

## The General Anti-Avoidance Rule Contained in the ATAD: Findings from the Italian Literature

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The purpose of this contribution is to present systematically some of the main points of the Italian domestic debate on the GAAR to the international public. In particular, it provides an overview of the 'Italian perspective' on the GAAR introduced at the European level by the Anti-Tax Avoidance Directive (ATAD). Italy already introduced its GAAR in 2015 and, consequently, it has been considered unnecessary to amend it in light of the ATAD, thus, sparking a fervid debate on the compatibility of the two standards adopted.

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### Introduction and scope of the article

Traditionally, the various approaches of the different tax systems toward tax avoidance have always been strongly influenced by the legal tradition to which they belong. An example of that are the substance-over-form doctrines elaborated by the courts of common law countries, on the one side, and the statutory abuse-of-law rules relied upon by civil law systems, on the other side.<sup>1</sup>

<sup>1</sup> For some literature, see, among others, P.D. Trotter (1989). *Canada's General Anti-Avoidance Rule*. 17 *Intertax*, No. 5, p. 180 (1989); B.J. Arnold (1995). *The Canadian General Anti-Avoidance Rule*. *B.T.R.* No. 6, p. 541; I. Aw (2009). *Revisiting the General Anti-Avoidance Rule in Singapore*. *Sing. J. Legal Stud.* No. 2, p. 545; and G. Colegate-

In particular, the doctrine of abuse-of-law was elaborated in the field of what in continental Europe is identified as 'private law' and is based on the concept that it is not permitted to exercise a right in a manner that conflicts with the function for which it was attributed. The scope of this doctrine, of which the ultimate rationale is to protect other persons' rights, was then progressively expanded in order to include other fields of the law, including taxation.<sup>2</sup>

Stone (2011–2012). *Is a UK Viable General Anti-Avoidance Rule Possible*. 22 *Int'l Tax Rev.* No. 8, p. 16.

<sup>2</sup> P. Rosenblatt (2014). *General Anti-avoidance Rules for Major Developing Countries*. *Series on International Taxation*, Vol. 49, p. 82 (Kluwer L. Intl.), where it is stated that: "The concept of abuse of law is widespread in civil law countries, where it is often regarded as a doctrine of

Nevertheless, as it is unavoidable in such an interconnected world, the different solutions belonging to diverse legal cultures have gradually converged, and hybrid solutions made their appearance in several contexts. This is the case, for example, of the attempt of some common law jurisdictions to codify a general anti-avoidance rule (GAAR) and, comparably, of several civil law courts to elaborate some type of substance-over-form doctrine that is applicable in their jurisdictions.<sup>3</sup>

The promotion of a GAAR in one of the directives of the European Union aimed at countering the phenomena of base erosion and profit shifting that makes it mandatory for every Member State to implement one in its tax system is a crucial step in this process of rapprochement of different legal traditions.

It is not a coincidence that the obligation to either introduce a GAAR or adapt an existing one initiated an intense scholarly debate regarding the nature of these rules and how to proceed. Italy is not an exception, however, because of the legislative choice to not take any action, the debate was focused on the compatibility of the existing GAAR with the one contained in the Anti-Tax Avoidance Directive.

There are Italian scholars, among which, for example, is Stevanato,<sup>4</sup> who wondered whether the standard adopted by the domestic GAAR that is based upon the ‘attainment of an undue tax advantage’ is effectively aligned with the standard adopted by the ATAD, specifically, that of ‘non-genuine arrangements’.

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statutory construction. It was initially imported from private law into tax law through judicial development and later codified. Generally, it means the action exceeds the limits of what is reasonable, often when the person acts with an improper motive or purpose. There are two main types of abuse: social abuse – when the action is deliberately driven to circumvent the law in order to achieve a result that the legislature did not intend – and intentional abuse to harm a third party.”

<sup>3</sup> On this point, see, among others, G. Mazzoni (2019). A Comparison of the US Economic Substance Doctrine with Italy’s New Abuse of Law Rules: Gravitation towards Similar Outcomes? *73 BIT*, No. 5, p. 235.

<sup>4</sup> D. Stevanato (2019). La norma antielusiva è conforme alla Direttiva ATAD? *Corr. trib.*, No. 7, p. 623.

The purpose of this contribution is to introduce systematically some of the primary points of that domestic debate to the international public in order to provide an overview of the ‘Italian perspective’ on this issue.

At first, the legal framework under analysis is briefly described. It consists of the ‘European GAAR’ promoted by the Union and of the ‘Italian GAAR’ under the Taxpayer’s Bill of Rights. Afterwards, the main points of the debate about the compatibility between the two GAARs that may be of some interest for an international public are presented. Finally, some general thoughts of why a GAAR is still necessary despite the level of uncertainty that it creates are summarized.

