Amending PS Directive, recital 8.
[243] Amending PS Directive, recital 8.
[244] Weber 2016, p. 126.

restrictive measures in deciding anti-avoidance cases. There is no exhaustive formula to test the proportionality of a given measure, but it entails more of a balancing act between the interests of taxpayers and tax authorities.[245] A given arrangement may not be regarded as artificial to the extent that it has valid commercial reasons which reflect economic reality. What it comes to other parts of the arrangement, which in turn have no such reasons, can be regarded as non-genuine and the ATAD GAAR may be applied to counter unfounded benefits rising from these arrangements. As such, the 'to the extent' approach also protects the provision from infringements of the primary law by guaranteeing the proportionality of the measure as to be evaluated in each case. As according to the rule of reason test the restriction to fundamental freedoms needs to be proportionate, i.e. not go beyond what is considered necessary, it would be unjustified, for example, to ignore a whole corporate structure when only one part of it, for example one holding company, was deemed non-genuine. Thus, it should be expected that this 'proportionality' test in the form of 'to the extent' approach to be implemented in Member States following the formulation presented in the ATAD GAAR.

3.5 The Interplay between the Different Tests

It should be considered how do the subjective and objective elements of the ATAD GAAR function in relation to each other. For this it needs to be clarified what is the meaning of the artificiality test in relation to the main purpose test and the object and purpose tests. Is the artificiality test needed to determine abuse to be at hand if tax reasons have been the main purpose of the arrangement that defeats the object and purpose of the norms applicable to the situation? In the PS Directive Article 1.3 can be read as a superfluous element, as kind of a clarification of the first paragraph.[246] The meaning seems to be deriving from the fact that the obtaining a tax advantage as such does not constitute abuse. If an advantage is obtained, it can only be abuse when the arrangement is constructed in an artificial manner.

Seiler deduces the separateness of the motive- and the substance tests through inversion.[247] Accordingly, it is clear from the wording of the ATAD GAAR that inversely there can exist such an arrangement that has in fact been put into place for the main purpose of obtaining a tax advantage but which despite is not regarded as 'artificial'. Consequently, artificial arrangement can be put into place also for other purposes than the main purpose of obtaining a tax advantage. Subsequently these two tests are cumulative in a sense that the arrangement has to be both artificial and coined up for the main purpose of obtaining a tax advantage for the GAAR to be applicable. In comparison, for example in Germany the objective test is

[245] Zalasinski 2007, p. 321.
[246] Weber 2016, p. 114.
[247] Concerning the GAAR of the ATP Recommendation, Seiler 2016 p.270.

sufficient in deciding on the abuse cases. Following the German 'innentheorie', counteracting abusive arrangements is merely a question of interpretation and no subjective element is needed.[248]

Subsequently, the purpose of obtaining a tax advantage can be seen as an additional criterion along with the non-genuineness. The purpose test alone is not enough for the application of the GAAR: the underlying motive for the arrangement can be the intent of obtaining a tax advantage, but as long as the arrangement has substance and thus is not 'wholly artificial', the provision does not come to play. Following ECJ case law, *"such tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives, the CFC is actually established in the host Member State and carries on genuine economic activities there*."[249] The significance of the purpose test can be seen as imposing the requirement for the tax authorities to evaluate tax avoidance cases on a case by case basis. This approach is reflected in the case *Leur-Bloem,* where it is stated that "*whether the planned operation has such an objective, the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination*."[250]

Considering the previous points on the interplay between the different tests it seems like the artificiality tests, i.e. the objective factors, are decisive in the application of the ATAD GAAR. However, in its case law concerning abuse of law the ECJ has also stated that anti abuse provisions might be justified even if they are not targeted against wholly artificial arrangements. [251] Moreover, giving a too clear definition to the GAAR as curbing 'wholly artificial arrangements' could even work as against the objectives of the directive in fostering tax avoidance.[252] In the end, the objective factors showing artificial arrangement demonstrate also the 'subjective' element of purpose of obtaining a tax advantage. The three tests are intertwined in a way that it seems rather factitious to separate them in a strict sense. For the application of the ATAD GAAR to be acceptable authorities must conduct a thorough analysis of the situation following the tests included in the text of the provision. This promotes legal certainty and the principle of legality.

In conclusion, there remains some grey area in the interplay between the different elements of the ATAD GAAR. Furthermore, the objective of the directive of uniform application seems to be endangered as Member States can end up following completely different rules in regard to the substance requirements.[253] It has to be kept in mind, however, that the provision is intentionally formulated in a vague manner to increase its effectiveness. At least it seems clear that the requirements are cumulative and thus all three

[248] See Seiler 2016, p.267.
[249] C-196/04 Cadbury Schweppes, para. 75.
[250] C-28/95 Leur-Bloem, para. 41.
[251] Case C-311/08 SGI, para. 66.
[252] Considering the GAAR of the PS Directive, see Tavares & Bogenschneider 2015, p. 484.
[253] Ginevra 2017, p. 128.

tests need to be fulfilled in order for the provision to be applicable. However, it is not predetermined what kind of emphasis the ECJ will give to the different elements in its jurisprudence. As such, the tests included in the wording of the provision offer the authorities a framework in which to conduct their analysis of the situation in applying the norm.

3.6 Consequences of the Application of the ATAD GAAR

Consequences of application of the ATAD GAAR are entailed in the third paragraph of the provision. According to the Article 6(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."* This calculation works as counteracting the abusive tax advantage the taxpayer has gained through the use of the non-genuine arrangement. Thus, it needs to be determined what is meant by this calculation. First it seems clear that the abusive practice can be countered by simply ignoring it. However, in some situations the arrangement might comprise of genuine and non-genuine parts, so that simply ignoring an abusive element would not work as countering the tax benefit, but re-characterization is needed. It is thus interesting to discuss whether the ATAD GAAR gives the authorities the competence to re-characterize an arrangement according to its economic substance.

The first option of ignoring the arrangement seems like a straightforward task for the tax authorities. The ratio of the consequences stipulated in the ATAD GAAR is to restore the situation that would have prevailed had the arrangement not been abusive.[254] This mode of action would be applied in a situation in which a tax advantage has occurred on account of abusive practice of the taxpayer and the said advantage must then be counteracted. The tax advantage might be for example a tax loss or business expense that the taxpayer wishes to deduct from their taxable income.[255] When the statutory conditions of the GAAR are fulfilled and abuse is determined to be at hand the advantage in question would be deemed unfounded. Consequently, the said advantage can be counteracted by simply carrying out the taxation as not counting for the abusive advantage, i.e. for example denying the deductibility of the tax loss or expense. Mitroyanni presents an example concerning holding company structures regarding the first option of ignoring the abusive arrangement for the application of the GAAR: Taxpayer would normally try to mitigate their tax burden by operating the dividend payment to shareholders outside the Union through the Member State with the lowest withholding tax. To this end, the taxpayer could interpose a holding company in the Member State with the lowest rate of withholding tax and steer the flow of dividend payments through the said holding company. The usual practice would be of course to effect the dividend payments directly to the shareholder residing in the third country. If the holding company interposed then

[254] Seiler 2016, p.213.
[255] HMRC GAAR Guidance 2017, C6.3.6.

would be artificial in a sense that it did not poses economic substance, the GAAR may be applied and the artificial holding company would be disregarded. Consequently, the dividends would be treated as having been paid to directly to the third-country shareholder. Then the application of the GAAR would lead to application of a tax between the country of the original payer state and the third country and charging the withholding tax accordingly.[256]

Nevertheless, tax avoidance cases are often more complex than the ones presented above. When there exist actual economic reasons for the arrangement in addition to the artificial parts of the transaction, the determining of the just tax liability becomes much less straightforward. According to the UK GAAR guidance "*in such a case, making a just and reasonable counteraction involves considering what transaction would have been carried out in order to achieve the same commercial purpose, but without including the steps or features which make the arrangement abusive. The approach to be applied in such cases is to identify the transaction which, in all the circumstances, would most likely have been carried out in order to achieve those objectives*."[257] Subsequently, the second option of basing the taxation on a fictional arrangement concerns the more intricate tax avoidance structures. This operation gives the tax authorities the competence to re-characterize the arrangement based on its economic substance.[258] This re-characterization goes beyond the mere ignoring of an arrangement – it includes evaluating what the correct form for the arrangement would have been and which kinds of tax consequences would have resulted from it. This approach concerning the fictional arrangement has been confirmed in the ECJ case law. In Halifax the Court states that "*where an abusive practice has been found to exist, the transactions involved must be redefined so as to reestablish the situation that would have prevailed in the absence of the transactions constituting that abusive practice*."[259] The scope of application of the ATAD GAAR is wide and the application relates to the calculation of corporate tax liability in general, not to a specific tax benefit.[260] Consequently it could be expected that the re-characterization aspect would be especially useful in its application, especially when the pros of the GAAR are that it is capable to attack arrangements as a whole, and intervene in for example in holding company structures.[261]

The formulation of the GAAR in the ATP Recommendation, which is referred to as preparatory work in relation to the ATAD GAAR seems to allow the re-characterization. This formulation seems to give the tax

[256] Mitroyanni 2016, chapter 2.3.
[257] HMRC GAAR Guidance 2017, C 6.3.5.
[258] Mitroyanni (2016) chapter 2.3, refers to 're-characterization fiction'.
[259] C-255/02 Halifax & others, para. 98.
[260] As comparison, in the anti-abuse rule of the PSD a specific provision concerning the calculation of tax liability is not needed, as the rule applies merely as denying the benefit otherwise granted by the directive i.e. the exemption from withholding tax between dividend distributions between parent companies and subsidiaries.
[261] ATP study mentions the acquisition holding companies as a passive ATP indicator.

authority competence for two options: "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 arrangements for tax purposes by reference to their economic substance*".[262] The second sentence indicates that the provision allows to base the taxation on a fictional arrangement.[263] However, the re-characterization fiction raises some concerns. First, the re-characterization is not an easy task, as there are often numerous acceptable ways to arrange business activities. The authorities then must choose between these different options. It would not seem just from the perspective of the taxpayer to carry out the taxation according to the most tax burdensome arrangement. As the taxpayer has the right to mitigate their tax burden, and as the use of anti-abuse measures are not intended to penalize the taxpayer,[264] but rather counteract the abusive practice, it would seem plausible that the tax authority should choose the most 'rational' course of action from the point of view of the taxpayer. This would most likely be the one that would result into the lightest acceptable tax burden.

Even though the ATAD GAAR does not impose any penalties, it is explicitly stated that Member States can impose penalties if they so wish. The preamble of the ATA Directive concerning the GAAR states that Member States should not be prevented from applying penalties where the GAAR is applicable. However, this does not create the obligation to impose penalties, merely permits them. Concerning the calculation of the tax liability it should be noted that it has been confirmed in the case law of the ECJ that the intention of the application of the GAAR is not to penalize the taxpayer. The ATAD GAAR does not include a clear and unambiguous legal basis that would stipulate such a penalty. Rather, the GAAR permits the collection of taxes for which the taxpayer would have been liable for in the first place if the abusive arrangement would not have been undertaken. The application of the rule as such thus creates the obligation to repay, not a penalty.[265]

In conclusion, it seems that it should be expected that in addition to simply ignoring an arrangement the interpretation of the ATAD GAAR would also give the tax-authorities the competence to re-characterize abusive arrangements. This seems the most compelling option, as the ATAD GAAR is precisely aimed at countering abusive practices as a last resort. Consequently, it should have wide possibilities to intervene in abusive schemes.

[262] Italicized by the author, ATP Recommendation 2012 para. 4.2.
[263] Seiler 2016, p. 322.
[264] See C-255/02 Halifax & others, para. 93.
[265] C-255/02 Halifax & others, para. 93; C-110/99 Emsland-Stärke, para.56.

