Analyses and Studies
Analizy i Studia

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

No 1(9) | May 2020 pp. 33–46 ISSN 2451-0475

Converging the Global Standard of General Anti-Abuse Rule: Is There Room for an Application of the GAAR (ATAD) and PPT (MLI) in a Similar Fashion?

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Finding much needed funds from taxes to state budgets and an ever-increasing mistrust of politicians and public opinion to the tax optimization schemes of multinational enterprises (MNEs) and high net worth individuals (HNWIs) have sparked an unprecedented political enthusiasm to address international tax avoidance in the last decade. This enthusiasm morphed into a political mandate given by G20 to the OECD in 2012. Amid a plethora of anti-avoidance rules delivered by the OECD under the BEPS Project, the principal purposes test (PPT) and its derivative under the EU Anti-Tax Avoidance Directive (ATAD) – the General Anti-avoidance Rule (GAAR) – are pivotal. The purpose of this contribution is to take an attempt to answer the main research question: is there room for an application of the GAAR (ATAD) and PPT (MLI) in a similar fashion? The assumption positively verified under this study via the prism of tax policy and technical (legal) reasons is that the less dissimilar an application of the GAAR and PPT will be, the less tax avoidance and fewer disputes arising from this phenomenon appear. However, there is a major caveat: the GAAR and PPT must gravitate towards the General Anti-abuse Principle (GAAP) as follows from the jurisprudence of the Court of Justice of the European Union's (CJEU) rather than to the OECD's version of the GAAR in the MLI (PPT). Only such an interpretative approach may ensure the right balance between fiscal interests of countries and individual economic freedoms of taxpayers. This contention stems from an analysis of the wording and structure of the GAAR and PPT, tax policy aims articulated in the preambles to the MLI and ATAD, the Court of Justice of the European Union's (CJEU) case law, the OECD's Commentary, and the relevant literature.

Keywords: global tax policy, tax avoidance, GAAR, PPT, OECD, BEPS, MLI, EU, ATAD
JEL Classification: K34

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Introduction

The aftermath of the global financial crisis in 2007–2009, concerted with the several major tax leaks between 2013 and 2017 (ICIJ, 2020), prompted an unprecedentedly far-reaching international response to the problem of tax avoidance and tax evasion.[1] The reason was at least twofold: (i) finding much needed funds from taxes to state budgets and (ii) an ever increasing mistrust of politicians and public opinion to the multinational enterprises (MNEs) and high net worth individuals (HNWIs). MNEs and HNWIs seemingly belong to the top seekers of the most tax-optimized routes for their businesses and investments, primarily due to their financial capacity to do so in the most intelligible and effective ways.

This combined reason made it possible for the OECD to receive from G20 in June 2012 a solid rock mandate to address tax avoidance (G20, 2012, para. 48; Fung, 2017, p. 76) and quite rapidly deliver 15 points' Action Plan in October 2015, commonly known as the Base Erosion and Profit Shifting (BEPS) (OECD, 2013 and 2015). In effect, the very far-reaching anti-tax-avoidance policy has been observed over the last seven years, mainly due to the works of the OECD and their spreading in the EU. Amidst the numerous new anti-avoidance rules resulting from the BEPS and its EU harmonized derivative – the EU Anti-Tax Avoidance Directive (ATAD, 2016), they are two rules that aim to set a global standard for addressing abuses of tax law through tax avoidance. One of them is the General Anti-avoidance Rule (GAAR), as enshrined in Article 6 of the ATAD, and the second is the principal purposes test (PPT) in Article 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) (OECD, 2015A; MLI, 2017).[2]

Although the GAAR (ATAD) and PPT (MLI) belong to different legal regimes, EU and tax treaties, respectively, and they do not have identical wording, their common origin (BEPS) and purpose (prevention of tax abuse) begs for a converging interpretative approach to their application. This, however, should be viewed against the crucial differences between the EU and OECD's agendas. For the EU, the key consideration is economic freedom as established under the internal marker, whilst the agenda of the OECD is recently preoccupied with the global fight against tax avoidance. As aptly put by Wolfgang Schön, "We shall see that this deep divide between the pro-business purpose of European law and the pro-revenue purpose of the BEPS Action Plan is responsible for seismic tensions and frictions beneath the surface of EU legislation in tax matters" (Schön, 2020, sec. 3 *in fine*). It should also be borne in mind that a considerable chaos in definitional boarders regarding the key terms, such as tax optimization, tax avoidance, and tax evasion, has arisen out of the mentioned mistrust of politicians and public opinion towards MNEs and HNWIs. As a result, for many politicians, and certainly for the majority of public opinion, those terms were used interchangeably (Douma, 2018), although they should be distinguished.[3]

Having said this, the purpose of this contribution is to deliver tax policy and technical (legal) reasons for applying the GAAR and PPT in a sim-

[1] This contribution deals only with tax avoidance. No further references to the problem of tax evasions will therefore be made, unless it will be justified by an ongoing discussion.