## **Relevant legal framework: the ‘European’ and Italian GAARs**

### **The ATAD Directive(s)**

The Anti-Tax Avoidance Directives are one of the most significant European Union’s responses to the OECD Base Erosion and Profit Shifting Action Plan (BEPS). They are designed to counter the BEPS conducts by establishing minimum standards for Member States and asking them to amend their tax law accordingly.<sup>5</sup>

There are two ‘ATAD Directives’, specifically, Directive (EU) 2016/1164,<sup>6</sup> also known as ‘ATAD 1’ (hereinafter also referred to simply as ‘ATAD’) and Directive (EU) 2017/952,<sup>7</sup> commonly referred to as ‘ATAD 2’. They are a component of an Anti-Avoid-

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<sup>5</sup> For an overview of some of the main points, see, among others, R. de la Feria (2017). Harmonizing Anti-Tax Avoidance Rules. *26 EC Tax Rev.*, No. 3, p. 110; and G. Bizioli (2017). Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market? *26 EC Tax Rev.* No. 3, p. 167.

<sup>6</sup> Council Directive (EU) 2016/1164 of 12 July 2016 establishing rules against tax avoidance practices that directly affect the functioning of the internal market.

<sup>7</sup> Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 regarding hybrid mismatches with third countries.

ance Package launched in 2016 that is formed by a broad set of proposals and recommendations aimed, in the commission's intention, at promoting fairer, simpler, and more effective corporate taxation in the EU.<sup>8</sup>

The ATAD intervenes in six major areas of taxation and provides guidance with regard to: CFCs; hybrid mismatches and interest deductions; the introduction of a corporate general anti-abuse rule (GAAR); and an exit tax.<sup>9</sup> It was adopted by the Council on 12 July 2016 and was followed by the ATAD 2 one year later, which amended and integrated it to include hybrid mismatches involving third countries.<sup>10</sup>

Italy transposed both directives by passing the Legislative Decree 142/2018,<sup>11</sup> which amends the rules on passive interests, CFC, entry/exit taxation, and the taxation of dividends and capital gains contained in the tax code.<sup>12</sup>

For the purpose of this contribution, it shall be emphasized that Article 6 of the ATAD mandates Member States to introduce a GAAR. It reads: "For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrange-

<sup>8</sup> For an evaluation of the package, see, among others, A.P. Dourado (2016). *The EU Anti-Tax Avoidance Package: Moving Ahead of BEPS?* 44 *Intertax*, No. 6/7, p. 440.

<sup>9</sup> It is important to bear in mind that the last two points are not part of the BEPS Project, with regard to which the two EU Directives go even further.

<sup>10</sup> For more details, see, among others, G.K. Fibbe & A.J.A. Stevens (2017). *Hybrid Mismatches Under the ATAD I and II*, 26 *EC Tax Rev.* 3, 153

<sup>11</sup> Legislative Decree No. 148 of 29 Novembre 2018 on the implementation of the ATAD Directive (*Attuazione della direttiva (UE) 2016/1164 del Consiglio, del 12 luglio 2016, recante norme contro le pratiche di elusione fiscale che incidono direttamente sul funzionamento del mercato interno e come modificata dalla direttiva (UE) 2017/952 del Consiglio del 29 maggio 2017, recante modifica della direttiva (UE) 2016/1164 relativamente ai disallineamenti da ibridi con i paesi terzi*).

<sup>12</sup> For the sake of completeness, it must be mentioned that Italy does not have a structured and homogeneous tax code. Italian scholars writing in English usually identify 'Tax Code' as the most prominent piece of legislation regulating direct taxation, namely, the Presidential Decree (DPR) No. 917 of 22 December 1986 (*Testo unico delle imposte sui redditi*, also known as 'Tuir').

ment 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 [...]."

In addition to that, paragraph 2 of the article, which resembles the anti-avoidance rule introduced in the EU Parent-Subsidiary Directive in 2015,<sup>13</sup> specifies that "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".<sup>14</sup>

The scope of the 'European GAAR' is wide as it includes all of the legal persons subject to corporate taxation and potentially any transaction and not only those that are intra-EU.<sup>15</sup> Furthermore, the preamble of the ATAD makes it clear that the GAAR under Article 6 is a 'blanket provision', namely, a provision aimed at closing any loophole within the complex tax systems of Member States

<sup>13</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. The anti-abuse clause was introduced by Council Directive (EU) 2015/121 of 27 January 2015. It is contained in Article 1, of which paragraphs 2-3-4 now reads: "Member States shall not grant the benefits of this Directive to 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 this Directive, are not genuine having regard to all relevant facts and circumstances [...] For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality".