3.7 Compatibility of the ATAD GAAR with EU Primary Law

3.7.1 General Remarks

As a provision of the secondary law the ATAD GAAR is under requirement to be compatible with the primary law of the Union. Hence, the next question to be answered is the compatibility of the above presented ATAD GAAR with the Union primary law. This question raises two different aspects regarding compatibility: first, the ATAD GAAR might be in conflict with the Union law *as such*.[266] Second, even if the formulation of the provision as such would be compatible with the primary law, the incompatibility might rise as a result of the implementation of the provision in Member States. This second option would result from transposition of the provision in a way that would be discriminatory or would restrict the fundamental freedoms in a way that would not be justifiable or proportionate. In addition to fulfill the elements of the rule of reason test (legitimate aim, imperative reason in the public interest, suitable to attain the objective in question, and proportionality) the measures must be compliant with the general principles of Union law.[267]

The Articles 263-264 TFEU give the ECJ the possibility to declare secondary legislation void if the legislation infringes the Treaties or procedural requirements in its implementation. At first glance, the compatibility of the ATAD GAAR, as formulated in the directive, with the Community primary law seems clear. As a part of the EU legal framework it seems hardly possible for the provision to be in contradiction with the very same legal order it originates from. The presumption of the GAAR to be in accordance with the Community law stems from the well established principles of the EU law, namely the 'presumption of validity of Union acts' and the 'Tedeschi' principle. By virtue of the former principle, all acts issued by the Union are presumed to be in accordance with the EU Treaties. [268] Therefore, the acts produce their effects until they are voided or withdrawn following the relevant procedures of the case. Further, the Tedeschi principle stipulates that in the case of fully harmonized subjects by means of secondary law acts, Member States cannot make use of exceptions to the fundamental freedoms set out under primary law.[269]

Concerning the first situation requiring the ATAD GAAR to be compatible with the Union primary law as such, it is dogmatically clear that the primary law prevails over the secondary law. However, it has been discussed in legal literature whether the ECJ is actually willing to enforce the hierarchical superiority of the

[266] According to the Article 263 of the TFEU The Court of Justice of the European Union shall review the legality of legislative acts, for example the directive of the European Council intended to produce legal effects *vis-à-vis* third parties.

[267] Only acts of the Member States that can be linked to Union law are subject to compliance with the general principles recognized in the Union's legal order. Further, see Szudoczky 2013, p. 98.

[268] See Case C-137/92 Commission v. BASF and others, para. 48; and Case C-245/92 Chemie Linz v. Commission para. 93.

[269] See Case C-5/77 Carlo Tedeschi v. Denkavit Commerciale.

primary law.[270] Szudoczky points out three techniques, which enable the Court to avoid analyzing the possible conflict between the secondary law and the fundamental freedoms. First, questions concerning the compatibility with fundamental freedoms is often raised by national courts in respect with the national implementing measures rather than the directive itself, thus allowing the ECJ to avoid the question concerning fundamental freedoms and to concentrate merely on the transposition of the of the directive into domestic law. According to Szudoczky this allows for the court not to scrutinize the directive's compatibility with fundamental freedoms. Second, the Court often applies the technique of consistent or reconciliatory interpretation. Using this approach the Court interprets the secondary law in a way which makes it compliant with the fundamental freedoms, and hence no invalidation of the Union act is needed. The third approach concerns cases where the doubts about the validity of the Union act are too obvious. Then the Court tends to resort to the less strict test for measuring the compatibility of secondary EU law with the fundamental freedoms than the test that would be applied to scrutinize measures originating from Member States.[271]

The compatibility of a provision with the primary law derived from the Union itself seems even clearer when taking into account the lack of case law of the ECJ where EU secondary legislation would have been declared invalid or in contradiction with the fundamental freedoms. The court has almost never declared EU secondary legislation invalid or annulled it for violating fundamental freedoms.[272] The fact that might more likely to become evaluated in practice, however, is the transposition of the secondary law provisions to national legislation. Then the secondary law provision will be assumed as compatible with the primary law and the national measure would be assessed in the light of this secondary law provision. The non-compatibility of the implementation of EU secondary act with the fundamental freedoms is present for example in the case Delhaize.[273] In this case ECJ stated that regarding to the possibility of the Member States to enact more stringent rules, these further restrictions shall not impose conditions that would form an infringement of the Treaty rules.[274] Another example is expressed in Bosal.[275] In Bosal the ECJ stated that when a Directive gives Member States options to choose from for implementing a directive the option selected cannot violate fundamental freedoms.[276]

[270] Szudoczky 2013, p. 325.
[271] Szudoczky 2013, p.196.
[272] Szudoczky 2013, p.380.
[273] ECJ 9 June 1992, Case C-47/90 Établissements Delhaize frères and Compagnie le Lion SA v. Promalvin SA and AGE Bodegas Unidas SA, para. 25.26.
[274] Case C-47/90 Delhaize, para. 26.
[275] ECJ 18 Sept. 2003, Case C-168/01 Bosal Holding BV v. Staatsseercretaris van Finacien, para. 45.
[276] See case C-168/01 Bosal, concerning the implementation of the Council Directive 90/435/EEC.

In the end the compatibility or non-compatibility of the provision of secondary law with the primary law stems from its application and thus is dependent on the implementation and application by the national authorities. In the following pages, however the compatibility of the secondary law provision of ATAD GAAR with the Union primary law will be examined as such. For this, it needs to be determined first if the ATAD GAAR may create a restriction of the fundamental freedoms and whether it is discriminative. If a restriction actualizes, it has to be evaluated what kind of reasons would justify such a restriction.

3.7.2 Does the ATAD GAAR Constitute a Restriction of Fundamental Freedoms?

First, it needs to be determined whether the ATAD GAAR can create a restriction on the fundamental freedoms, namely to the freedom of establishment. In principle such restrictions are prohibited.[277] If such a restriction exists, the measure ends up breaching the fundamental freedoms after which the justification of the measure needs to be considered. Restrictions of fundamental freedoms are caused by the use of discriminatory measures or simply by the use of measures that in some way impede the exercise of fundamental freedoms. Therefore, the ATAD GAAR is also evaluated regarding the principle of non-discrimination as well as the principle of proportionality.

First of all, a restriction can be the result of a discriminatory measure. The measures can result in direct discrimination or in indirect discrimination. Whereas direct discrimination rests on nationality, indirect discrimination is based on other components that in the end, however, result in treating nationals of other Member States in a discriminatory manner.[278] The prohibition barring restrictive measures impedes measures that treat cross-border economic activities less advantageously than equivalent domestic activities.[279] Subsequently national courts have to carry out a hypothetical evaluation as to whether the rule could be applicable in purely domestic situation. Hence, a discriminatory restriction is likely to occur if the provision in question refers only to a cross-border transaction and imposes a less favorable treatment than in the domestic situation.[280]

The text of the ATAD gives guidance in considering whether the ATAD GAAR could constitute a restriction in the sense of discrimination. According to the preamble of the ATAD concerning the GAAR *"it is important to ensure that 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."*[281] Hence, it is clear that the provision is intended to apply equally in domestic and cross-border situations. If the provision then is applied in the national level following this requirement, it would not

[277] Article 18 of the TFEU.
[278] Dahlberg 2005, p. 93-94.
[279] Douma 2012, p.67.
[280] Hilling 2013, p. 296. See also case case 270/83 Avoir Fiscal para. 27, where discrimination resulted in restriction.
[281] ATAD, recital 11.

create a restriction on these basis.[282] Furthermore, the fact that the GAAR is imposed on a directive that creates an obligation for its adoption for all the Member States also works as dispelling concerns regarding the principle of non-discrimination. In this regard, however, the nature of the directive as a minimum directive raises some concerns - discrimination might be at hand due to uneven application of the GAAR in Member States.

However, a restriction can be deemed to be at hand also in situations where the measure in question concerns equally domestic and cross-border activities. In fact, the measure does not need to be discriminatory on the basis of nationality to result in breach of fundamental freedoms.[283] According to the settled case law of ECJ "*all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions."*[284] As the GAAR works in international situations and its application is a matter of interpretation in a particular case, it can be assumed that the provision could work as rendering less attractive the exercise of the fundamental freedoms. In the worst case scenario a certain type of arrangement could be classified as acceptable in one Member State, while in others it would be deemed as abusive.[285] The uncertainty created in the internal market with the use of GAARs whose implementation undoubtedly will differ from country to country, entails the risk of creating restrictions. Companies might be less prone to engage themselves in cross-border activities and take advantage of the freedom of establishment, for example, if they are uncertain about the tax treatment those cross-border activities would propel. Furthermore, as the ATAD GAAR includes a main purpose test, but no guidance on the division of the burden of proof between the taxpayer and the tax authorities a hindrance to the internal market might actualize from the point of view of proportionality. This aspect would consequently result in a restriction of the fundamental freedoms. If the national application of the rule would charge the taxpayer with strenuous burden of proof a restriction would likely be at hand.

3.7.3 Justification for the Restrictive Measure

For the application of an anti-abuse measure to be acceptable there needs to be a justification for the restriction it causes on the fundamental freedoms. As the need to prevent the reduction of tax revenue is not one of the grounds listed in Article 52(1) TFEU or a matter of overriding general interest which would justify a restriction on a fundamental freedoms,[286] the acceptability of the justification needs to be

[282] Compared with SAARs that might target exclusively cross border situations and hence result in obstacle, the GAAR has a general applicability which means that it must be applied in a *discriminatory manner* for the obstacle to realize. See Hilling 2013, p. 296.

[283] See for example Case C-157/07, Finanzamt für Körperschaften III in Berlin v Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH, para. 29-30.

[284] See cases C-55/94 Gebhard, para. 37; Case C-442/02 CaixaBank France, para 11.

[285] Cordewener 2017, p. 66.

[286] C-196/04 Cadbury Schweppes, para. 49, see, to that effect, Case C-136/00 Danner para. 56; and C-422/01 Skandia and Ramstedt, para. 53.

evaluated on a case by case basis.[287] The existing case law concerning the justifications of restrictive measures illustrates the doctrine on what grounds the application of the ATAD GAAR could be justified. First, it needs to be determined whether the taxpayer relied on the rights granted by the Treaty in abusive manner. This abuse can be deemed to be at hand in the case of wholly artificial arrangement. Hence, national restrictive measures have traditionally been justified only when they are targeted against wholly artificial arrangements.[288] However, it can also be argued that case law of the ECJ shows signs of rejecting the strict requirement of artificiality in moving towards deeming as acceptable measures not targeted only against *wholly artificial arrangements*.[289]

First, as restriction of the fundamental freedoms can be deemed to be justifiable when those freedoms have been relied on in abusive manner, abuse needs to be determined to present in the case. The question regarding the compatibility with the fundamental freedoms and the rule of reason test thus is whether the formulation of the ATAD GAAR preconditions this pursuit to find abuse to be at hand. It can be argued that the ECJ does not lightly determine abuse to be present.[290] ECJ has recognized that national courts can take account of abuse or fraudulent conduct of the persons and deny them the benefit of the provisions of the Community law. However, this determining of conduct as being abuse of Community rights should happen on a case by case basis and be based on objective evidence. Further, the national courts should asses such conduct in the light of objectives pursued by those provisions, on which the person is seeking to rely on.[291] For example, if the Freedom in question is the freedom of establishment, the objective of this provision is to promote cross border activities and the abuse of this provision should result from a situation in which the company has not genuinely been established in another Member State.

There exists vast amount of case law concerning different justifications for the restrictive measures. Regarding the freedom of establishment, for example, it can be concluded that the mere fact of setting up a company with limited economic substance does not call into question the right to exercise the freedom of establishment.[292] In addition, abuse of the freedom of establishment may not be deemed to be at hand merely on the basis that the taxpayer benefits from the more favorable tax legislation of another Member State.[293] It flows from the ECJ case law, that the fundamental freedoms can be deemed to be relied on in abusive manner in the case of wholly artificial arrangement. Consequently, ECJ sets the requirement for

[287] C-28/95 Leur-Bloem, para. 41.
[288] C-196/04 Cadbury Schweppes, para. 51; C-324/00 Lankhorst-Hohorst, para. 37; C-446/03 Marks & Spencer, para. 57.
[289] Hilling 2013,
[290] Urpilainen 2007, p.225-226.
[291] C-212/97 Centros, para.25.
[292] Panayi 2015b, chapter 7.
[293] C-196/04 Cadbury Schweppes para. 37; C-212/97 Centros, para. 27; and Case C-167/01 Inspire Art para. 96.

the national restrictive measures to be targeted against wholly artificial arrangements in order to be justifiable. The ATAD GAAR does not refer to 'artificiality' *per se,* but as it was discussed in the chapter concerning the artificiality test, it can be concluded that the ATAD is meant to reflect the artificiality test formed in the ECJ case law.