[2] By incorporating in their tax treaties, the new wording of titles, preambles and the PPT, as enshrined in the MLI, governments and jurisdictions will have met the minimum standard promulgated by Action 6 of the OECD/G20 BEPS initiative (OECD, 2015A, para. 22 at p. 19).

[3] (1) Tax optimization is a legal way of reducing tax burden of genuine structures and transactions in accordance with the letter of the tax law and its purpose. (2) Tax avoidance is legal as well, but structures and transactions are not genuine in the sense that they miss the sufficient degree of economic substance and non-tax business reasons for their existence (they exist only or essentially for tax avoidance purposes), formally complying with the letter of tax law, but defeating its purpose. (3) Tax evasion, in turn, is an illegal practice of non-paying or paying less tax, typically by means of concealing the sources of income and wealth and/or falsifying documentation required for income and wealth assessment and thus taxation of it (Mclaren, 2008, pp. 141–163; Neck, Wächter and Schneider, 2012, pp. 104–117).

ilar fashion with an important caveat – such an application should not compromise the right balance between fiscal interests of countries and individual economic freedoms of taxpayers. The assumption of this study is that the less dissimilar an application of the GAAR and PPT will be; the less tax avoidance and fewer disputes arising from this phenomenon appear, providing that the overarching purpose of the EU to build and protect economic freedoms will not be overruled by the pro-fiscal tax policy desires of the OECD.

The methodology relies on legal analysis in conjunction with *de lege lata* and *de lege ferenda* approaches undertaken under such an analysis, the comparative research method (Zweigert and Kötz, 1998; Thuronyi, 2003), and the use of the Court of Justice of the European Union's (CJEU) case law and the OECD's Commentary for interpretative and argumentative purposes. The legal reasoning is strengthened via the frequent use of the relevant literature.

Global impact and coverage

The GAAR and PPT undeniably set a global standard to prevent tax avoidance.

The GAAR is adopted by all 28 EU member states (MSs)[4] with various structure and language, but remaining the same core operative elements: (i) tax intention; (ii) contradiction of the object or purpose of tax law; and (iii) the artificiality (Lang et al., 2016; Prats et al., 2018). Moreover, the ATAD is secondary EU law and given its inferiority to the primary law, all provisions of that Directive must be compatible with EU Treaties and the relevant CJEU case law, in particular in cases regarding abuse of tax law under fundamental freedoms.[5] Indeed, the EU Commission in the proposal of the ATAD pointed out that the GAAR must comply with the CJEU case law, which is the part of the *aquis communautaire* (Commission, 2016, p. 9). This requires an application of the GAAR within the EU as well as from the EU to third countries under the free movement of capital, whenever applicable, in a similar way.[6] This all means that although the GAAR from the ATAD primarily covers the territory of all MSs and all taxpayers established therein, including subsidiaries of third countries' parent companies and their permanent establishments (PEs), its impact reaches a way beyond.

The PPT has a global coverage by design, since, as of writing this chapter (April 2020), this rule was included in around 2000 bilateral tax treaties among 94 jurisdictions across the world via the MLI's procedure (OECD, 2020). Moreover, much more jurisdictions add the PPT to their tax treaties beyond the MLI procedure, i.e. their treaties were not submitted to the MLI's procedure or the jurisdictions are not members of the BEPS's inclusive framework.[7]

This shows that the GAAR from ATAD and PPT from MLI may have a considerable impact on the design of domestic GAARs by the vast majority of countries across the world. Their application may, however, vary considerably among countries just as different fiscal agendas and the bodies of law (including case law) vary between them. Still, the GAAR and PPT have an unprecedented potential to tackle tax avoidance in relatively converging ways globally, irrespective of various perceptions of this phenomenon. A similar way of preventing tax avoidance globally appears to strengthen the effectiveness of anti-avoidance rules, because the more similarly countries perceive and apply such rules, the less loopholes and mismatches remain to be exploited by taxpayers via international tax arbitrage (R.S. Avi-Yonah, 2007, pp. 182–188).

[4] Counting in the UK, since it was an MS at the time of adoption of the ATAD.

[5] See *infra* secs. 6 and 7.

[6] See more on that *infra* sec. 3.

[7] *See*, for example, Singapore-Brazil (2018) – Brazil is not a party to the MLI. See also protocols to the UK-Switzerland (1977 and 2012); the UK-Uzbekistan (1993 and 2018); and Argentina-Brazil (1980 and 2017), which amended these tax treaties by, *inter alia*, including the rule with the wording of the PPT, although neither Brazil nor Uzbekistan is a party to the MLI, while the Switz.-U.K. Income Tax Treaty (1977) is not in the list of Covered Tax Agreements (CTAs) of either Switzerland or the United Kingdom. See Schwarz J. (2018); Tomazela R. (2017); Hattingh (2018, sec. 2.3.1).