<sup>14</sup> Among others, see also D. Weber (2016). *The New Common Minimum Anti-Abuse Rule in the EU Parent Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*. 44 *Intertax*, No. 2, p. 114.

<sup>15</sup> As to the wide scope of applicability, recital No. 11 of the preamble states that: "It is furthermore important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ".

without affecting or narrowing the scope of application of specific anti-avoidance rules.<sup>16</sup>

### Article 10-bis of the Taxpayer's Bill of Rights: the Italian GAAR

Italy considered any intervention regarding this issue as unnecessary as, in 2015, it radically 're-wrote' its anti-abuse body of rules. More precisely, at that time, Italy had already introduced a GAAR with its Legislative Decree n. 128 of 5 August 2015, which is currently contained in Article 10-bis of Taxpayer's Bill of Rights.<sup>17</sup> This GAAR is based on the concept of the 'abuse of law' and is aimed at targeting those situations in which the taxpayer established arrangements that formally comply with the law but are misaligned with its underlying rationale.

In Italian, very often the expressions 'tax avoidance' (*elusione fiscale*) and 'abuse of law' (*abuso del diritto*) are used interchangeably, and the legislator also contributed to this non-fully rigorous approach. It has been pointed out that Article 10-bis is titled "abuse of law or tax avoidance" (*Disciplina dell'abuso del diritto o elusione fiscale*), not being fully clear whether 'or' is to be intended as a disjunctive conjunction meaning that 'these are two different concepts' or as a correlative one meaning that 'it is the same concept called by two different names'.

The illustrative memorandum attached to the Legislative Decree<sup>18</sup> states that "This position

<sup>16</sup> In particular, again recital n. 11 states that: "General anti-abuse rules (GAARs) feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs".

<sup>17</sup> Law No. 212 of 27 July 2000, Taxpayer's Bills of Rights (*Disposizioni in materia di statuto dei diritti del contribuente*).

<sup>18</sup> *Relazione illustrativa allo schema di Decreto legislativo recante disposizioni sulla certezza del diritto nei rap-*

[namely, in the Bill of Rights] is justified by the need to introduce a rule that [...] unifies the concepts of tax avoidance and abuse of law, with the purpose to have a rule that has general value and cover all the taxes, either the harmonized ones, for which the concept of abuse originates in EU law, and the non-harmonized ones, for which avoidance is seen by the Supreme Court in light of the constitutional principle of ability-to-pay".<sup>19</sup>

Although there is no doubt that the two concepts widely overlap anyway and that the abuse-of-law is one of the ways in which taxpayers avoid taxes, the mentioned illustrative memorandum clarifies that, under the Italian tax system, they have been 'unified'.<sup>20</sup> The consequence is that, from a purely Italian perspective, the two concepts are actually interchangeable.

The relevant concept of the abuse of law is briefly stated in paragraph 1 of Article 10-bis: "It shall amount to abuse of law one or more transactions that lack economic substance and that, despite their formal compliance with the law, essentially realize an undue tax advantage. These transactions may be disregarded by the tax administration, which does not acknowledge the deriving tax advantages and re-assess the tax to be paid on the basis of the avoided rules and the amount already paid by the taxpayer".<sup>21</sup>

*porti tra Fisco e contribuente - Atto del Governo sottoposto a parere parlamentare n. 163-bis della XVII Legislatura.*

<sup>19</sup> This is a free translation conducted by the author of the following piece of writing: "Questa collocazione muove dall'esigenza di introdurre un istituto che, conformemente alle indicazioni della legge delega, unifichi i concetti di elusione e di abuso e conferisca a questo regime valenza generale con riguardo a tutti i tributi, sia quelli armonizzati, per i quali l'abuso trova fondamento nei principi dell'ordinamento dell'Unione europea, sia quelli non armonizzati, per i quali [...] il fondamento è stato individuato dalla Corte di Cassazione nel principio costituzionale della capacità contributiva".

<sup>20</sup> G. Falsitta (2018). Unità e pluralità del concetto di abuso del diritto nell'ordinamento interno e nel sistema comunitario. 28 *Riv. dir. trib.*, No. 4, Vol. I, p. 344.

<sup>21</sup> This is a free translation conducted by the author of the following piece of writing: "Configurano abuso del diritto una o più operazioni prive di sostanza economica che, pur nel rispetto formale delle norme fiscali, realiz-

The following paragraph 2 specifies, among other things, that the “lack of economic substance” consists mainly of: (1) inconsistency between single transactions and the legal rationale of the transactions as a whole; or (2) a use of legal instruments that is incompatible with the normal market logic”.

Paragraph 3 specifies that arrangements justified by valid non-tax reasons are not to be deemed ‘abusive’.