In its case law, the ECJ has developed an explicit set of requirements that should be fulfilled in order to consider an arrangement as wholly artificial. Regarding artificiality it needs to be determined whether the arrangement in reality belongs under the scope of the fundamental freedoms. First, the arrangement must contain a subjective element. This subjective element must show that it is the taxpayer's intention to obtain a tax advantage. This calls for clear benchmarks indicating the fiscal motives of the arrangement at hand.[294] Furthermore, despite the existence of fiscal motives, objective factors must exist indicating that the arrangement does not reflect economic reality. While genuine establishment exists and real business is carried out, the arrangement cannot be regarded as artificial. The artificiality must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to physical presence of the company. This presence, in order not to be regarded as artificial, should include substantive factors such as premises, staff and equipment.[295] If evaluation of those factors then leads to the finding that the entity is a fictitious establishment not carrying out any genuine economic activity in the territory of the host Member State, the creation of that entity must be regarded as being a wholly artificial arrangement. That could be so in particular in the case of a 'letterbox' or 'front' subsidiary.[296] Consequently, the arrangement has to be treated as wholly artificial. As was presented in the previous chapters, the ATAD GAAR includes both the subjective and the objective elements preconditioned also in the ECJ case law.

It can thus be concluded that the actual question about compatibility of the ATAD GAAR with primary law is not about the scope of fundamental freedoms *per se,* as the freedom of establishment is automatically fulfilled when setting up an arrangement in another Member State. Rather, the question to be resolved relates to a balancing act between the interests of the Union and interests of the Member States. As Seiler points out, the fact that justifications for the arrangement are considered, already implies that the scope of the freedom of establishment has in deed been fulfilled. Consequently, in Cadbury Schweppes it seems to be more of a matter of balancing interest of the smooth functioning of the internal market and the Member State's preoccupation of maintaining an anti-avoidance provision protecting their tax base. From the point of view of the fundamental freedoms the arrangement is genuine and does not defeat the purpose and objective of the freedom in question. Rather, the provision whose purpose is being defeated

[294] See cases C-196/04 Cadbury Schweppes*,* para. 64; and C-524/04Test Claimants in the Thin Cap Group Litigation para. 78.
[295] C-196/04 Cadbury Schweppes, para. 67.
[296] See cases C-196/04 Cadbury Schweppes, para. 68; and C-341/04 Eurofood IFSC, para. 34 and 35.

is the provision of the national tax law.[297] This reasoning is reflected by the ATAD GAAR as well, as it explicitly states that the object and purpose to be defeated is the object and purpose of the applicable national law. Thus the fact that the fundamental freedoms have actually been exercised, for example the subsidiary has actually been incorporated in another Member State, does not deny the applicability of the GAAR. What matters, instead, is the degree of economic substance of the arrangement, as the objective of the freedom of establishment is not merely to allow companies to set up entities within the internal market, but that those entities engage in economic life of Member States and profit therefrom.[298]

Consequently, the artificiality refers to the economic substance of the case. As is confirmed in the case law of the ECJ, "*a national measure restricting freedom of establishment may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned."*[299] Having regard to the objective of integration in the host Member State, the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment in that state for an indefinite period.[300] Accordingly, the Court states that in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements. Seiler sees it as a curious choice to refer back to the objective of the freedom of establishment after it has been determined that the national measure indeed restricts this freedom.[301] According to the Court the 'wholly artificial arrangement' does not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory. The formulation of the ATAD GAAR seems to be in line with this requirement, as it defines the non-genuineness as not reflecting economic reality.

However, it has been argued that ECJ does not maintain this requirement of wholly artificial arrangements in its current case law.[302] In the case SGI the court states that "*national legislation which is not specifically designed to exclude from the tax advantage it confers such purely artificial arrangements — devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory — may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States."* [303] The reduction in tax revenue cannot be regarded as such

[297] Seiler 2016, p. 158.
[298] Case C-55/94 Gebhard, para. 25.
[299] C-196/04 Cadbury Schweppes, para. 51.
[300] see Case C-221/89 Factortame and Others, para. 20; and Case C-246/89 Commission v United Kingdom para. 21.
[301] Seiler 2016, p. 158.
[302] Hilling 2013, p. 300.
[303] Case C-311/08 SGI, para. 66.

as an overriding reason in the public interest, which may be relied on to justify a measure, which is in principle contrary to the fundamental freedoms.[304] Conversely, the need to ensure that the balance in the allocation of taxing rights between Member States together with the need to protect the tax base of a Member State has been considered as an acceptable justification for the restriction.[305] The so-called 'symmetry argument' has been successful in court: in Marks & Spencer UK put forward the argument that in tax matters profits and losses are two sides of the same coin and must be treated symmetrically in the same tax system in order to protect a balanced allocation of the power to impose taxes between the different Member States concerned.[306] According to Hilling, when an overall evaluation is made of the need to prevent tax avoidance as one justification among several justifications, the requirement of artificial arrangement is generally disregarded.[307] In fact, it has been argued that ECJ's attitude towards Member State's restrictive rules has moved to more permissible direction.[308] Often the justification for the restrictive measure in these situations has been the balanced allocation of taxing rights, both in conjunction with other justifications and as a separate justification.[309] However, the compatibility of the ATAD GAAR with the requirement of wholly artificial arrangements has been confirmed by explicitly taking the artificiality tests as part of the provision by referring to non-genuineness of the arrangement.

Due to the fact that the ECJ has been more willing than previously to accept justifications for restrictive national rules, the significance of the proportionality test has been highlighted.[310] The assessment of proportionality leads to the possibility that a restriction might be regarded as acceptable in certain situations while unacceptable in others.[311] Furthermore, the proportionality test requires that the taxpayer must be given the opportunity to prove that the transaction at issue was carried out for commercially sound reasons.[312] In addition, it is clear that un-rebuttable presumptions on tax avoidance are not acceptable, as they are intrinsically disproportionate.[313] The ATAD GAAR does not set up a presumption of tax avoidance which would make it disproportionate. However, there is no mentioning of the burden of proof in the ATAD GAAR which might be problem regarding the proportionality test.

[304] Case C-319/02 Manninen, para. 49
[305] Case C-446/03 Marks & Spencer, See e.g. Case C-414/06 Lidl and case C-371/10 National Grid Indus.
[306] C-446/03 Marks & Spencer para. 43.
[307] See e.g. cases C-446/03 Marks & Spencer; Case C-231/05 OY AA; Case C-311/08 SGI.
[308] Hilling 2013, p. 298.
[309] See for example Case C-337/08 X Holding, para. 31, Case C-231/05 *Oy AA*, para. 55, case C-414/06 Lidl, para. 34
[310] Hilling 2013, p.302
[311] See e.g. Case C-446/03 Marks & Spencer and Case C-414/06 Lidl
[312] Case C-524/04 Thin Cap Group Litigation, para. 80
[313] Dourado 2015, p. 46.

3.7.4 Compatibility of the ATAD GAAR with the General principles of Union Law

As was discussed above, the compatibility of a measure deriving from Union law has to comply with the general principles of Union law in addition of passing the rule of reason test.[314] This requires the provision to be compliant with the principle of proportionality and legal certainty. As was shown in the previous chapter, principle of proportionality can be applied as a balancing test between conflicting rights and interests. However, the principle of proportionality operates also as an independent basis for the review of the legality of secondary Union law. As such, the principle functions as an autonomous general principle and fulfilling exclusively its public law function by protecting the autonomy of individuals.[315] Regarding the ATAD GAAR the principle of proportionality requires that the authorities do not intervene in the arrangements of taxpayers unless the intervention would be deemed as proportionate with the aim obtained, i.e. the protection of the country's tax base. As was discussed in previous pages, the ambiguous subjective element of the ATAD AAR might lead into situation where the tax authority might be tempted to abuse the provision.

Another controversial issue regarding the GAAR is that it doesn't seem to guarantee much legal certainty.[316] Legal certainty has also been deemed as part of the proportionality test of the restrictive measure.[317] According to Hilling, the ECJ can be expected to consider whether a national legislator has tried to achieve predictability without compromising the effectiveness of the law. Further, when certain amount of vagueness is needed to render the rule effective, the ECJ may permit such vagueness.[318] Thus it seems that in the light of the current case law the ATAD GAAR might well be compatible with EU law even if it does not guarantee a high degree of legal certainty. Furthermore, the principle of legal certainty boarders closely with the principle of legitimate expectations. According to the principle of legitimate expectations "those who act reasonably and in good faith on the basis of the law as it is or a least seems to be should not suffer form disappointment of those expectations."[319] This principle is particularly relevant regarding the ATAD GAAR with a general scope of application, as it gives tax authorities more power to intervene in arrangements of taxpayers. Arrangements that could not be countered before, might be deemed to belong under the scope of application of the ATAD GAAR. The application of the ATAD

[314] Szudoczky 2013, p. 98.
[315] Szudoczky 2013, p. 113.
[316] Aramayo 2016, p.17.
[317] See Case C-318/10 SIAT, para. 50: where legislation is predicated on an assessment of objective and verifiable elements for the purposes of determining whether a transaction represents a wholly artificial arrangement entered into solely for tax reasons, it may be regarded as not going beyond what is necessary to prevent abusive practices, if, on each occasion on which the existence of such an arrangement cannot be ruled out, that legislation gives the taxpayer an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement.
[318] Hilling 2013, p. 304.
[319] Raitio 2008, p. 54.

GAAR in a way that it would intervene in taxpayer's arrangements that would previously have been deemed acceptable would no doubt infringe the legitimate expectations of the taxpayers. Furthermore, as regards the principle of clarity and definiteness, the ECJ has even deemed that vague laws are to be interpreted in favor of the addressee[320]

In conclusion, taking the above observations into consideration the ATAD GAAR can be considered as proportionate measure to attain the aim of combatting tax avoidance and thus compatible with the EU law when applied in case-by-case basis without setting up un-rebuttable presumptions of abuse. Further, the provision is compatible with the case law of ECJ concerning the anti-abuse doctrine. As the implementation of the ATAD GAAR in Member States is bound to differ, it is left for the ECJ to create a coherent anti-abuse doctrine.[321] How this will correspond with the doctrine created in the classic Cadbury Schweppes case, and the more recent case law concerning the prevention of tax avoidance and the just allocation of taxing powers as justifications for the restriction, remains to be seen. However, the existence of the ATAD GAAR implies to confirm the acceptability of the prevention of tax avoidance and balancing the just allocation of taxing powers as justifications for restrictive measures. It could be argued that the doctrine would move away from the strict area of evaluating the pure artificiality of arrangements in assessing tax avoidance cases in order to better cover novel tax avoidance situations. As it is shown in the previous pages that the compatibility of the GAAR will only resolve after its implementation to national tax systems this aspect will be discussed next.

4 Compatibility of the Finnish VML Sec. 28 with the ATAD GAAR

4.1 General Remarks on Implementation of the ATAD GAAR

The ATAD GAAR will have to be transposed to national legislations by the beginning of the year 2019. This means a very rushed schedule for the Member States. The national rules then may go further in the protection of the national tax base, which in the case of GAAR would mean a looser formulation of the provision, which would lead into wider scope of application. This would in turn mean a stricter provision from the perspective of the taxpayers. However, as was presented in the previous chapter, the national legislator is restricted by EU primary law – the rule imposed cannot cause a restriction of the fundamental freedoms. The rule then has to fit between the narrow grey area created in between the minimum level of protection caused by the positive harmonization effect of the ATA Directive and the negative harmonization of the primary law constituting the upper limit for the application of the rule. As the Finnish

[320] Case C-169/80, Administration des Douanes v. Gondrand Frères, para. 17
[321] Cordeweber 2017, p. 66.

tax system already includes a version of a GAAR in VML Sec. 28, it is worthwhile to consider whether this existing GAAR fits into this narrow scope.[322]

It is noteworthy, that like Finland, almost all the Member States' tax systems already entail a version of a GAAR.[323] Furthermore, most Member States deem their current GAAR to be compliant with the Union law. However, Member states risk their GAARs to be successfully challenged by taxpayers in the ECJ if they are not fully compatible with the Union law. As the Finnish GAAR is not inspired by the ATP Recommendation GAAR nor the ATAD GAAR, it poses the risk of non-compatibility with the EU primary law.[324] Further, the fact that the Commission puts forward a directive imposing a GAAR to be adopted in a situation in which nearly all Member States already entail such a rule seems to indicate that a thorough analysis on the compatibility of the national GAARs with the new ATAD GAAR should be carried out and amendments corresponding the directive's formulation should at least be considered. The Commission seems to imply that the national GAARs should be critically assessed from the point of view of their compatibility with the Union primary law, as well as their ability to comprehensively to counter aggressive tax planning structures. In the end, as the implementation of the ATAD GAAR in Member States is bound to differ, it is left for the ECJ to create a coherent anti-abuse doctrine concerning the application of the GAARs.[325]