Need for a common strategic approach and action against tax avoidance

The preamble to the MLI *expressis verbis* calls for "co-ordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context" (MLI, 2017). The results of the MLI are remarkable: almost 100 signatories in less than 3 years. The influence of MLI is also worth an attention. Many jurisdictions follow the script with the PPT and the new preamble to tax treaties, even if they were neither legally nor politically obliged to do so. This shows that the common global standard to prevent tax avoidance under tax treaties is emerging fast and big.

The preamble to the ATAD put even more emphasis on the need for a coordinated and common strategic approach and action against tax avoidance. In particular, in recital 2, we can read that "[…] it is essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion".

Considering that the GAAR and PPT should be viewed against their background, which constitutes their legal and policy context relevant for interpretative purposes,[8] a common understanding and thus application of these rules by domestic tax authorities of the countries is preferable and greatly desired by the EU and the OECD. It implies that for the OECD and EU, the application of the GAAR and PPT in sufficiently coherent and a coordinated fashion is of a strategic significance for an appropriate and effective prevention of tax avoidance.

Clearly, the tax authorities of the countries are not obliged to mutually recognize their respective decisions under the GAAR or PPT. It may happen, therefore, that one state (e.g. a resident state of the investor) will be of the opinion that there is abuse of domestic tax law and tax treaty, whilst the other state (a state hosting the investment) that the abuse does not exist. This conflict of recognition of the abuse may lead to unresolved double or even multiple taxation, as exemplified by scholars (Weber, 2016, p. 128; Moreno and Zornoza Pérez, p. 134). Many of these cross-border conflicts can fall within the scope of the Directive on tax dispute resolution mechanisms in the European Union (Council Directive (EU) 2017/1852) or arbitration clauses in tax treaties (the equivalents of Article 25(5) of the OECD Model Convention) or investor-state dispute settlement (ISDS) procedures (Uribe and Montes, 2019, pp. 1–11; Gordon and Pohl, 2015, pp. 29–35).

In practice, a divergent application of the GAAR and PPT by tax authorities of the countries may diminish a minimum predictability of such rules internationally to the extent that investors may not be able to foresee at all tax outcomes of their investments. Big losses of investors triggered by unpredictable tax consequences can transform into even bigger losses of countries in a medium or long period, not only by losing foreign direct investments (FDIs), but also by means of losing cases with investors in the ISDS. As researched data shows, such losses can be vast: the three high-loss countries in the world – Argentina, Poland, Venezuela— lost in total approximately USD 22.3 billion as of 2018 and those figures are likely to be significantly underestimated due to gaps in ISDS data (Samples, 2018, p. 164).

Simply speaking, a converging application of the GAAR and PPT by the tax authorities of countries lies with the interest of all stakeholders. Especially a very restrictive application of the GAAR and PPT favouring fiscal agendas at the cost of economic freedoms may in the medium or long term appear to be very expensive for many countries (Ladziński, 2019, pp. 22–28; Gomułowicz, 2019, pp. 14–20; Szef KAS, 2020; Kuźniacki, 2020a).

[8] See, for example art. 31(1)–(2) of the Vienna Convention on the Law of Treaties (VCLT, 1969), which codifies customary international law and, therefore, the principles included in this Convention must be applied by all countries and jurisdictions, i.e. those that have ratified and those that have not ratified the VCLT. See Ward, 2005, pp. 15–16; Vogel and Prokisch, 1993, sec. III.1.

Similar linguistic, functional and proportional approach to denial of tax benefits

The GAAR from ATAD and PPT from the MLI read as follows in Table 1.

other purpose, i.e. at least as the main purpose, but typically as the essential/predominant purpose. Only such an interpretative approach may ensure a consistent and reasonable application of this standard (Avi-Yonah and Mazzoni, 2018, pp. 895–899). Otherwise, the EU abuse standard

Table 1. The wording of the GAAR and PPT

GAAR: art. 6 of the ATAD	PPT: art. 7 (1) of the MLI
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.	1. Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes of any arrangement or transaction** that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

The four major similarities at the linguistic, structural and functional level can be *explicitly* recognized between the GAAR and PPT:

1) The criterion of 'one of the main purposes' in the GAAR and 'one of the principal purposes' in the PPT, which can be also called the first test of tax avoidance, are semantically and functionally identical, i.e. the adverb 'main' equals 'principal'. Moreover, the reasonability test used in the PPT ('reasonable to conclude') gives 'one of the principal purposes' a reasonable meaning of 'the principal purpose' (the main purpose) in the context of tax avoidance (Freedman, 2019, p. 335–337; Avi-Yonah and Mazzoni, 2018, pp. 895–899; Kuźniacki, 2018, sec. 2.3.3). The common origin of this criterion of abuse, as explained in section 5 below, further exacerbates strong ties between the GAAR and PPT. To set a proper threshold for abuse of tax law, the phrases 'the main purpose' and 'one of the main purposes' under the GAAR from the ATAD and the PPT from the MLI should be understood alike, as the purpose to obtain a tax advantage exceeds or outranks in importance any may be lowered too much with the result that, as the OECD under tax treaties in my view incorrectly suggests,[9] a refusal of tax benefit to a taxpayer would be possible if one of the principal purposes was to obtain that benefit.