In addition to that, paragraph 4 explicitly protects the right of the taxpayer to select between different transactions that result in different tax burdens.

The consequence of this rule is that the abuse of (tax) law occurs when: (1) one or more transactions generate a tax advantage; (2) these transactions lack economic substance; and (3) the tax advantage thus obtained is the essential consequence of the transactions that are performed.

As already mentioned, in the course of the transposition process, the Italian legislator considered the GAAR that was in place as already being fully aligned with the provision contained in the ATAD and, therefore, left its anti-avoidance legislation unchanged.

## Are the two anti-avoidance standards comparable? The ‘Italian Debate’

### The ‘non-genuine’ arrangements tackled by the ATAD

Besides being the last step of a long-standing process of judicial elaboration, the Italian GAAR was drafted also taking into account<sup>22</sup> the EU Recom-

ziano essenzialmente vantaggi fiscali indebiti. Tali operazioni non sono opponibili all’amministrazione finanziaria, che ne disconosce i vantaggi determinando i tributi sulla base delle norme e dei principi elusi e tenuto conto di quanto versato dal contribuente per effetto di dette operazioni”.

<sup>22</sup> This point is emphasized in the report accompanying Legislative Decree No. 128/2015.

mendation on Aggressive Tax Planning<sup>23</sup> which endorsed the following GAAR: “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”.<sup>24</sup>

On the other hand, the terminology of Article 6 of the ATAD departs from that of the recommendation. Whilst the latter addresses arrangements that ‘lack economic substance’, the concept in the ATAD is instead expressed using the wording ‘non-genuine’.

In order to ascertain whether the Italian GAAR is consistent with Article 6 of the ATAD, it is necessary to examine the nature of the tests that they rely upon to detect the existence of tax avoidance.

The test adopted under the ATAD to counter BEPS is based on a standard that is strongly focused on a subjective element: the “main purpose [to obtain a tax advantage]”. The relationship between the subjective and the objective element of the test has been at the core of an intense scholarly debate.

In general, there is agreement that the GAAR that is present in the ATAD is fully in accordance with the CJEU jurisprudence.<sup>25</sup> In particular, it is agreed that Article 6 has been influenced by the judgements delivered in the cases *Halifax*<sup>26</sup> and *Cadbury Schweppes*<sup>27</sup> in which a subjective test on the intention to obtain an advantage is elaborated together with the objective test aimed at ascertaining the violation of the rationale of the piece of law upon which the non-genuine arrangement is built.

<sup>23</sup> Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU).

<sup>24</sup> Point 4.2 of the Recommendation.

<sup>25</sup> See, among others, D. Beckers (2017). The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice’s Case Law on Abuse of EU Law. *26 EC Tax Rev.*, No. 3, p. 133.

<sup>26</sup> UK: CJEU, case C-255/02, *Halifax e a.*, ECLI:EU:C:2006:121, par. 86.

<sup>27</sup> UK: CJEU, case C-196/04, *Cadbury Schweppes e Cadbury Schweppes Overseas*, ECLI:EU:C:2006:544, par. 64.

From this perspective, the concept of abuse in Article 6 of the ATAD is based on the presence of two elements: (1) a ‘non-genuine arrangement’ which is a concept elaborated in *Cadbury Schweppes* and (2) a tax advantage as the main purpose which is detected through a subjective test and results in the arrangement being in conflict with the rationale of the law that is instead detected with an objective test, as elaborated in *Halifax*.<sup>28</sup>

Regarding the second element, it is not enough that a general principle is infringed. It is necessary to identify specific provisions of which the rationale has been ‘objectively’ defeated. The essence of the objective test, therefore, would be the ‘legislator’s intention’.

On the other hand, a theory has been proposed according to which the standard of the ‘main purpose’ is per se a subjective one, but what is relevant is the ‘objective element’ of the existence of the advantage.

This is grounded on the circumstance that, under the tax law, the will of the taxpayer is largely irrelevant and almost all consequences must be regulated under the law.<sup>29</sup> As a result of this analysis, the ‘main purpose to obtain a tax advantage’ should be considered as an objective element of the legal instruments employed by the taxpayer regardless of the actual intentions.<sup>30</sup>

<sup>28</sup> See also P. Pistone (2007). L’elusione fiscale come abuso del diritto: certezza giuridica oltre le imprecisioni terminologiche della Corte di giustizia europea in tema di IVA. *Riv. dir. trib.*, No. IV, p. 17; L. Salvini (2006). L’elusione Iva nella giurisprudenza nazionale e comunitaria. *Corr. trib.*, No. 39, p. 3097; M. Poggioli (2006). La Corte di giustizia elabora il concetto di “comportamento abusivo” in materia d’IVA e ne tratteggia le conseguenze sul piano impositivo: epifania di una clausola generale antielusiva di matrice comunitaria? *Riv. dir. trib.*, No. III, p. 107; M. Basilevichia (2006). Norma antielusione e “relatività” delle operazioni imponibili. *Corr. trib.*, p. 1466.