From the point of view of the minimum level of protection, the VML SEC. 28 should be able to cover all the same possible tax avoidance situations as the ATAD GAAR. However, in the Commission working document it is accorded that despite almost all Member States tax systems entail a GAAR, the scope of those rules is not such as to counter all identified ATP structures.[326] It is pointed out that existing rules would be able to counter some parts of the structures i.e. by making it impossible for a company to play a certain role in the structures if it resides in one the twenty-six Member States. Having an effective GAAR is seen relevant for all the listed seven ATP structures.[327]

As the implementation of the provisions of the ATAD is to happen on the basis of de minimis rule, there exists the risk of incorrect transposition and consequently infringement of EU primary law. The

[322] The Finnish tax law has entailed a GAAR since the 1930's. The formulation of the provision has remained the same for decades. The Previous GAAR was the Sec. 56 of the act on assessment procedure. When the provision was changed in 1995 and became the Sec. 28, the core idea remained the same. Thus, the previous case law of the SAC concerning the application of the Sec. 56 is still relevant for the application of the current GAAR of VML 28.
[323] At least 24 Member States, according to the discussion paper on General Anti-Abuse Rules (GAAR), Platform for Tax Good Governance, 2014.
[324] Platform for Tax good Governance, Discussion Paper on General Anti-Abuse Rules (GAAR) 2014 p. 3.
[325] Cordeweber 2017, p. 66.
[326] The ATP Study identifies seven most commonly used ATP structures: 1. Offshore loan ATP structure; 2. Hybrid loan ATP structure; 3. Hybrid entity ATP structure; 4. Interest-free loan ATP structure; 5. Patent box ATP structure; 6. Two-tiered IP ATP structure; 7. ATP structure based on IP and cost contribution agreement.
[327] SWD(2016) 6 final, p. 22.

compatibility of provisions of national law might come into question through two processes: First, the preliminary ruling process guides the national court to reference a question concerning Union law to the Court of Justice for a preliminary ruling. [328] The Court then gives its legally binding ruling on the matter. Secondly, the Commission may bring proceedings against a Member State for failure to fulfil their Treaty obligations.[329] In these infringement proceedings the Commission may act both in response to a complaint as well as based on its own investigations. Both the preliminary ruling mechanism and the infringement proceedings work as ensuring legal coherence and avoiding disparities in the application of Union law in Member States. As was discussed in the previous chapter, the compatibility of secondary legislation with the Union primary law usually concerns the implementation of the secondary legislation provisions in the Member States. The compatibility of the VML SEC. 28 with EU primary law can thus be determined by how well it corresponds to the ATAD GAAR.

4.2 Wording of the VML Sec. 28

4.2.1 Text of the Provision

In analyzing whether or not the GAAR of the Finnish legislation corresponds the one presented in the ATAD, the analysis has to start with the wording of the two articles. The Finnish GAAR of the VML Sec. 28 states that:

> 1. If a circumstance or an arrangement is given such a legal form, which does not conform its actual nature or purpose, taxation is carried out as if the correct form had been used. If it is evident that a price, other compensation or the moment of payment has been agreed on, or other action has been taken in order to avoid taxes, the taxable income and capital can be estimated.
>
> 2. If it is evident that the taxation should be carried out in accordance with paragraph 1, all facts and circumstances that may have impact on how the case is evaluated must be carefully investigated. The taxpayer must be given the opportunity to give clarification on the observations. If the taxpayer does not provide evidence that the form used conforms to the actual nature or purpose or that it is not evident that the arrangement was made in order to avoid tax, taxation must be carried out in accordance with paragraph 1.[330]

Similarly to the ATAD GAAR, the Finnish GAAR includes a description of the situation in which the provision is applied. Further, it includes direction on how to proceed when the provision is applied. VML Sec. 28 indicates how the taxation should be carried out in certain situations. As such it can be classified as a competence norm. The legislator has broadened the discretion of the tax authority by enabling it to tackle tax avoidance in a way that goes further than the normal competence of the tax authority.[331] Furthermore, it is essential for VML Sec. 28, as for GAARs in general, that it derives its meaning only in relation to other

[328] Under Article 267 TFEU.
[329] Under Article 258 TFEU.
[330] Translation of the VML 28, Helminen 2016a, chapter 12.1.
[331] Tikka, 1972, p.188-190.

tax norms. The rule does not include elements that would imply a concrete tax consequence.[332] Consequently, the rule can be applied only in situation where the application of another tax norm is in question. Then, VML Sec. 28 acts as taking stance on the application or non-application of this other norm. The effects of the application of the VML Sec. 28 are thus only visible regarding the application of this other provision.[333] In this sense it can be seen as fulfilling the task of filling gaps and being applicable in abusive situations that fall outside the scope of the SAARs.[334]

Concerning the elements constituting the provision, Tikka points out that the two sentences of the VML Sec. 28(1) are not in connection to each other, but they entail two separate situation to which two different modes of action apply.[335] According to Knuutinen, in fact, the efficacy of the provision is strengthened by the fact that tax avoidance is described in two different ways.[336] For the application of the norm to actualize it is enough that either one of these descriptions is fulfilled.[337] The first sentence applies in situations where a *circumstance or an arrangement is given such a legal form, which does not conform its actual nature or purpose.* The assessment described in the provision realizes only in a situation where the tax authority considers the applicability of a norm entailing a concrete tax consequence. The tax authority then has to decide whether the transaction can be described on the elements constituting this another concept that normally is from another field of law. The second sentence of the first paragraph, on the other hand, is applicable *if it is evident that a price, other compensation or the moment of payment has been agreed on, or other action has been taken in order to avoid taxes*.[338]

Subsequently, the two phrases of the VML Sec. 28(1) seem to include also separate consequences resulting from their application. Whereas the first phrase of VML Sec. 28(1) stipulates that taxation has to be carried out as if the correct form had been used, the second phrase refers to estimation of the capital and income. The first phrase thus seems to give the tax authority the competence to re-characterize the circumstance or the transaction to correspond to the correct form.[339] However, it is not always ambiguous what the 'correct' form would have been.[340] The VML Sec. 28 gives the tax authority the competence to coin up the fiction of the correct form, with all the elusiveness related to it. The ATAD GAAR, however, refers to only

[332] Compared, for example, with a rule constituting the tax liability TVL 9 §, according to which a person residing in Finland is liable from income from Finland and elsewhere.
[333] Tikka 1972, p. 215.
[334] This was specifically as a purpose for the GAAR in the preamble of the ATAD.
[335] Tikka 1972, s.215.
[336] Knuutinen 2016, p.817.
[337] In Comparison with the Swedish GAAR, for example, that includes four cumulative elements.
[338] It should be noted that this estimation does not include punitive element.
[339] Tikka 1972, p. 217.
[340] KHO:2014:66.

the 'ignoring' of an arrangement, not to the re-characterization fiction.[341] As the scope of the 'arrangement' is very broad, it is impossible to say what would have been the correct form for the taxpayer to realize the arrangement and consequently for the tax authority to impose in order to carry out the taxation. Furthermore, the fiction concerning the 'correct' form has evolved in the case law over the years. Previously, it has been common to apply the VML Sec. 28 to disregard the whole corporate form of small one-man companies. Recently, however, the tax authorities have rarely disregarded the whole corporate form.[342] The second phrase gives the tax authority the competence to estimate the income and capital and thus enables it to go beyond the normal interpretation of the law.[343] This means that taxation will be carried out based on the actual economic substance of the arrangement or based on the price that would have been used if the tax avoidance purpose had not affected the transaction.

As was discussed above, the ATAD GAAR can be seen as constituting of three tests: the subjective test, objective test and the artificiality test. In comparison, VML Sec. 28 consist of the objective test and the subjective test. The objective element is manifested as the substance over form approach in the first part. The second part then expresses the subjective part as making reference to the tax avoidance purpose of the taxpayer. Tikka saw the two parts as constituting two separate situations. This approach, however, has been debated in literature. The case law concerning the application of the provision doesn't seem to give affirmation to the perspective that the VML Sec. 28(1) would consist of two independent statutory orders.[344] However, as the wording of the provision is not clear on the cumulativeness of the objective and subjective elements, there is some confusion regarding the provision's compatibility with the ATAD GAAR. Moreover, as there is no mentioning of the artificiality or non-genuineness the wording of provision seems to lack the artificiality test. As was discussed in the previous chapter, in the ATAD GAAR the objective and subjective tests as well as the artificiality tests are clearly cumulative in a sense that all the tests have to be passed for the application of the provision to be in line with the EU primary law.

The VML Sec. 28, however, includes also a procedural element in addition to the objective and subjective tests: guidance on the burden of proof. This can be seen as an element increasing the taxpayer's protection. In some countries GAARs are criticized when it comes to the burden of proof. In United Kingdom, for example, the burden of proof on whether or not an arrangement is abusive lies solely on the tax authority. Some commentators see this as an insuperable obstacle for the efficient application of the GAAR.[345] Conversely, in Finland the burden of proof is divided between the taxpayer and the tax authority.

[341] About re-characterization fiction, see Mitroyanni 2016 chapter 2.3.
[342] Helminen 2016a chapter 12.3.1.
[343] Tikka 1972, p.218.
[344] Engblom 2013, p. 467.
[345] De Carolis 2017, p.173.

According to the VML Sec. 28(2) the tax authority is obliged to give the taxpayer the opportunity to give clearance on the observations, if it is obvious that the taxation should be carried out in accordance with the first paragraph. If the taxpayer then does not give clarification that the legal form given to the circumstance or the operation does correspond to the actual purpose or nature of the matter, or that the action has not been taken evidently in the purpose of relieving the tax due, taxation has to be carried out following the first paragraph. The burden of proof thus lies initially on the tax authority. The tax authority must show that it is evident that the arrangement has been entered into in order to avoid tax. Then the burden of proof shifts to the taxpayer, who in turn has to show that there indeed are sound economic basis for the arrangement, in order to escape the application of the rule.

As the VML Sec. 28 is applicable both to individual taxpayers as well as corporate entities, its scope is even wider than the ATAD GAAR which applies only to taxpayers subject to corporate tax. The VML Sec. 28 applies both to domestic and cross-border situations. However, until recently there has not really existed case law of the rule's application to cross-border situations. In recent case law, however, the SAC offers an example of the applicability also in cross-border situations.[346] Further, Finnish tax system includes also two other anti-abuse provisions specifically targeted to entities that are subjects to corporate tax. These are the EVL 6a(9) concerning dividend distributions between parent companies and their subsidiaries and the EVL 52 h concerning business restructurings. Both rules are modelled after the respective Union directives.[347] These provisions, however, do not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse. Indeed these rules seem to be somewhat overlapping with the VML Sec. 28. Thus, it is interesting to consider the relation between these SAARs and the VML Sec. 28. As the interpretation of the VML Sec. 28 should follow the interpretation doctrine of the ECJ concerning anti-abuse provision, the Finnish rule will next be assessed according to the three tests presented previously in connection with the interpretation of the ATAD GAAR.

4.2.2 Subjective Test of the VML Sec. 28

In the ATAD GAAR the subjective element was manifested as the 'main purpose' test. As it was presented above, the two sentences of the VML Sec. 28(1) are seen as two separate situations for the application of the provision. Accordingly, the purpose test can be seen in different ways in the two different sentences.

The first phrase of the VML Sec. 28(1) manifests the substance over form approach. At first sight it seems not to include a requirement for the subjective element of the taxpayer's intention. According to this phrase "*if a circumstance or an arrangement is given such a legal form, which does not conform its actual nature or purpose, taxation is carried out as if the correct form had been used."* This formulation implies

[346] KHO:2016:72.

[347] Parent Subsidiary Directive and the Merger Directive.

that whenever the form used by the taxpayer is not the 'correct' one, the tax authority could carry out the taxation according to the correct form, even in situations where the taxpayer has not intended to avoid tax. This kind of interpretation would lead into situation in which an arrangement could be classified as tax avoidance also when the taxpayer has accidentally adopted the "incorrect" form.[348] The classification of an arrangement as tax avoidance on the mere basis that it is not following the "correct" form would be highly dubious regarding the taxpayers freedom to choose the form in which it wishes to conduct business.