2) The next criterion (or the second test) of tax avoidance, under the GAAR and PPT refers to a contradiction of obtaining a tax benefit with tax law or relevant treaty provisions. This criterion gives a special significance to the object and purpose of the tax law, including tax treaties, a different one than that existing under ordinary interpretation of the tax law. The second test of tax avoidance authorizes the tax authorities to recharacterize the private law transactions to which the tax law should be adopted or authorizes some degree of analogical interpretation to prevent tax avoidance (Zimmer, 2019, sec. 7). Such a criterion has a common origin in the jurisprudence of many

[9] Unless the OECD inconspicuously intended to suggest an application of the PPT in order to prevent the use of tax treaties for tax optimization purposes rather than the abuse of tax treaties for tax avoidance purposes.

countries in tax avoidance cases (Arnold, 2002, pp. 46–48; Dabner, 2000, pp. 232–233; Atiyah and Summers, 1987, pp. 249–266). Despite the reference to the purpose or object of the applicable tax law in the GAAR versus the object and purpose of the relevant provisions of the tax treaty, this criterion should be understood and applicable identically, or at least in a very similar manner, under the GAAR and PPT. It follows from the two intertwined reasons.

Firstly, the purpose of the law stems from and is closely bound with the intentions of the legislator, as articulated in the text of the law, and therefore, it is embedded within the object of law via the text of the law. Thus, it will be near to impossible that one and the same arrangement can defeat the purpose of the law and yet clearly falls within its scope (object) without defeating the object of the law. That is why many prominent scholars do not distinguish between the object and purpose of the law (De Broe, 2008, p. 247; Ward, 1996 p. 25; Vogel and Prokisch, 1993, p. 72). An interpreter should follow that path for the purposes of an interpretation of the GAAR, which means that the purpose or object of the applicable tax law in the GAAR will, in practice, usually equals the object and purpose. Likewise, those parts of the second test in the GAAR and PPT usually should be seen identically.

Secondly, although the wording of the GAAR implies that it is the object and purpose of the entire corporate tax regime rather than those of the concrete tax provisions which were applied to obtain a tax advantage, it would be unreasonable to start with the object and purpose of the former. This follows from the fact that the overall object and purpose of the tax regime are often too general and remote to allow the suitable application of that test (Prats et al., 2018, p. 69). More appropriately would be to begin with the scrutiny of the object and purpose of the concrete tax law provisions, which were applied by a taxpayer to obtain a tax advantage. Then, it would be wise looking for the general object and purpose of the tax law to confirm, clarify or to find the object and purpose of the concrete tax law provisions. Accordingly, in principle, a way of identification of the object and purpose under the second test should be identical under the GAAR and PPT, i.e. starting from concrete provisions, then going through of the chapter of the interpreted tax provisions up to the general object and purpose of the entire tax regime (domestic statutory law or tax treaty).

3) Both rules aim to prevent tax avoidance by denying tax benefits proportionally to the range of abusive practices. In the PPT, it stems from the phrase “a benefit under the Covered Tax Agreement shall not be granted *in respect of an item of income or capital*”. In the GAAR, in turn, it follows from the combination of the phrases “shall ignore an arrangement or a series of arrangements” with “shall be regarded as non-genuine *to the extent that* they are not put into place for valid commercial reasons which reflect economic reality”. An *item by item of income* approach under the PPT converges with *to the extent of the artificiality* approach under the GAAR, since both approaches lead to a denial of tax benefits only to the income which arises from abusive practices, i.e. undertaken principally for obtaining a tax benefit so that it contradicts the object and purpose of relevant provisions. This observation remains valid, notwithstanding that the GAAR does so by an explicit reference to the degree of artificial (non-genuine) arrangement, whilst the PPT is not. The reason for that is the underlying significance of artificiality for determining that an obtainment of a tax (treaty) benefit contradicts the object and purpose of relevant provisions. This topic is so important for an appropriate operation of the GAAR and PPT that it deserves a discussion in separate section 7 below.