<sup>29</sup> On this point, see also P. Russo (2016). Profili storici e sistematici in tema di elusione ed abuso del diritto in materia tributaria: spunti critici e ricostruttivi. *Dir. prat. trib.*, No. I, p. 10001.

<sup>30</sup> D. Stevanato (2019). The New Italian GAAR in Light of the EU Anti-Tax Avoidance Directive (2016/1164). *59 Eur. Taxn.*, No. 9, p. 430.

The main practical advantage of this second theory is that the tax administration would not be asked to conduct a difficult investigation on the intention of the taxpayer. Indeed, the tax advantage could be disregarded irrespective of any evaluation on the subjective element of the arrangement that is targeted.

When the analysis is extended to paragraph 2, Article 6 of the ATAD, it becomes necessary also to take into consideration the standard of ‘valid commercial reasons which reflect economic reality’. The uncertainty arises of how the presence of a valid commercial reason should affect the standard of the ‘main purpose to obtain a tax advantage’, since there may be tension between the two of them.

In fact, there may be an arrangement that has two primary purposes, one of which is to obtain a tax advantage and the other is commercial. In theory, it appears that such an arrangement may be considered as ‘non-genuine’ if the tax advantage is contrary to the rationale of the law, although this may contradict the provision under paragraph 2 according to which, in order to be ‘non-genuine’, a transaction shall occur without a valid commercial reason.

The generally agreed solution for not creating tension between the first two paragraphs of the article is to consider as ‘non-genuine’ those arrangements for which the tax advantage is predominant and the commercial purpose, when present, is not.

### ‘Undue tax advantages’ under the Italian GAAR and its ‘constitutional roots’

The Italian GAAR under Article 10-*bis*, on the other side, is based on the objective standard of the ‘undue tax advantage’.<sup>31</sup> An element of subjectivity can be determined in paragraph 3 of the article under which the duty to substantiate that

<sup>31</sup> See also G. Zizzo, *La nozione di abuso nell’art. 10- bis dello Statuto dei diritti del contribuente*, in *Abuso del diritto ed elusione fiscale* (E. Della Valle, V. Ficari & G. Marini (Eds.). Giappichelli 2016), p. 7.

there are also valuable non-tax reasons that are of a non-secondary nature (*non marginali*) is assigned to the taxpayer, and the individual is able to justify the targeted arrangement.

Nevertheless, even the acknowledgement of such a subjective element, which belongs to an autonomous step in the process of detecting tax avoidance, does not affect the substantially objective nature of the test under Article 10-bis.

The wording of the article at issue is the culmination of a long-standing elaboration operated mainly, although not exclusively, by the Italian courts and of which the most relevant result is the establishment of a close association between tax anti-avoidance rules and some of the most prominent constitutional principles.

Italy has a tradition of specific anti-avoidance rules the main of which was contained in Article 37-bis of Presidential Decree n. 600/73<sup>32</sup> and was abolished by the same piece of legislation that introduced Article 10-bis. Nevertheless, it is noteworthy that much before the introduction of the GAAR, the Italian courts provided a significant contribution to designing a general anti-avoidance principle that culminated in three judgements delivered by the Supreme Court in 2008.<sup>33</sup>

These judgements are about dividend washing and dividend stripping arrangements and develop a legal reasoning articulated in five main steps. First, and probably the most significant, the judges state that a ‘general anti-avoidance principle’ derives ‘directly’ from Article 53 of the constitution which enshrines the ability-to-pay principle (*principio della capacità contributiva*).

Second, it is affirmed that, from Article 53 of the constitution, the principle also derives according to which “it is prohibited to obtain tax advantag-

<sup>32</sup> IT: Presidential Decree n. 600/1973, Art. 37-bis; of which paragraph 1 stated that: “The tax administration shall disregard transactions, events or legal deeds, also connected to each other, which are devoid of business purpose and aim at outflanking obligations or prohibitions provided by tax law, and which reap tax breaks or reimbursements otherwise undue.”

<sup>33</sup> IT: Italian Supreme Court (*Suprema Corte di Cassazione*), judgments No. 30055, 30056 and 30057 of 23 December 2008.

es through the wrong use of legal instruments, although formally complying with the law, in the absence of valid economic reasons other than the tax advantages themselves”.<sup>34</sup>

Third, the judges state that this ‘immanent principle’ does not conflict with either existing specific anti-avoidance rules which, on the contrary, shall be considered as a manifestation of the general rule, or with the principle of legality under Article 23 of the constitution, since it does not impose any further obligation but only provides for a tool to enforce those already existing.