According to the wording of the provision the 'correct' form of the arrangement would be the one reflecting the actual purpose and nature of the arrangement. The 'nature and purpose' seems somewhat arbitrary criteria on which to base the correctness of the form. As the taxpayer has the freedom to choose to arrange their business as they see fit, it is not clear what would be the correct form conforming the nature and purpose of the arrangement. This leads into the question whether the VML Sec. 28 can be applied in benefit of the taxpayer in a situation in which the taxpayer has chosen a legal form that does not conform to the nature and purpose of the arrangement and also leads to adverse tax consequences for the taxpayer.[349] Can the VML Sec. 28 be applied so that the actual arrangement adopted by the taxpayer is disregarded and the taxation is carried out as the more beneficial form, the one conforming the nature and purpose of the arrangement, had been used? In case law the application of the VML SEC. 28 to the benefit of the taxpayer has been rejected in situations where the taxpayer has claimed for the provision to be applied to their benefit.[350] On the other hand, if the provision was applied on the suggestion of the tax authority, it could be plausible that the application of VML Sec. 28 would finally create a tax benefit for the taxpayer.[351]

However, the case law concerning the application of the provision has confirmed that tax avoidance purpose is needed also for the first sentence of the VML Sec. 28(1) and the provision is not applied without reference to the subjective tax avoidance purpose.[352] However, the formulation of the VML Sec. 28 is problematic from the point of view of compatibility with the ATAD GAAR. As it is not clear whether the two sentences are to be evaluated separately or not, the VML Sec. 28 would go further than the ATAD GAAR and thus possibly be incompatible with the primary law if the provision could be applied solely based on the objective criterion of the first phrase. Nevertheless, concerning the first sentence of the VML Sec. 28(1), it can be deduced that the conflict between the legal form and the actual nature and purpose of the arrangement creates the presumption that the purpose of the arrangement has been mainly the

[348] Helminen 2016a, chapter 12.2.3.
[349] See Torkkel, 2016 p. 390.
[350] KHO 2005 T 422 and KHO 1973 II 563.
[351] Concerning for example a deductible loss that would be realized due to disregard of a holding company structure, see Torkkel 2016, p. 391.
[352] See for example KHO:2017:20.

attainment of a tax benefit to which the taxpayer otherwise would not have been entitled to. In this situation the taxpayer has the opportunity to rebut the presumption of tax avoidance either by rebutting the tax authority's view of the tension between the legal form and the actual nature and purpose of the matter or by showing that the main purpose for the arrangement has not been the attainment of tax benefits.[353]

In the second sentence, conversely, there is an explicit manifestation of a purpose test: "If it is *evident* that a price, other compensation or the moment of payment has been agreed on, or other action has been taken *in order to avoid taxes,* the taxable income and capital can be estimated." This formulation requires explicitly for the subjective tax avoidance purpose to be present for the provision to be applicable. Furthermore, this purpose needs to be evident. When the evident purpose of tax avoidance has not been showed, the SAC has not applied the VML Sec. 28, even though the arrangement has otherwise been regarded as unusual.[354]

As a conclusion regarding both parts of the VML Sec. 28(1) it can be gathered that the transaction has to be entered into for the purpose of avoiding tax due. The subjective element is thus always present in the application of the rule. The Finnish rule does not include a similar categorization into 'main purpose or one of the main purposes' as the ATAD GAAR. The term 'evident' nevertheless gives some direction on how to interpret the purpose. The tax avoidance purpose thus has to be obvious. The Finnish term evident however, is not univocal: on the other hand it can be translated into *apparently*, *seemingly* or even *supposedly.* The terms seem to entail different amounts of clarity on the purpose. From the point of view of legal protection of the taxpayer the attribute 'evident' should imply a rather high threshold for the application of the provision.

Corresponding to the ATAD GAAR, the subjective test of the VML Sec. 28 also requires that the taxpayer has received a tax benefit. As was discussed in relation to the ATAD GAAR, the tax benefit is both an independent element required for the application of the GAAR as well as a subjective element resulted from the comparison of the actual arrangement with the fictitious arrangement the taxpayer would have used in the absence of the abusive arrangement. [355] According to the instructions given by the tax administration, if there are no sufficient reasons for the transaction besides tax reasons, the application of the rule might actualize. However, also in these situations the application of rule may actualize only when the transaction has led to an obvious tax benefit for the taxpayer.[356] The application of the rule does not require that the taxpayer had completely escaped from paying tax. The rule has been applied for

[353] Engblom 2013, p. 491.
[354] KHO:2017:20.
[355] Tax advantage as a subjective element, see Seiler 2016, p. 298.
[356] Instructions of the tax administration, 2.8.2016, A126/200/2014.

example in situations where the taxpayer has aimed at taxation of income as capital instead of earned income and when corporate income has been aimed to get taxed as capital gain under the income tax act. Naturally, the tax benefit gained can be also the lowering of the taxable income when benefiting from deductions. The threshold for finding a tax benefit seems thus rather low, as many different types of benefits have been covered by the provision. However, it could also be deemed that the benefit gained is not 'obvious' enough for the application of the VML Sec. 28.[357]

Similarly than regarding the ATAD GAAR, the danger of broadening the discretion of the tax authority is also present in the purpose tests of the Finnish GAAR. The degree of tax avoidance purpose is determined by the open-ended term 'evident' in the second sentence. The tax authority thus has a wide power in deciding what can be determined as 'evident tax avoidance purpose'. However, in contrast to the ATAD GAAR, the Finnish provision includes a clear direction when it comes to the burden of proof. The tax authority must show the tax avoidance purpose, which has to be observable from the circumstances of the arrangement. The burden of proof then shifts from the tax authority to the taxpayer: the taxpayer still has a chance to show that the tax avoidance purpose was not the motivation for the transaction by giving other reasons for the arrangement. This can be seen as a safety valve increasing the legal protection in the otherwise highly ambiguous purpose test. The application of the provision requires always clarification on the subjective tax avoidance purpose. There has to be evidence of this purpose, or at least the tax avoidance purpose must be able to be concluded in an evident manner from the circumstances of the case.[358]

4.2.3 Substance over form Approach

The object and purpose test of the Finnish GAAR can be seen in the first sentence of the paragraph 1, according to which: arrangement *is given such a legal form, which does not conform its actual nature or purpose.* Conflict with object and purpose test of the ATAD GAAR is demonstrated as the *substance over form principle* in the VML Sec. 28. This principle includes the description of the conflict as well as the solution for it.[359] Similarly than with the subjective element presented above, the problem with this test regarding the compatibility with the wording of the ATAD GAAR also stems from the fact that purely based on its wording it seems to be an independent application criterion compared with the subjective test.

The phrasing *if a circumstance or an arrangement is given a legal form* seems to imply that following normal interpretation, the requirements of the legal form of the respective transaction are present.[360] In other words, the transaction as such is formally correct. The GAAR has relevance only in a situation where

[357] See the dissenting opinion of the case KHO 2016:72.
[358] Ryynänen 2001, p 360.
[359] Wikström & al. 2015, p. 96.
[360] Tikka 1972, p.216.

the transaction *does not conform to the actual purpose or nature of the matter.* However, the GAAR does not cover fraudulent situations, as the provision does not call for the collision of the contradiction between the transaction and the purpose of the parties. To examine the meaning of the provision, it has to be settled what is meant by the phrase the transaction not to "*conform to the actual purpose or nature of the matter*". According to Tikka this element seems to refer to the economic factors. The legal form chosen for the transaction is not suitable for the situation, as the economic factors that usually are referred by the concept, are not present. The GAAR is thus applied in situations where there is a contradiction between the normal factors that constitute the normal requirements and the economic factors that are characteristic to this transaction.[361] The arrangement in itself may be in line with the letter of the law, but fails to respect the underlying purpose of the said law.

The threshold for the fulfillment of this test seems to be rather high in the case law. The substance over form principle does not realize merely on the basis that the choosing a certain legal form, even though unusual, leads to more advantageous tax treatment than some other form. For example, KHO acknowledges that it is a usual practice for a limited company to distribute profits as dividends. Regardless, the shareholders can also choose not to distribute dividends. Furthermore, it is not considered as unusual practice to restrain from the dividend distribution. Consequently, the restraint from dividend distribution, even when it would lead to tax benefit, is not regarded as a legal form which does not conform the actual nature or purpose of the arrangement, in the sense that the application of the VML Sec. 28 would require.[362] It can be also discussed whether the second sentence of the VML Sec. 28(1) includes this objective element, or if an objective element is needed for the application of the provision when *it is evident that a price, other compensation or the moment of payment has been agreed on, or other action has been taken in order to avoid taxes.* Is there the element of defeating the object and purpose of the applicable law present in this formulation? It seems that the objective element is present, as the purpose to avoid taxes by the use of certain form constitutes action that can be seen as defeating the object and purpose of the matter.

4.2.4 Artificiality test of the VML Sec. 28?

Probably the most evident difference between the ATAD GAAR and the VML Sec. 28 is the lack of express reference to *artificiality* in the VML Sec. 28. In the ATAD GAAR an explicit reference is made to 'non-genuine' arrangements, and considering the ECJ case law it seems clear that the provision is not to be applied when the arrangement is not 'wholly artificial'. The lack of artificiality in the VML Sec. 28 seems especially problematic, as the artificiality seems to be the factor that ensures the compatibility of the ATAD

[361] Tikka 1972, p.216.
[362] KHO:2016:219

GAAR with the Union primary law.[363] As established in the case Cadbury Schweppes, for a restriction on the fundamental freedoms to be justified on the grounds of preventing tax avoidance, the object of a such restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due.[364] Thus for the VML Sec. 28 to be compatible with the fundamental freedoms it should has as its specific aim the prevention of wholly artificial arrangements.

Regardless the lack of explicit artificiality criterion in the VML Sec. 28 the threshold for applying the Finnish rule in case law has been traditionally high. Furthermore, artificiality has been referred to often in the jurisprudence of the KHO. KHO has referred to *unusual* and *artificial* arrangements that have as objective the avoidance of tax. The KHO also explicitly refers to the artificiality of the arrangement in deeming the application of the VML Sec. 28 to be in line with the Union primary law.[365] Similarly than the artificiality test of the ATAD GAAR, this could also be referred to as the 'objectified intentions test' as tax avoidance purpose has to be observable from the circumstances of the arrangement, i.e. the lack of business reasons.

The VML Sec. 28(2) states expressly that the provision may be applied only if the taxpayer cannot prove that the form of transactions conforms to its substance, or that the purpose of the transactions was not to avoid taxes. Consequently, the VML Sec. 28 cannot be applied if genuine commercial reasons for the transactions are shown. Hence, the commercial reasons that reflect the economic reality are a part of the non-genuineness in the ATAD GAAR. In the Finnish jurisprudence too the commercial reasons have often been discussed concerning the application of the VML Sec. 28. In addition to the commercial motives the arrangement may have also other purposes, such as fiscal purposes, and it still is not automatically deemed as tax avoidance. The weight of the tax purposes has to be compared with the commercial purposes. Concerning the 52 h the KHO has described the business purposes for the arrangement. The mere existence of business purposes as such is not enough to escape the application of the provision, but it seems that these purposes have to be strong and independent enough in comparison with the tax purposes.[366]

The Finnish case law also directly refers to the business purpose test that has been also applied by the ECJ concerning the application of the anti-abuse provision of the Merger Directive. In the case law of the ECJ the 'business purpose test' has been referred to as the 'economic reality test'.[367] This test helps in

[363] In the Preamble of the directive proposal there is a direct reference to the artificiality tests.
[364] C-196/04,Cadbury Schweppes, para. 55.
[365] See for example cases KHO 2010:15; and KHO 2016:71
[366] See KHO:2014:66, where the SAC considered there to be business reasons for the management incentive scheme, but those reasons were considered rather weak.
[367] Almendral 2013, p. 164.

evaluating the significance of the business reasons compared to the tax reasons. In this test the balance between the different types of reasons is demonstrated by evaluating if there would exist a plausible business reason for the arrangement if the tax factors were eliminated.[368] The business purpose test can then be illustrated with an example of an arrangement undertaken by the taxpayer in a situation where there are losses confirmed in taxation. If the taxpayer would have undertaken the arrangement even if the confirmed losses were not counted for, the fiscal reasons can be seen as not being predominant compared with the commercial reason and the application of anti-abuse measures would not come into question. It is the taxpayer's task to provide the tax authority with evidence on the commercial reasons for the arrangement after the tax authority has deemed the tax avoidance purpose as evident. In this context it is also important to notice that the formation of tax benefits, even significant benefits, cannot as such lead to the application of the VML Sec. 28. Thus, the commercial reasons are not to be compared to the tax benefits gained, but rather the circumstances of the taxpayer.[369] Also it should be kept in mind that the arrangement should result in an obvious tax benefit for the rule to be applicable.[370]

In conclusion, the lack of explicit reference to the artificiality should not be over emphasized. First of all, the threshold for the application of the VML Sec. 28 is very close to what the ECJ's concept of 'wholly artificial arrangement' due to the requirement of the tax avoidance purpose to be 'obvious'.[371] Second, even without the explicit mentioning of artificiality in the provision, the KHO seems to take non-genuineness to account in its case law.