4) The GAAR says that after the ignorance of an arrangement or a series of arrangements, “the tax liability shall be calculated in accordance with national law”. An ignorance of the arrangement or a series of arrangements that resulted in a tax benefit requires tax authorities to deny such advantage insofar as the absence of the source of the benefit invalidates its very existence. The tax authorities should be, however, very meticulous in such denial because of the use of the phrase ‘to

the extent'. That is to say, the tax advantage can be denied only to the extent of its source in an artificial arrangement, which contradicts the object or purpose of the applicable tax law. Those legal consequences of the GAAR are identical to those under the PPT due to 'an item by item of income approach'. In general, the GAAR and PPT equip the tax authorities with wide discretionary powers to determine further legal consequences (Lang, 2014, pp. 661–663; Kuźniacki, 2018, sec. 2.5).

Reasonably, albeit largely *de lege ferenda*, the determination of further legal consequences under both rules could be guided by economic substance and non-tax business purposes. In effect, the tax authorities could redefine the abusive arrangements so as to re-establish the situation that would have prevailed in the absence of the elements constituting that abusive practice, i.e. on the basis of the existence of economic substance and non-tax business justification sufficient to let the redefined arrangement be considered compatible with the object and purpose of the tax law. Although not perfect, this guideline mirrors the taxpayer's behaviour targeted by the GAAR and PPT: just as taxpayers' behaviour was considered by the GAAR and PPT as abuse of the tax law, the consequences of such a judgment would follow from the appropriate use of the tax law. Such an approach to determine the legal consequences of anti-abuse rules is also recommended by the CJEU (*Halifax*, C-255/02, para. 98; *Weald Leasing*, C-103/09, para. 51)[10] and various scholars (Zimmer, 2019, sec. 11; Palao Taboada, 2015, p. 606).

Identity of origin in the UK legislation and tax practice via BEPS

The GAAR and PPT share the common origin in the BEPS project. In fact, the PPT was proposed before the GAAR in September 2014 in the proposal of Action 6 (OECD, 2015A, p. 66). The final proposal of the ATAD, as released by the EU Commission in February 2016 (Commission, 2016, art. 7), varied much more from the PPT than GAAR in the ATAD, as adopted by the EU Council in July 2016. First and foremost, the EU Commission did not use the phrase 'one of the main purposes' but 'the essential purpose'. There are, therefore, good reasons to believe that the use of the phrase 'one of the main purposes' in the GAAR from the ATAD was eventually influenced by the OECD and its version of the GAAR (PPT) tax treaty. That is to say, the EU Council presumably wanted to bring the GAAR as close as possible to the PPT in order to implement anti-abuse solutions at the EU level as much consistently with the OECD's BEPS solutions as possible. But the actual origin of the GAAR and PPT goes through the BEPS much deeper to the UK legislation and tax practice.

The actual origin of the PPT and then GAAR goes decades before the BEPS, since the PPT style anti-abuse provisions has grown out of the UK practice to deny the benefits in some of the dividend, interest and royalties articles of the UK's tax treaties over the last 30 years. As put by Philip Baker, "UK treaty negotiators, operating through the OECD, therefore have to bear full responsibility for promoting a generalised PPT as a measure to combat tax treaty abuse" (Baker, 2017, p. 284). The view that there can be more than one main purpose to obtain a tax benefit (or more blatantly, to avoid taxation) was first submitted, despite being difficult to grasp, and used in UK legislation in 1960 (Shiers and Miller, 2007, p. 8). Hence, any transplantation of that British legal concept to legislation of other countries should be done with extreme cautiousness, in particular by remembering that the UK practice of double reasonableness test means that 'one of the main purposes' equals the main purpose to avoid taxation (Cf. Freedman, 2019, pp. 335–337).

The point to be made is that the GAAR and PPT belong to the same family that have grown up in a similar tax policy environment and their very origin is deeply rooted in the UK notion of 'one of

[10] There is no reason not to rely on the reasoning of the CJEU case law in VAT cases on abuse whenever it is relevant for the purpose of abusive practices in direct tax law. Moreno and Zornoza Pérez, 2019, p. 134; Smit, 2014, p. 261; Baker, 2015, p. 414).

the main purposes'. Notably, PPTs in tax treaties of contracting states and GAARs in domestic laws of MSs should be interpreted and applied as similar as possible by tax authorities and courts across the world.