Fourth, the judges state that the existence of one or more specific anti-avoidance rules targeting specific aspects of an arrangement does not limit the tax administration in disregarding the remaining aspects that are not explicitly covered.

Finally, which is a procedural issue, they stated that the court is entitled to ascertain *ex officio* the invalidity for tax purposes of a contract on which the avoidance scheme is based. From this perspective, the ability-to-pay not only constitutes a maximum threshold for the levy of taxes but also a minimum one.<sup>35</sup>

Although some scholars have criticized the Supreme Court’s findings, they have been widely relied upon since their establishment. Just to make an example, Lovisolo<sup>36</sup> upheld that the existence of specific anti-avoidance rules is nothing but the demonstration of the legislator’s intention to narrow the scope and target ‘specific arrangements’.

<sup>34</sup> This is a free translation conducted by the author of the following wording: “non può trarre indebiti vantaggi fiscali dall’utilizzo distorto, pur se non contrastante con alcuna specifica disposizione, di strumenti giuridici idonei ad ottenere un risparmio fiscale, in difetto di ragioni economicamente apprezzabili che giustifichino l’operazione, diverse dalla mera aspettativa di quel risparmio fiscale”.

<sup>35</sup> F. Tesaurò (2017). *Istituzioni di diritto tributario - Vol. I: Parte generale* (Utet Giuridica 2017), p. 66; G. Zizzo (2009). Clausola antielusione e capacità contributiva. *Rass. trib.*, No. 2, p. 487.

<sup>36</sup> A. Lovisolo (2009). L’art. 53 Cost. come fonte della clausola generale antielusiva ed il ruolo delle «valide ragioni economiche» tra abuso del diritto, elusione fiscale ed antieconomicità delle scelte imprenditoriali. *GT - Riv. giur. trib.* No. 3, p. 216.

Moreover, it was also affirmed that Article 53 of the constitution would be stated in a way that is too generic to clearly identify a right that is violated by an avoidance arrangement.

It is also interesting to note that, in the context of the debate that followed these judgements, there have also been scholars<sup>37</sup> who upheld that more suitable constitutional grounds for a general anti-avoidance would have been Article 41 of the constitution which enshrines some of the general principles that have to underlie the ‘economic relationships’. This article, on the one hand, entrenches the freedom of economic initiative and fully elevates it to the rank of an individual right and, on the other hand, restricts it by stating that it cannot be exercised in a manner that is against the general social benefit.

From that perspective, taxes are considered as something that is necessary to enable public authorities to perform their duties with the consequence that avoiding paying them amounts to damage to the social benefit protected under the constitution.

The final terminology of the article has also been at the centre of an intense scholarly debate because, although the substantial objective nature of the provision has never been questioned, its ambiguity has been seen as a potential source of uncertainty and inconsistency when the time of its practical application occurs.

The main issues arise with regard to the content of paragraph 2 and the way in which it clarifies the meaning of the standard of ‘lack of economic substance’ on which paragraph 1 is based. In particular, it has been objected that not only, very often, does the legal instrument exploited to avoid taxes have a solid market logic but that it may be very difficult in practice to prove that a transaction carried out in a business context has ‘no economic substance’.

This vagueness is the basis of substantial legal uncertainty which may end up resulting in either an ineffective rule or, more likely, in a rule that is so general that it may be potentially applied to any transaction of which the economic result might

have been obtained ‘also by means of any other arrangement’. As a result, despite the fact that this is an objective test and the taxpayer’s intention is irrelevant, the application of the GAAR may be extremely difficult for the tax administration and/or very burdensome for the taxpayer when the time comes to explain and justify the individual’s arrangements.

### **An extensive interpretation to make the two standards compatible**

It emerges from what has been discussed thus far that the tests proposed in the Italian GAAR and in the ATAD are not identical. Unless solid legal grounds are identified to state that the scope of the Italian GAAR entirely covers that of the ATAD, it may be concluded that Italy failed in satisfactorily transposing the directive.

What emerges from the previous analysis is that the two rules rely on a different concept of the ‘lack of economic substance’: while the Italian GAAR is based on the ‘improper use of legal arrangements to obtain undue tax advantages’, Article 6 of the ATAD relies on the ‘absence of valid economic reasons that reflect the economic reality’.

There is, therefore, legitimate doubt that the two criteria are misaligned. The ‘main purpose’ test under the ATAD may be satisfied even in situations when valid commercial reasons are present. Indeed, valid commercial reasons may well coexist with the main purpose of obtaining a tax advantage that defeats the object or purpose of the applicable tax law. From this perspective, by requiring a ‘lack of economic substance’ and, therefore, that arrangements that are adopted are inadequate for producing economic effects other than the tax advantages, the Italian GAAR would require a higher standard and fail to amount to a satisfactory transposition of the standard promoted by the directive.