4.2.5 Conclusions on the Compatibility of the VML Sec. 28 with the ATAD GAAR

As the Finnish tax system already includes a GAAR it seems at first sight to be compliant with the obligation of minimum level of protection required by the ATA Directive in this regard. However, as it was presented in previous pages there are some seemingly major differences with the formulations of the two articles. Further, the Union primary law creating the upper limit for the application of the provision has to be considered. To be compatible with the ATAD GAAR, regardless the discretion left for the Member State's implementation of the rule, VML Sec. 28 must fit within this narrow scope created by the obligations of EU law. Due to the long tradition regarding the application of the GAAR of VML Sec. 28 in Finland it can be considered that VML Sec. 28 is not found to be unconstitutional as such and it has not been seen as infringing the principle of legality.[372] However, in many other jurisdictions the principle of legality has been seen as preventing the enactment of flexible rules such as GAARs. [373]

[368] KHO:2013:126
[369] KHO:2013:126
[370] Instructions of the tax administration A126/200/2014 chapter 2.3.
[371] Helminen 2016a, chapter 12.6.6.
[372] Helminen 2016a, chapter 12.1.
[373] Knuutinen, 2015 p.820.

As presented above, the Finnish GAAR differs from the ATAD GAAR in its wording. The Finnish provision does not include 'valid commercial reasons', 'economic reality' or 'artificiality'. Nevertheless, these elements can be found from the case law concerning the rule's application. As VML Sec. 28 contains less criteria than the ATAD GAAR, the Finnish rule appears to be more flexible. As a more flexible rule its application risks being wider and it is thus more stringent from the taxpayer's perspective. As the minimum directive allows for stricter provisions of national law, it should be noted that regarding GAARs the strictness stems from the loos formulation of the provision. Accordingly, from the perspective of 'minimum protection' a more loosely formulated (i.e. stricter) rule is allowed. However, this looseness is limited by the primary law of the EU. From the perspective of the ATAD this is not a problem, as Member States' GAARs are allowed to go beyond the minimum level of protection offered by the Directive. From the point of view of the functioning of the internal market, however, the loose formulation of rule might pose a problem.

The clear instructions on the burden of proof found in the VML Sec. 28 strengthens the provision's proportionality. The rule is in line with the ECJ case law concerning artificial arrangements, as the taxpayer has the opportunity to escape the application of the GAAR by giving the tax authorities proof that the arrangement indeed is based on true business purposes.[374] Furthermore, as it was discussed above, the requirement of 'wholly artificial arrangement' seems to have somewhat lost its significance as a justification for a restrictive measure in the ECJ. As a consequence of this evolution the significance of the proportionality has in turn augmented.[375] When considering the compatibility of the VML Sec. 28 with Union primary law, the fact that the taxpayer has had the opportunity to clarify the business reasons for the application would function as legitimizing the rule's application. Whether these reasons are accepted or not, and on what basis, is another question.

The differences in the formulations of the VML Sec. 28 and the ATAD GAAR raise the question on whether the minor differences in the designs of the two provisions can be done away with the principle of Union loyalty and the directive compliant interpretation.[376] The technique of directive compliant interpretation may be used in situations of failed transposition of a directive in interpreting the provision of national law in a corresponding manner with the objectives of the directive it refers to.[377] This would seem like a tempting option in saving the national legislator the trouble of amending the already existing provision according to the requirements of the Union directive and just change the interpretation of the provision to refer to the directive. This approach, however, poses some severe concerns regarding essential

[374] C-524/04 Thin Cap Group Litigation, paras. 80 and 83.
[375] Hilling 2013, p. 307.
[376] Element of the principle of Union loyalty enshrined in the Artcle 4, paragraph 3 of the TEU.
[377] Wittock 2014, p. 175-176.

principles of Union law, namely the principle of legal certainty. This principle stipulates that national courts may not be obliged to interpret provisions of national law *contra legem,* i.e. in conflict with its wording.[378] The obligation for the Union compliant interpretation entails interpretation in accordance with the directive 'as far as possible'. Hence, the interpretation should not jeopardize the legal certainty.

Further, as explained in the case Kofoed, a directive cannot create obligations for individuals without correct transposing of the provisions into national legislation. The principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals.[379] Thus it would be highly questionable to adopt a more stringent interpretation of the VML Sec. 28 without amendments to its wording. For these reasons the mere changing of the interpretation of the article with reference to the ATAD GAAR does not satisfy the correct transposition of the provision. On the other hand, however, it would seem that the Finnish provision, as being formulated in a more ambiguous manner, is stricter than the EU provision. Thus the limits of the EU law would result particularly from the primary law, and not from the minimum standard. The tax authorities, in a way, are not obliged to stretch the interpretation of the provision beyond the Finnish settled case law in order to reach the minimum level – VML Sec. 28 already represents effective enough measure to combat the ATP structures that the ATAD GAAR is supposed to counter. However, it should be noted that the VML Sec. 28 seems to be in line with the Union doctrine concerning abuse of law, as including a procedural element in addition to the subjective and objective elements.[380]

Due to the requirements of the Union primary law the scope of acceptable implementation of the ATAD GAAR is narrow. It is thus plausible that the strict rule of national law without reference to artificiality would result in breach of fundamental freedoms. Further, if the rule is seen as consisting of two separate situations, the lack of purpose test in the first part seems especially problematic from the point of view of the compatibility with the ATAD GAAR. Even though the rule has not been applied without assessing the tax avoidance purpose, the wording of the provision seems to grant this possibility. This is problematic from the point of view of the principle of legality that insists the application of rules to be based on their wording. However, the role of application of the VML Sec. 28 is decisive in this regard: Member States are allowed to continue to apply the restrictive provision in situations where the restriction has not actually materialized, i.e. the rule has not been applied to its full potential in a restrictive way.[381] Thus, it would suffice for the compatibility of the VML Sec. 28 that the SAC adopted a coherent interpretation doctrine consistent with the ECJ case law and applied the provision only to wholly artificial arrangements. In the

[378] This principle is enshrined in the case ECJ 4 Jul. 2006, Adeneler e.a. para. 110.
[379] C-321/05 Kofoed, paras. 40-42.
[380] See case C-110/99 Emsland Stärke, para. 39.
[381] Ståhl 2007 p. 550-551

next chapter it will be evaluated whether the interpretation doctrine of the VML SEC. 28 has changed under the international pressure.

4.3 Application of the VML Sec. 28 in Case Law

4.3.1 General Remarks on the Application of the VML Sec. 28

As it was demonstrated in the previous chapter, the VML Sec. 28 differs from the ATAD GAAR in its wording. However, as a GAAR it is a competence norm, whose content is intentionally ambiguous, and hence its compliance with the Union law will finally be determined in its application. The case law concerning the application of VML Sec. 28 is abundant[382] and it helps to shed some light on how the very loosely formulated rule can be interpreted. Many different sets of typical application situations have been coined up for the VML Sec. 28. The different situations have traditionally been divided into four categories, which are the situations in which there is a conflict between the legal form and the economic substance of the matter, partial transactions, situations lacking interest and the unusual pricing in situations between interested parties.[383]

The first sentence of the VML Sec. 28(1) manifesting the substance over form approach can be used as disregarding the legal form of an arrangement and carry out the taxation as the correct form had been used. For example, VML Sec. 28 has enabled the tax authorities to carry out the taxation as the business of one company belonging to other company i.e. to equate two businesses. In KHO:2010:85 the KHO states that as a starting point two companies legally registered are evaluated as separate entities. The Court however acknowledges that there exists situations, in which the norms of different fields of law call for the disregard of the formal structure. The court explicitly states that it is possible on the grounds of VML Sec. 28 to equate the businesses of two formally separate companies so as the income of the other company is taxed as the income of the other one. Nevertheless, the Case law concerning the disregard of the limited company is not unanimous. There exists cases both for the equation and against it. For example, the disregard of a company seems to be prohibited when the company exercises business activities. In the KHO 1997/1820 the KHO took account the amount of the turnover, the amount of the fixed assets and nature of the business in denying the application of the VML Sec. 28.

In the case KHO:2016:115 the KHO considered that there was no conflict between the legal form used and economic substance of the arrangement, as the companies in question were actually liquidated, both in the legal and in the economic sense. The KHO confirmed in this case that the taxpayer has in principle the freedom to choose the manner in which it wishes to give away the business, albeit a liquidation of the

[382] Administrative courts decide approximately on 25-30 cases a year concerning the application of the VML 28. On these cases roughly half are complaint to the Supreme Administrative Court. On these cases the SAC decides on about 5-10 cases a year. See Knuutinen 2014a, p. 113-118.
[383] Tikka 1972, p. 215-315.

company, a merger or selling the company. In this case, the KHO also considered the arrangement as a whole, and ended up in the conclusion that the division of the two companies could not be regarded merely as an interphase before the liquidation of the companies with the aim of benefit from the lower capital gains taxation as opposed to the dividend taxation.

Normally the tax interests of the parties of commercial operations are opposite to each other. Conversely, the lack of interest -situations concern situations in which the other party of the transactions agrees to unusual terms for tax reasons.[384] According to the case law it can be stated that if the division of the sales price significantly differs from the fair value of the assets, the division can be corrected in taxation in applying the VML Sec. 28.[385] The unusual pricing can be also problem between interested companies. However, this is not as relevant for the application of the VML Sec. 28, as those situations belong rather under the scope of the transfer pricing provision of VML 31 or VML 29 when concerning transactions between the shareholder and the company. These specific provisions can, however, be applied together with the VML Sec. 28. As a matter of fact, in some cases VML 31 and VML 29 need the support of the VML SEC. 28 in order to re-characterize the legal form of the transaction.[386]

Moreover, the relation of the VML Sec. 28 with the other anti abuse provisions has been clarified in the case law. It is explicitly stated in the EVL 6a.9 as well as in EVL 52 h that the rules do not preclude the application of other anti-abuse provisions. It has also been confirmed in case law that the VML SEC. 28 can be applied together with the anti-abuse provision of the EVL 52 h.[387] Thus the VML Sec. 28 works as filling gaps that are left from the application of specific anti-avoidance provisions. This function is especially evident regarding serial transactions. Normally acceptable arrangement, such as the liquidation of a company, in general does not need to be presented for with business purposes. However, the KHO has acknowledged that in some occasions the arrangement has to be evaluated as a whole, possibly taking account also previous arrangements. Also in these cases, the underlying motivation for the serial transactions as a whole is to be evaluated. Consequently, when the tax motivation for the arrangement has not been deemed as evident, the VML Sec. 28 has not been applied.[388]

It is noteworthy to point out how the principle of legal certainty is promoted in the application of the VML Sec. 28. Legal certainty is protected, as the threshold for the amount of evidence needed to apply VML SEC. 28 has been set high. Following Ryynänen, the application of VML can come into question only when the tax authority has carefully weigh the VML Sec. 28(1) in accordance with the requirements set out in

[384] Tikka 1972, p. 285.
[385] KHO 1.11.1976 T 4169.
[386] KHO 2014:119.
[387] See case KHO 2014:66.
[388] KHO:2016:115

VML Sec. 28(2). The actual burden of proof laid upon the tax authority must be fulfilled and the requirement of the tax avoidance purpose to be 'evident' must be met. Thus, already before taking the application of the provision into consideration, its application must have seem evident. The tax authority must carefully investigate all the factors that might have relevance to the situation. Further, the obligation to hear the taxpayer applies. Only after this objective weighting the tax authority may end up in the conclusion that all the requirements for the application of the provision have in fact been fulfilled. After the burden of proof laid upon the tax authority has been fulfilled the burden of proof realizes for the taxpayer. Hence, the taxpayer must show contrary evidence or the provision will be applied.[389]

4.3.2 The widening application of the Finnish GAAR?

There are vast amounts of examples of the application of the VML Sec. 28 in the Finnish case law. However, it belongs to the special nature of the rule that a decisive overarching formula cannot be drawn for the provision's application. This results from the impossibility to exhaustively define the concept of tax avoidance. In this chapter a few especially problematic cases will be presented and EU law's effect to these cases will be evaluated as well as the need for jurisprudence following clearly the requirements of the EU law.