The CJEU's recent jurisprudence on tax avoidance *nonchalantly* bridging the GAAP (and thus indirectly the GAAR) with the PPT

Rita de la Feira aptly observed that the EU principle of prohibition of abuse of law within taxation "has assumed the role of a *de facto* General Anti-Avoidance Principle (GAAP), with the characteristics of a legal principle, rather than merely an interpretative one" (De la Feira, 2020). For decades, i.e. from the mid-1970s until February 2019, the CJEU used the threshold of abuse in line with the standard of sole/essential/predominant/main intention to obtain a tax advantage by a taxpayer under EU fundamental freedoms and directives to identify the abuse of law (Kuźniacki, 2019, pp. 261–282). Famously, the CJEU coined the phrase 'wholly artificial arrangement' in its judgment of 16 July 1998 in the *ICI* case (ICI, C-264/96, para. 26) and since then it has been repeated in nearly all cases on tax avoidance (for example: X and Y, C-436/00, para. 61; Lankhorst-Hohorst, C-324/00, para. 37; De Lasteyrie, C-9/02, para. 50; Marks & Spencer, C-446/03, para. 57), including the landmark case *Cadbury Schweppes* of 12 September 2006 (Cadbury Schweppes, C-196/04, paras. 51, 55, 56, 57, 61, 63, 68, 69, 72, 75, and 76). Also, from the *Cadbury Schweppes* follows that the threshold for abuse in relation to the tax avoidance's intention is *sole* (Cadbury Schweppes, C-196/04, para. 63). *A contrario*, there is no abuse if a taxpayer shifts its *genuine economic activities* to other MS for the sole purpose to avoid taxation (Prats et al. (2018), p. 12). That being said, the abuse exists only if: (i) there is no genuine economic activity being conducted by the taxpayer and (iii) their sole purpose is to conduct that non-genuine activity in order to avoid taxation.

A more subtle economic substance analysis, i.e. assessing a transfer of the profits rather than the entire arrangement, can be found in the recent *X GmbH* case of 26 February 2019 (C-135/17). In the *X GmbH*, the Court stated that the free movement of capital between Member States and third countries is intended not to frame the conditions under which companies can establish themselves within the internal market. Therefore, in that context the concept of 'wholly artificial arrangement' may go beyond the legal factors articulated in the *Cadbury Schweppes* case, such as any scheme which has as "*its primary objective or one of its primary objectives* the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate." (X GmbH, C-135/17, para. 84). Apparently, the use of the phrase 'one of its primary objectives' brings the standard of abuse from the PPT to the GAAP.

A similar outcome emerges from the *Danish beneficial ownership* cases on 26 February 2019, concerning the abuse of the IRD and PSD (C-115/16, C-118/16, C-119/16 and C-299/16 regarding IRD, para. 127 and C-116/16 and C-117/16 on PSD, para. 100). In those cases, the CJEU seems to compose the concept of abuse under the EU secondary law by referring to 'the principal objective' or 'one of the principal objectives' to obtain a tax advantage, i.e. by sticking to the wording of anti-abuse rules under the IRD and PSD, rather than to the 'sole' or the 'essential' or the 'predominant' objective of doing so: "A group of companies may be regarded as being an artificial arrangement where it is *not set up for reasons that reflect economic reality*, its structure is *purely one of form* and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law." Just as in the *X GmbH*, the CJEU moved GAAP towards the standard of abuse in line with PPT.

It may be assumed the GAAR from the ATAD noticeably influenced the CJEU's reasoning in the *X GmbH* and in the *Danish beneficial ownership* *cases*. Therefore, at first glance, the standard of abuse under the GAAP is now very close to these under the GAAR from ATAD and PPT from the MLI. At a closer and holistic look, this observation must be accompanied with essential cautions.

First and foremost, before judgments in the cited cases, the CJEU has never in the area of harmonised direct tax law cases among Member States, stating that the standard for abuse may rely on the threshold lower than the sole intention to obtain a tax advantage. In the scope of partly harmonised direct tax law or fully harmonised indirect tax law, this threshold was lowered to the essential, predominant or main intention, but never lower, except for the recent *Danish beneficial ownership* cases where the phrase 'one of the primary objectives'" was used. Only in *X GmbH*, the CJEU used the phrase 'one of the primary objectives' in not harmonised direct tax law, but that case concerned the artificial transfer of the profits from a Member State to a low tax third country (Kuźniacki, 2019, p. 280).

Hence, it seems that the CJEU in *Danish beneficial ownership* cases and in *X GmbH* case used a quite nonchalant reasoning. This reasoning was apparently constructed under the political pro-fiscal pressure of the OECD on the EU rather than on standards of interpretation of the EU primary and secondary law, "which have been around for nearly 30 years and which should not be construed in the light of a recent political agenda" (Schön, 2020, sec. 6.4.3.1 *in fine*; Cf. Kuźniacki, 2019A, 323).[11] In my view, this reasoning will not and should not be continued by the CJEU in other cases regarding an alleged tax avoidance, if the CJEU wants to effectively continue its major role, which is to interpret the EU law in order to ensure an appropriate application of fundamental freedoms and thus, to protect the functioning of the internal market.