The debate among Italian scholars<sup>38</sup> on this point reached the conclusion that the two anti-

<sup>37</sup> Russo, *supra* No. 30.

<sup>38</sup> Stevanato, *supra* No. 5. On this point, see also V. Liprino (2008). Il difficile equilibrio tra libertà di gestione

avoidance rules can be considered aligned only if the scope of the concept of ‘reflecting the economic reality’ is stretched to the point where the ‘use of disproportionate or unusual arrangements’ falls within it. Indeed, in most of the cases, if not in all, the legal arrangements involved in tax avoidance are much more complex than those that would normally be used to pursue comparable economic results without the ‘undue’ tax advantages.

Such a stretch can be reached through conjunct reading of paragraphs 1 and 3, which results in the arrangements that are justified by non-secondary (*non marginali*) reasons being deemed non-abusive. Even if not expressly mentioned, the taxpayer’s intention would play an important role in weighting and deciding what are the main reasons at the basis of the arrangement and what are those that are secondary. Therefore, even if the Italian GAAR is based on an objective test, this would be perfectly comparable, in reality, to the more subjective one on which Article 6 of the ATAD is based.

This is also consistent with the idea that is at the very basis of the abuse-of-law in the field of private law which is to counter the ‘abuse’ of private autonomy that is realized to obtain economic advantages that would be obtainable through more suitable arrangements that are more suitable.<sup>39</sup>

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e abuso di diritto nella giurisprudenza della Corte di giustizia: il caso Part Service. *Riv. dir. trib.*, No. II, p. 113.

<sup>39</sup> For different positions in the debate at issue, see, for example, R. Cordeiro Guerra & P. Mastellone (2009). *The Judicial Creation of a General Anti-Avoidance Rule Rooted in the Constitution*, 49 *Eur. Taxn.* 11, sec. 2.2.: “Initially, the ISC [Italian Supreme Court] considered some transactions to be legitimate provided they were not expressly identified by the law as constituting tax avoidance behaviour, since the contractual autonomy of parties can only be limited by specific provisions. In the absence of specific provisions such transactions would merely fall under the “gap”, in the tax legislation. According to this interpretation, taxpayers, were absolutely free to put into practice tax saving structures – such as “dividend washing” transactions – and benefitting from a reduced tax burden, as long as there was no explicit prohibition that could be relied upon by the tax authorities”; and G. Maisto (1991). *The abuse of rights under Italian tax law: an outline.* 19 *Intertax*, No. 2, p. 94, who states that: “The applicability to

According to this extensive interpretation, the concept of ‘lack of economic substance’ under the Italian GAAR that is currently in place would cover both the fully artificial arrangements and the cases in which the law has been ‘abused’ because a more suitable arrangement could have occurred. This would make it possible for this provision to correlate with Article 6 of the ATAD under which the targeted non-genuine arrangements are those not put into place for valid commercial reasons despite the fact that a purely literal interpretation would result in the word ‘lack’, making it possible to cover only fully artificial arrangements.

### **Conclusion: Why a GAAR creates uncertainty, why we need one and how we can justify it**

Back in 1983, Uckmar, a leading Italian scholar, defined tax avoidance as the exploitation of areas that the legislator intended to cover but did not for one reason or another.<sup>40</sup> Almost four decades after that definition, this has not really changed. The uncertainty surrounding the concept of ‘tax avoidance’ reappears every time measures are taken to tackle anti-avoidance schemes, and the introduction of a GAAR at the European level simply reanimated a long-standing debate although in a renewed perspective.

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tax law of the principle of fraude à la loi set forth by Art. 1344 of the Civil Code has been rejected by the case-law and by prevailing literature: the denial is based on the circumstance that the liability arises as a result of the assessment by the tax office (i.e. an administrative act). Consequently, any fraud committed by the taxpayer would not qualify as fraud to the law but as fraud to the fisc. In addition, Art. 1344 of the Civil Code refers to the avoidance of legislative provisions which prohibit a given course of action. On the contrary, a legislative tax provision simply sets forth a tax regime for a given factual situation. The tax provision therefore does not contain any prohibition”.

<sup>40</sup> V. Uckmar (1983). General Report, in *Tax Avoidance/Tax Evasion*, International Fiscal Association (IFA), *Cahiers de droit fiscal international*, vol. 68a., 3. *Tax avoidance*, No. 23 (Kluwer L. Intl.).