First, the case KHO 2014:66 has be seen as dangerously broadening the scope of VML Sec. 28.[390] In this case the top management of A Oyj had set up a holding company B Oy that acquired shares of A Oyj. This acquisition was financed with equity capital contributed by the top management and a loan issued by A Oyj to B Oy. The loan agreement between B Oy and A Oyj was concluded at arm's length terms. A Oyj and the top management had concluded a shareholders agreement that included leaver provisions and restrictions on the right of pledge and disposal of B Oy's and A Oyj's shares. Further, it was agreed that B Oy and A Oyj's board of directors would decide to dissolve the holding company structure by a certain date. Potential income arising as a result would be paid to B Oy's shareholders in A Oyj's shares. The arrangement thus entailed a risk for the top management to lose their significant equity capital contribution to B Oy. Under the agreement multiple alternatives to dissolve the structure were accepted but the preferred manner was to merge B Oy to A Oyj. In this ruling benefits received by top management through a holding company structure were considered as earned income under the VML Sec. 28. The KHO admitted that there were business purposes for the management incentive scheme. According to the taxpayer, the purposes for setting up the holding company structure were that the scheme was considered to align the interests of the top management with A Oyj's objectives. Furthermore, the structure was

[389] Ryynänen 2000, p. 276.

[390] Torkkel sees that the SAC acted actively as continuing the work of the legislator in this case, Torkkel 2014, p.391.

considered to be transparent and clear in the light of insider rules and corporate governance regulation. However, the KHO regarded these reasons to be too 'weak' to escape the application of the VML Sec. 28.

The ruling can be criticized for several reasons. First, KHO should have given more argumentation on why it considered the business purposes not to be enough in this case.[391] This would undoubtedly increase the legal certainty when the taxpayers could conclude from the case law what kind of reasons and in what circumstances have been regarded as 'too weak' for an actual business purpose to be considered to be at hand. Without the information on the acceptability of business reasons it becomes very difficult for the taxpayers to exercise their freedom to organize their business as they see fit. As an exception to the settled doctrine on the acceptability of the management holding structures this broad interpretation of the VML Sec. 28 cannot be seen as having preliminary relevance in future rulings. In deviating from the general doctrine the court put emphasis on the fact that A Oyj was fixedly part of the arrangement and further, the arrangement applied only to the management of A Oyj. The case also sheds some light in the relation between the anti-abuse rule concerning business structurings EVL 52 h and the VML Sec. 28. The purpose of the EVL 52 h undoubtedly is to cover all possible abuse situations related to business restructurings. The application of the VML Sec. 28 then seems to be possible in business restructurings only where the EVL 52 h does not apply.[392] The 52 h functions only as denying a benefit included in the Merger directive, but the tax benefit in the case at hand was the classification of the income as capital. As the arrangement formed of several parts the court concluded both the EVL 52 h and the VML Sec. 28 to be applicable together. The VML Sec. 28 was needed to correct the taxation to correspond to the correct form, as the benefit created was not a benefit granted by the Merger Directive. The scope of the EVL 52 h would thus not cover re-characterization of the income received by the shareholder.

However, it is not unproblematic that a general rule can be applied as fixing non-applicability of a specific provision. It could be concluded that the VML Sec. 28 would not be applicable regarding the arrangement that fall under the scope of the EVL 52.[393] In the case Kofoed the ECJ stated that while it was true that in the main proceedings there was some evidence which might justify application of the anti-abuse provision of the Merger Directive,[394] it is necessary to determine whether, in the absence of a specific transposition provision transposing Article 11(1)(a) of Directive 90/434 into Danish law, that provision may nevertheless apply in the case in the main proceedings. In that regard the court reminds that "*according to Articles 10 EC and 249 EC, each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully*

[391] Torkkel 2014.
[392] Knuutinen, 2014. s. 9-11, 187.
[393] Järvenoja 2007, p. 328-329.
[394] C-321/05 – Kofoed, para. 39.

effective, in accordance with the objective that it pursues."[395] Furthermore, the Court states that the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Therefore, directives cannot be relied upon per se by the Member State as against individuals.[396] According to Torkkel this position of the Court indicates rather clearly that the VML Sec. 28 could not, for example, be used as fixing the non-applicability of the EVL 52 h.[397]

As the Merger Directive creates benefits for EU citizens, it was conceivable that those benefits could not be done away with the application of a domestic GAAR. According to Torkkel, for example, if the VML Sec. 28 was used in spite of the EVL 52 h it would be against the purpose of the Merger Directive as well as the traditional interpretation doctrine of the EU. In the future, however, it seems that this would be exactly the legislators will – ATAD GAAR was imposed especially for the purpose of fixing gaps in legislation. The fact that the GAAR is now based in the directive legitimates once and for all its application in a situation in which the specific anti-abuse measures of different directives were inapplicable. Along with the ATAD GAAR the national GAARs are now in way in the same 'level' with the provisions granting tax benefits.

Another controversial case is the KHO 2016:72. The case concerned the deductibility of interest expenses allocated to a Finnish branch of a foreign company. This case is interesting to consider to shed some light on the application of the VML Sec. 28 in latest case law in a cross-border situation. In this case company A inc. registered in the United States, acquired the shares of a Swedish company B AB. After the acquisition followed a series of arrangements within the group company. A Inc. assigned the shares to a United States based company AA Inc. On the same day AA Inc. assigned the shares forward to its Luxemburg subsidiary's (AAA Holding) Swedish subsidiary AAAA holding AB. AAAA Holding AB operated through a Finnish branch. The shares of B AB owned by the Swedish holding company AAAA Holding AB's and the debt related to its acquisition were allocated to the to the Finnish branch of AAAA Holding AB.

The branch had staff and its operation comprised of corporate governance functions as well as monitoring- and economic activities. Group company C Oy made group contributions to the branch, that was used to cover the interest expenses from the debt allocated to the branch. This resulted in a situation in which the interest paid to the Swedish company was deducted from the group contribution that the branch was receiving, hence leaving the branch with no taxable income. KHO determined that the restructuring did not have actual economic impact on the group if the tax benefits are not taken into account. Further, the debt allocated to the branch relating to the intra-group structuring was to be considered as an intra-group debt. The allocation of the debt to the Finnish branch did not improve the financial situation of the group.

[395] C-321/05 – Kofoed, para. 41, where it is referred to the judgment of 10 March 2005 in Case C-531/03 Commission v Germany, not published in the ECR, para. 16, and Case C-456/03 Commission v Italy para. 50.
[396] C-321/05 - Kofoed para. 42.
[397] Torkkel 2014, p. 388.

Administrative court stated, that the Swedish tax legislation cannot be taken into account as an reason independent from taxation for the allocation of the shares to the branch.

In the end, the deductibility of the interest expenses resulting from the intra-group sale of shares was denied from the Finnish branch on the basis of the VML Sec. 28. The norm abused was the Sec. 7 of the Business Tax Act regarding business deductions. The arrangement was formally lawful, but when regarded as a whole the KHO determined there to be a conflict between the legal form used and the substance of the arrangement. KHO deemed that the series of arrangements had to be evaluated as a whole. The court then determined, that the arrangement in which the B AB's shares had been sold by the AA Inc. to AAAA Holding AB, and then allocated to the Finnish branch, as an arrangement that had been given a legal form that did not correspond to the actual purpose and nature of the matter, and that the arrangement had been entered into solely for tax purposes. The Court considered there to be no economic reasons for the arrangement, rather the purpose was to avoid paying taxes by benefitting from the group contribution system.

However, the application of the VML Sec. 28 was not unanimous in this case. The majority of the judges accepted the judgement and the argumentation of the Administrative court, but the case was decided by vote.[398] In the dissenting opinion the deductibility of the interest expenses was accepted. The opinion analyses the tax avoidance perspective in detail and is therefore useful for understanding the problems related to the application of the GAAR in the case in question. To determine the applicability of the VML Sec. 28(1) first sentence it has to be examined whether the holding structure used means that the arrangement has been given a form that does not correspond to the actual nature and purpose of the matter. The dissenting opinion notes that the use of holding company structures in group restructurings has been generally accepted since the case KHO 1989 B 513. Accordingly, the structure cannot be denied solely on the basis that a holding company has been used. The acceptability of the structure can thus be seen as the starting point for the analysis. Further, it is emphasized in the opinion that a deviation from this basis would, especially in a situation where the interest is paid abroad, be contrary to the non-discrimination principle of the Union law. This argument can be easily justified, as the non-discrimination principle stipulates that cross-border situation shall not be treated less favorably than purely domestic situations.

Furthermore, the role of the Finnish branch used in the arrangement was evaluated. The opinion sees that there are nothing but tax-related reasons for the branch structure as the AAAA Holding AB has no other operation within the branch. Consequently, the structure has been given a form that does not reflect the actual purpose and nature of the matter. In addition to the conflict between form and substance, however,

[398] 2+1-2.

the application of the VML Sec. 28 requires that the arrangement would result into receiving a tax benefit in the Finnish taxation. In the end, the tax benefits resulted from the branch structure is the escaping from paying taxes by using the interest deduction and group contributions. According to the dissenting opinion, this cannot be the obvious tax benefit that is referred to in the VML Sec. 28 and the provision would thus not be applicable in the situation.

Finally, the applicability of the second sentence of the VML Sec. 28(1) has to be determined, i.e. *if it is evident that a sales price, other compensation or the time of the transaction has been determined in a contract, or other action has been entered into in the purpose that the tax due is relieved from.* The opinion points out that the transfer of the shares of the B AB to AAAA Holding AB and the allocation to the Finnish branch is closely related to the outside transaction of acquiring the shares. The opinion regards it as a normal course of action that shares originally acquired by the parent company are then transferred to other group companies. The arrangement can be based on corporate governance reasons. The conclusion of the dissenting opinion is that even though tax planning reasons have no doubt had effect on the structure chosen, the arrangement cannot be deemed as lacking business reasons *as a whole*. Consequently, the case falls out of the scope of the Sec. 28.

However, in the light of the recent ECJ case law the application of the VML Sec. 28 in the above mentioned situation seems justified. As was discussed above, the ECJ has moved to tolerate other reasons than the mere 'artificiality' for national restrictive measures. The prevention of tax avoidance together with the need to ensure the balanced allocation of taxing powers between Member States has been accepted as justification for national restrictive measures.[399] The case KHO:2016:72, by referring to tax benefit gained in the Swedish taxation would fall under this sort of justification.

Due to the case KHO:2016:72 the threshold for application of the GAAR in a debt push down situation seems to be currently rather low. These cases seem to reflect the tightening attitude towards international tax planning – the threshold to intervene in international tax planning structures has lowered as a result of the BEPS action plan and the EU initiatives against aggressive tax planning.[400] The Finnish tax administration has also published guidance concerning the application of the VML Sec. 28 in the aftermath of the debt push down cases.[401] In its publication the Tax Administration draws a conclusion on a new interpretation doctrine concerning the application of the VML Sec. 28 in debt push down arrangements. This interpretation seems to indicate that the use of holding company structures would now be highly questionable in business restructurings. This approach is especially dubious conclusion, as previously the

[399] C-446/03 Marks & Spencer; Case C-231/05 OY AA, para. 63; Case C-311/08 SGI, para. 66.
[400] Nykänen 2016, p. 37.
[401] Briefing of the tax administration, 27.5.2016.

use of these vehicles has been regarded as normal practice in acquisitions.[402] Regarding a certain type of arrangement as evidence of tax avoidance purpose is not acceptable from the point of views of EU law nor the legal certainty.[403]

According to the guidance published by the tax administration, an arrangement can be deemed as tax avoidance when 1) the internal financing of the group has been organized using a Finnish branch or holding company and 2) the arrangement has been given a legal form that does not conform the nature and purpose and 3) the arrangement has been undertaken in order to avoid tax. These three requirement are cumulative so as to all of them have to be fulfilled in order the GAAR to be applicable. The interpretation of the tax administration includes the conflict with object and purpose test (i.e. the substance over form principle) as well as the purpose test, but does not mention the artificiality. As the guidance given by the tax administration is not legally binding its significance should not be over emphasized, but it seems clear that the tax administration plans to apply this doctrine in the future when deciding on the application of the VML Sec. 28 in debt push down arrangements. Even if the Supreme Administrative Court has the final say in the matter in an individual case, this is of little solace to a taxpayer whose arrangement would be considered as tax avoidance and would have to wait for the final demarcation of the Court for years, even close to a decade.[404]

The case KHO:2016:72 is important in understanding the volatile nature of the application of the VML Sec. 28. This case reflects the tightening approach that the SAC has adopted in application of the norm. The decision has been criticized for broadening the application outside the traditional framework of interpretation making it ever more difficult for even experienced tax law experts to precedent the outcome in the norm's application.[405] Business restructurings with the use of holding company or branch structures has been widely used and generally accepted in the Finnish tax practice.[406] The described cases show clearly that the former interpretation doctrine has changed in its tolerance towards these structures. Moreover, In this case the SAC seems to have somewhat broadened its discretion in the application of the GAAR. Previously the Court has been careful in applying the Finnish GAAR in cross-border situations,[407] even though the rule as such applies to international situations.[408] The case goes to show that there exists

[402] Katramo, Lauriala, Matinlauri 2014, p.205.
[403] C-28/95 Leur-Bloem, para. 41: In order to determine the existence of tax avoidance purpose, *"the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination."*
[404] The case KHO:2016:72, for example, concerns arrangements made in 2008.
[405] Knuutinen 2016, p.818.
[406] Knuutinen 2016, p. 807–808.
[407] As the ATP study point out, the Finnish GAAR has only rarely been used against international tax planning structures.
[408] For example KHO 1999/4219.

a vast grey area when it comes to the application of the GAAR. Whether or not this grey are is wider than what the requirements of the EU law would allow, is not unambiguous.