Moreover, as it will be explained more in the section below regarding the artificiality, although in *the Danish beneficial ownership cases* and in *X GmbH* case the CJEU used the phrase 'one of the primary (principal) purposes (objectives)', that phrase was coined in relation to artificial arrangements which were not set up for reasons that reflect economic reality and structures being purely of form or to an artificial transfer of profits to third low-tax countries. Clearly, such arrangements are designed by taxpayers solely or essentially to obtain a tax advantage. In other words, despite the use of the expressions 'one of the primary purposes' and 'one of the principal objectives', the facts of the cases and the linguistics used by the CJEU, which were adjacent to the cited expressions, imply that it was all about the structures and transactions that are essentially driven by tax purposes and any other economic purposes are either nonexistent or negligible. (Kuźniacki, 2020, secs. D and E; Cf. Advocate General (AG) Mengozzi, 2018, para. 90).

Consequently, on the one hand, the recent CJEU case law gives another dimension in which a perception of abuse under the GAAP, GAAR and PPT appears to be seen alike or at least very similarly. On the other, it seems reasonable to view this case law carefully and not forget that the GAAP has arisen out of decades of the CJEU case law rather than only from two recent judgements of the CJEU based on quite a nonchalant, politically pressured reasoning.

Artificiality as the overarching operative constituency for the GAAR and PPT

Prima facie, one of the strongest arguments against the common approach to interpretation and application of the GAAR and PPT stems from the lack of references to artificiality in the latter rule. This is, however, just a superficial observa-

[11] Contrary: Filip Majdowski (Majdowski, 2019, p. 39) who seems to endorse the CJEU for dropping the line of reasoning from its previous, well established case law, in particular the standard of abuse based on the notion of 'wholly artificial arrangement', and use an unprecedented reasoning and conclusions in the *Danish ownership* cases, which lowers down the threshold of abuse to 'one of the principal objectives'.

tion and should be dismissed under a deeper and more holistic scrutiny of the PPT in comparison to the GAAR.

Although the wording of the PPT does not use a phrase 'artificial' or 'non-genuine' (they should be used interchangeably), the analysis of the OECD examples of the PPT reveals that the symptoms of artificiality were of utmost importance to decide about the abuse under the PPT (OECD (2017), art. 29(9), paras. 182 and 187; Van Weeghel, 2019, sec. 8; Kuźniacki, 2018, sec. 2.4.3). In particular, the OECD said many times that arrangements or transactions with economic substance and business purpose (other than tax avoidance) benefit international commerce, and therefore, help achieve the ultimate purpose of tax treaties appropriately. Also, whenever arrangements or transactions or had economic substance and/or business purpose, the OECD considers them as being in accordance with the relevant treaty provisions (Ibidem).

Consequently, the economic substance and business purpose matter for determining the requirements under the first and the second elements of the PPT, i.e. reasonably concluding that one of the principal purposes of a taxpayer's arrangement or transaction was to obtain a treaty benefit and establishing that the obtainment of the treaty benefit by a taxpayer was in accordance with the purpose of the relevant provisions of the tax treaty. In other words, tax benefits which stem from artificial arrangements or transactions, i.e. those that lack the economic substance and/or non-tax business purposes or have merely a patina of them, should be denied under the PPT. The analysis of international jurisprudence in cases regarding tax avoidance corroborates with the observation according to which artificiality matters a lot for deciding about the abuse of tax treaties (Van Weeghel, 2019, sec. 5; Zimmer, 2002, pp. 61–62).

Taking into account that artificiality is of utmost importance to apply the GAAR to prevent tax avoidance, which is clearly articulated in the wording of the GAAR and facilitated by the CJEU case law and scholars (Prats, 2018, pp. 70–71; Moreno, 2017 p. 440; Schön, 2010, pp. 59–61), the artificiality constitutes a solid bridge between the GAAR and PPT. Worth consideration is also the fact that symptoms of artificiality, as induced from the CJEU relevant case law, AGs opinions, the OECD's examples to the PPT, and international jurisprudence largely converge: all of them imply that the economic substance and non-tax business purpose of an arrangement or transaction are often of significance for determining whether their main purpose was to obtain tax advantages contradictory to the object and purpose of relevant tax provisions.[12]

This also shows, by analogy, that the active business test under the LOB clause (Article 7(8)-(13) of the MLI) seems to be one of the most important tests for dealing with abusive treaty shopping, if designed appropriately (Kuźniacki, 2018, sec. 2.1).[13] This same can be said by the analogy to directive shopping. Most importantly, it appears that the factors/features of abuse under the PPT standard in respect of abuse of the EU law and tax treaties – the GAAR from the ATAD and the PPT from the MLI – are similar and aim to scrutinize the degree of economic substance of the arrangement (in the CJEU's case law references are usually made to a company) or transaction.