The ultimate reason for any possible misalignment or doubt that a misalignment is present is in the fact that the borderline is not clear between tax avoidance and the legitimate tax advantages. In-between these two categories, there is a wide gray area, and the allocation of one specific arrangement to one of the two will always imply some discretionary power by either the tax administration and by the judge when the question happens to be brought before a tax court.

This becomes more evident when it is thought that even the very same arrangement can fall within the scope of each of the two categories depending on the general context in which it is put in place. Potentially, any fact and circumstance, either subsequent or precedent that are strictly linked to the arrangement or not, and even the timing, may be taken into consideration in the course of the analysis.

Avi-Yonah, Sartori, and Marian<sup>41</sup> explained back in 2011 that there is no universally accepted definition of the concepts of tax evasion, tax avoidance, and legitimate tax planning (or, as it is referred to in the present contribution, legitimate tax advantage). However, while it seems possible to state regarding tax evasion that it consists of the violation of the letter of the law and, in most jurisdictions, there are solid grounds on which to identify it, the same does not appear to occur in the case of tax avoidance.

This is also the ultimate reason why, under the Italian GAAR, the tax administration is obliged to consult with the taxpayer and take into consideration the individual's arguments before serving that person with an assessment notice. In fact, although a general principle under which the tax administration is required to consult the taxpayer before serving an assessment is not established in the Italian tax system, Article 10-*bis*, paragraph 6, mandates formally asking for clarifications from the taxpayer when the GAAR is activated.<sup>42</sup>

<sup>41</sup> R.S. Avi-Yonah, N. Sartori & O. Marian (2011). *Global Perspectives on Income Taxation Law*, 151 (Oxford U. Press).

<sup>42</sup> Tesouro, *supra* No. 36, p. 170.

These characteristics of tax avoidance makes it necessary for every advanced tax system to have a GAAR in place. It was previously mentioned that the doctrine of abuse-of-law was elaborated in the field of private law because the freedom of contract and freedom of disposition that underlie the legal system offer many options to achieve similar economic results through different arrangements. Due to the fact that most of the tax avoidance arrangements are based on private law concepts, in order to have an effective tax system, it is necessary to extend the applicability of the doctrines elaborated in the field of private law. The freedom of contract is so wide that even a very comprehensive set of specific tax anti-avoidance rules would never be able to target every possible avoidance arrangement.<sup>43</sup>

Arguments in favour of a GAAR are not exclusively of a practical nature; scholars<sup>44</sup> have also affirmed that it is important to counter tax avoidance because it undermines equity among taxpayers and disturbs efficiency in the marketplace as tax avoiders can conduct business with lower tax costs than others.

In the course of the scholarly debate that preceded the establishment of the Italian GAAR, it was admitted<sup>45</sup> that such a rule will always create some friction with the principle of legal certainty. This is the reason why it has to be grounded on the general constitutional value of 'justice'. In comparison to SAARs, the wide scope of a GAAR, which covers potentially any tax and arrangement, is likely to improve the level of equality by reducing the disparities in the treatment of different taxpayers but will always induce a certain level of uncertainty. At the end of the day, the tax administration decides what arrangements are abusive and when to apply it,

<sup>43</sup> M. Beghin (2012). L'abuso e l'elusione fiscale tra regole "scritte", giustizia tributaria e certezza del diritto. *Corr. trib.*, No. 17, p. 1298.

<sup>44</sup> F. Zimmer (2019), In Defence of General Anti-Avoidance Rules. 73 *BIT*, No. 4, p. 218.

<sup>45</sup> M. Beghin (2009). L'abuso del diritto tra capacità contributiva e certezza dei rapporti fisco-contribuente. *Corr. trib.* No. 11, p. 823.

thus triggering a very burdensome commitment, even up to litigation, for the taxpayer to prove the contrary.

The GAAR is commonly perceived as one of the best tools to guarantee equality among taxpayers, however, unless the tax laws are detailed and clearly written, it may also end up in constituting a significant obstacle for the attainment of legitimate tax advantages.

Moreover, on the same note of the mentioned Supreme Court judgement of 2008, the scholarly debate also reached the conclusion that GAARs formally comply with the principle of legality because their rationale is indeed to impede the sub-

stantial infringement of, precisely, the principle of legality.<sup>46</sup>

Finally, regarding the form of the GAAR, it was proposed that the best solution is to have a statutory provision because it is more in accordance with the constitutional principles of legality and the separation of powers. Indeed, although a GAAR inherently results in wide discretionary power because it must be written in general terms, in parallel, it also reduces the possibility for both the tax administration and the judiciary to take over and create their own rules.<sup>47</sup>

<sup>46</sup> Beghin, *supra* No. 37.

<sup>47</sup> Zimmer, *supra* No. 45.

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