Both of these cases concerned the use of holding company structures that was in the end deemed as tax avoidance. A GAAR can be especially useful against these kinds of structures in giving the tax authorities the competence to evaluate the arrangement beyond its legal form. The VML Sec. 28 thus seems to reach the minimum level of protection in being able to counter the ATP structures discussed in the ATP study, namely the leveraged acquisition with debt push-down and use of intermediate holding companies.[409] Another question remains whether this doctrine is compatible with the upper limit of the ATAD GAAR, and does it go beyond the limits set by the Union primary law. Not to go over this upper limit the provision must be applied in a way that the possible restriction on fundamental freedoms can be justified following the rule of reason test. Further, the doctrine must in line with the general principles of Union law, namely the proportionality and legal certainty.

4.3.3 Conclusions on the application of GAAR in Finland

The application of the GAAR has been rather frequent in the Finnish tax practice. The recent case law, however, gives contradictory signs on the application. The cases KHO:2014:66 and KHO:2016:72 seem to widen the scope of application of the GAAR in a questionable way from the perspective of the Union law. However, in the case KHO:2017:20 the SAC seems to go back to strict interpretation regarding the purpose of the arrangement in setting the requirement of evident tax avoidance purpose rather high. The case law shows that the interpretation of the GAAR is not stable but it is in constant movement to be able to keep up with the ever changing landscape of complex tax avoidance schemes.

Predictability and legal certainty are the most important aspects of a good tax system. As principles deriving both from the of the Finnish constitution, as well as being a general principle of Union law, predictability and legal certainty should be considered especially carefully in a situation that requires the tax authorities and courts to weigh between different interpretations.[410] However, a tax system without any flexibility would be impossible to realize without creating serious loopholes for tax avoidance. Despite the uncertainty created by the open-ended and flexible VML Sec. 28, it is a necessary means in the fight against abusive practices.

It seems that the risks entailed in the subjective elements of the GAAR have in fact been realized to some extent in the Finnish case law and opened the door for a wider discretion for the tax authorities in deciding tax avoidance cases. To take back this unforeseen power of the tax authority, the jurisprudence concerning the application of the VML Sec. 28 should be updated according the requirements of the ATAD GAAR. The

[409] Study on Structures of Aggressive Tax Planning and Indicators 2015, p. 24.
[410] Knuutinen 2015, s.816.

update would set the view that the GAAR should only be used as a last resort and not be applied to established and acceptable tax planning structures. The update should work as a means of adopting the artificiality tests of the ECJ. At least, the KHO should create a coherent interpretation doctrine in line with the ATAD GAAR in deciding on tax avoidance cases. As the EU legislation seems to call for strong tendency for case by case analysis, this might lead into more general and open-ended anti-avoidance rules.[411] Nevertheless, as the VML Sec. 28 will after the implementation of the ATA Directive reflect the EU secondary law provision of the ATAD GAAR, its interpretation must lean more heavily on the Interpretation doctrine derived from the EU law.

The relation between the artificiality test and the requirement of proportionality is also interesting when considering the acceptable scope of anti-abuse measures' compatibility with the Union primary law. Traditionally it has been established that the requirement for a 'wholly artificial' arrangement is the decisive element in determining whether national restrictive measures are justified under the rule of reason test.[412] It has been argued, that when the anti-abuse rules have wider scope than the mere purpose of preventing tax avoidance i.e. when serving a wider purpose of preventing taxpayers from freely moving tax bases, the anti-abuse rules need not to target only artificial arrangements. According to Hilling, it is unacceptable for the taxpayers to freely choose themselves where their income is being taxed and thus the need to maintain a balanced allocation of taxing rights works as an acceptable purpose for national anti-avoidance measures.[413] In the light of the recent case law, the principle of proportionality, however, might be endangered in the application of the VML Sec. 28 as it seems impossible to predict with sufficient precision whether the rule will be applicable or not.[414]

A critical analysis on the compatibility of the VML Sec. 28 with the ATAD GAAR is advisable for several reasons. First, the argumentation of the KHO concerning the application of the VML Sec. 28 should be more comprehensive to verifiably create an interpretation doctrine in line with the demands of the ATAD GAAR. Another severe issue of the compatibility of the Finnish GAAR with GAAR of the ATA Directive is the lack of mention of artificiality or non-genuineness in the Finnish provision. The point of the artificiality tests required by the directive is that it brings the element of case by case analysis to the decision making process concerning tax avoidance. In the Finnish case law tax avoidance cases have been decided on a case by case basis even without the mention of the artificiality. This shortcoming of the Finnish rule, however is not desirable position now after the legally binding obligation for the artificiality tests has been set into

[411] Ståhl 2007, p. 594.
[412] See case C-196/04 Cadbury Schweppes.
[413] Hilling 2013, p.307.
[414] On the principle of proportionality, see Hilling, 2013. Further, C-318/10 SIAT, para. 57.

the ATA Directive. Further, even when accepting a certain amount of uncertainty as a natural part of tax systems, this uncertainty should be balanced by effective means available for the taxpayer to get confirmation concerning the tax treatment of their arrangement. The case law shows that the current means available to the taxpayer are not sufficiently effective. It takes too much time to get confirmation on the tax treatment, especially when the Tax Recipients' Legal Services Unit uses its right of complaint. [415] Too aggressive of an approach in determining tax avoidance combined with ineffective legal protection could result in serious adverse consequences for the functioning of the internal market – locating business activities in the internal market would not seem like an attractive choice if the tax ramifications of those operations were completely unforeseeable.

The uneven application of the Finnish GAAR adds on the pressure to amend it to better correspond the EU GAAR. At least tax authorities and Courts should adopt a coherent interpretation doctrine compatible with the ATAD GAAR, in taking account the tests mentioned in the provision. Especially the requirement of artificiality should be emphasized, as the text of the current VML Sec. 28 is lacking this test. The predictable application of anti-tax avoidance provisions is in line with the Union objective of securing the smooth functioning of the internal market.

5 Conclusions

The elements of the ATAD GAAR have been analyzed in preceding chapters, namely the interpretation of the provision, its compatibility with Union primary law as well as its implications to the Finnish GAAR of VML Sec. 28. The uncertainty concerning its application is the most apparent conclusion relating to its future application and implementation in Member States. As the ATAD GAAR represents an unprecedented provision in the EU tax law as an EU wide GAAR it seems evident that its interpretation as well as its relation to other anti-abuse provisions included in the EU law will be clarified in the future jurisprudence of the ECJ.

Concerning the first research question on the interpretation of the ATAD GAAR it has to be noted that the final demarcation is to be given on a case by case basis regarding the respective facts and circumstances of each case. It is however safe to say that the previous case law of ECJ gives some lead on the interpretation of the ATAD GAAR. As in the end the ATAD GAAR was given a formulation almost identical to the anti-abuse provision of the PSD, it can be expected that the terms used in the provision will be interpreted accordingly. However, as the ATAD GAAR is equipped with general scope of application, it could indicate that the concepts used in the provision could be given an independent meaning. From the

[415] The case KHO:2016:72 concerned a situation that took place in 2006, and the final demarcation on the issue was made in 2016.

point of view of legal certainty it would also seem justified that the threshold for the application of the ATAD GAAR should be higher compared with the other anti-abuse provisions with only limited scopes. However, if interpreting the ATAD GAAR in the light of the previous ECJ case law, it seems like the decisive factor for the application of the provision is that the arrangement is lacking commercial substance, i.e. the artificiality of the arrangement. The subjective element required for the application will be demonstrated through the objective elements constituting the non-genuineness of the arrangement. The main purpose test, however, remains a source of confusion in the application of the provision. It is not clear even in the case law what is the amount of tax avoidance purpose needed to allow for the application of the rule.

The aim of the ATAD GAAR is to increase legal certainty in the field of direct taxation and in the same time be able to counter the abusive practices of MNE's resulting into the erosion of the tax base in the community area. Despite the apparent need for measures combatting aggressive tax avoidance practices the GAAR and its implementation and interpretation might in fact create more uncertainty in the internal market. Too aggressive application of the GAAR could actually lead to adverse consequences for the internal market in making it less attractive for MNE's to engage in business activities in the Union area. To avoid the adverse effect of the GAAR being abused by the tax authorities in interpreting the provision in an arbitrary manner it is important that GAARs only target schemes that are plainly abusive.

Regarding the second research question of compatibility of the ATAD GAAR with the primary law of the Union it has to be stated that finally this aspect will clarify only in the course of application. However, if the provision is to be applied in accordance with the case law of the ECJ concerning the artificiality tests, it seems that the rule will be compatible with fundamental freedoms. However, the ECJ seems to have shifted the emphasis on tax avoidance cases to the proportionality of the national measures and the balanced allocation of taxing rights from the strict criterion of 'wholly artificial arrangement'. This would mean that more reasons for domestic restrictive measures could be accepted in the future. The fact that the ATAD GAAR applies both to domestic and cross-boarder activities ensures that it is compatible also with the principle of non-discrimination. As the ECJ has been reluctant to consider the compatibility of EU secondary law with primary law, it is likely that only the compatibility of the national implementation with the requirements of the primary law would be evaluated.

Concerning the final research question of the compatibility of the VML Sec. 28 with the ATAD GAAR it seems clear that as an open-ended competence norm the Finnish VML Sec. 28 fulfils the minimum level of protection required by the ATAD GAAR. Nevertheless, when it comes to the compatibility of the Finnish VML Sec. 28 with the ATAD GAAR some questions remain open. The wording of the Finnish rule differs from the wording of the ATAD GAAR in few important aspects, for example in failing to mention the artificiality. Nevertheless, many of the concepts lacking from the wording of the article have in any case

been confirmed in the case law concerning the rule's application. As the VML Sec. 28 is applied on a case by case basis the acceptability of its application is accordingly determined separately in every case. If the rule will not be amended following the ATAD GAAR, there remains the risk that a taxpayer might challenge the application of the VML Sec. 28 in the ECJ, but this would most likely not be successful if the rule's application in the specific case has been in line with primary law and the arrangement deemed as tax avoidance has been 'wholly artificial'. The question to answer then is weather the Finnish interpretation doctrine only targets wholly artificial arrangements as the Union law requires. In the light of recent case law it can't be given an clear answer whether the use of holding company structures in restructurings, for example, would make the arrangement to be considered 'wholly artificial'. Thus, the tax avoidance cases should be decided in accordance with the interpretation doctrine of the ECJ concerning artificial arrangements. Previously the Finnish GAAR has been applicable only keeping in mind the interpretation in light of EU law. From now on the interpretation of the VML Sec. 28 will not constitute the interpretation of domestic legislation in light of EU law, but interpretation of EU law itself. The significance of proportionality in deciding tax avoidance cases can also be argued to have gained foothold in the EU context, and this development should be reflected in the national jurisprudence as well.

In conclusion, the compatibility of the ATAD GAAR with Union primary law will likely be tested regarding the rule's implementation in Member States. As almost all the Member States' tax systems already include a GAAR it remains to be seen whether the statutory rules are amended or whether the lining the interpretation doctrine to correspond with the ECJ is considered as sufficient action. As the Finnish VML Sec. 28 resembles the ATAD GAAR closely, especially in its application, it seems unlikely that any statutory amendments would be made and the differences would be done away in the interpretation of the provision. Furthermore, conserving the GAAR unchanged in jurisdictions where the tradition for its application is as long as in Finland can also be seen as promoting legal certainty. As the vague formulation makes the interpretation of the VML Sec. 28 especially sensitive from the point of view of legal certainty, the interpretation doctrine should be predictable. To promote legal certainty the KHO needs to adopt a coherent interpretation doctrine concerning the VML Sec. 28. However, it is unlikely that Member States can with ease trust the article and restrain from action – a thorough step by step analysis should be carried out in order to determine definitively the implementation needed.