[12] C-196/04, Cadbury Schweppes, paras. 64–68; AG Léger, 2016, paras. 111–114; Test Claimants in the Thin Cap Group Litigation, C-524/04, para. 81; Oy AA, C-231/05, paras. 63–65; SGI, C-311/08, paras. 66 and 72; C-115/16, C-118/16, C-119/16 i C-299/16, Danish Cases, paras. 127–137; C-135/17, X GmbH, para. 84; OECD, the Commentary to art. 29(9) of the Model Tax Convention (2017), paras. 182 and 187. For the international jurisprudence see Vvan Weeghel, 2019, sec. 5; Zimmer, 2002, sec. 8.5.3.2. For OECD's examples of the PPT see OECD, 2017, paras. 182 and 187.

[13] This does not mean that the active business test under the LOB clause the best approach to prevent tax avoidance. Indeed, Martín Jiménez provided good reasons to consider this test as permitting for many artificial arrangements to obtain treaty benefits, not least because the test "leaves a considerable margin for the resident entity to outsource or fragment activities to related persons in a third state while still taking advantage of the tax treaties of the state in which the trade or business is carried on". See Martín Jiménez, 2016, sec. 2.5.2. Cf. Tavares, 2016, p. 145.

Conclusion

The analysis in this contribution has positively verified the assumption that the application of the GAAR and PPT in a similar way seems to be plausible and good for the elimination of international tax avoidance without triggering many tax and investment disputes insofar as it will be closer to the protection of economic freedoms, *inter alia*, pivotal to the functioning of the internal market in the EU rather than the pro-fiscal tax policy desires of the OECD. There are several tax policy and technical legal reasons for it.

As for tax policy perspectives, we should bear in mind that the GAAR from the ATAD and the PPT from the MLI have a significant potential to influence the design of domestic GAARs by a vast majority of countries across the world because of their multijurisdictional coverage. This created an unprecedented potential to tackle tax avoidance in relatively converging ways globally under a political umbrella of G20. The application of the GAAR and PPT in a sufficiently coherent and coordinated fashion is emphasised in the preambles to the ATAD and MLI. Such an application may strengthen the effectiveness of the GAAR and PPT in prevention of tax avoidance insofar as converging the application of anti-avoidance rules by many countries reduces loopholes and mismatches between them that normally are exploited by taxpayers via international tax arbitrage. Furthermore, a lack of sufficient predictability of tax outcomes that may stem from the application of GAARs and PPTs may trigger international disputes between taxpayers (investors) and tax authorities (governments) on the basis of bilateral tax and investment treaties. A low level of predictability could often follow from the application of GAARs and PPTs in an overly restrictive way, which cannot be deemed as a global standard of prevention of abuse of the tax law. A converging application of GAARs and PPTs by the tax authorities of countries shrinks the said risk of disputes. A wise strategy to manage this risk is to apply the GAAR and PPT alike and in a balanced way. That is to say, a converging application of the GAAR and PPT must be balanced so that such an application discourages taxpayers from entering into abusive practices and simultaneously lets them choose most tax-efficient structures with a sufficient degree of precision and foreseeability.

In addition to tax policy reasons, many technical legal reasons speak in favour of a converging application of GAARs and PPTs. To sum up the similarities at the linguistic, structural and functional level, it must be reiterated that the GAAR and PPT share the three major operative constituencies: (i) tax intention (the first test of tax avoidance) by referring to the main or one of the main purposes to obtain a tax benefit; (ii) contradicting the object and purpose of the tax law (the second test of tax avoidance); and (iii) the degree of artificiality of an arrangement or transaction (the third test of tax avoidance). The last constituent is not included *expressis verbis* in the PPT but follows from its context (the OECD Commentary and relevant jurisprudence). The artificiality test can also be seen as the bridge between the GAAR and PPT via the GAAP, as developed through the CJEU's jurisprudence. Tax consequences of the application of the GAAR and PPT are also the same – a denial of tax benefits. In that context, it is worth restating that the GAAR and PPT are proportional in denying tax benefits by means of *the extent of artificiality* and *the item by item of income* approaches, respectively. Common reasoning may assist in redefining the abusive arrangements under the GAAR and PPT by references to economic substance and non-tax business justification. Finally, the GAAR and PPT share the same origin in the OECD's BEPS work, which, in turn, was influenced by the design of anti-avoidance rules in the UK.

Accordingly, many intertwined and important tax policy and legal reasons pave the path to a converging application of the GAAR and PPT. This has a potential to become a global standard to prevent tax avoidance *if and only if* a coherent application of those clauses will emerge from gravitation of the GAAR and PPT towards the GAAP, as follows from the CJEU long-standing case law, rather than to the OECD's version of the GAAR in the MLI (PPT). Only such an interpretative approach may ensure the right balance between fiscal interests of countries and economic freedoms of taxpayers.

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· PUBLISHER ·
Centre for Analyses and Studies of Taxation SGH · Al. Niepodległości 162 · Warsaw 02-554 · Poland
Dominik J. Gajewski (General Editor) · Grzegorz Gołębiowski · Tomasz Grzybowski (Managing Editor)

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