

Anti-Avoidance Jurisprudence in Direct Taxation: The CJEU Between Politics and Certainty

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Over a span of several years, the Court of Justice of the European Union (CJEU) developed a framework for anti-abuse in the context of European law and particularly established criteria for justifying restrictions on the fundamental freedoms in the tax context. In tax cases on anti-avoidance that are more recent, however, the court has demonstrated a notable change in its stance towards this issue that represents a disruption in the consistent development of its jurisprudence on abuse. While the court covers the contradictions in its case law by passing an impression of continuity between disparate decisions, it is remarkable how recent rulings draw from Organisation for Economic Co-operation and Development (OECD) language. This reliance on concepts from a non-EU institution, however, leads to legitimacy concerns. The increasing importance of international organizations and public opinion – for example, in reaction to the Panama Papers – in shaping the international tax landscape is undeniable. While high-profile projects like Base Erosion and Profit Shifting (BEPS) and Global Anti-Base Erosion (GloBE) highlight international tax issues, they also exert political pressure on judicial bodies such as the CJEU which leads to less methodological decisions that will align the court with political interests. In this context, the CJEU's acting as a political player at the borderline of its competences is to be viewed critically, especially regarding the recent shift in its case law on abuse and tax avoidance that leads to concerns over legal certainty.

Keywords: Anti-abuse principle, anti-avoidance jurisprudence, CJEU, international organizations, international taxation, legal certainty, legitimacy, political influence.

I INTRODUCTION

Over the years, the Court of Justice of the European Union (CJEU) developed standards for an anti-abuse principle in tax matters and particularly established criteria for justifying restrictions of the fundamental freedoms in the tax context on anti-avoidance grounds. Anti-avoidance measures are inherently more straightforward concerning harmonized subjects within the European Union (EU), as is the case with indirect taxation.¹ However, there has been an enduring CJEU position on direct taxation – although this subject falls within the competence of the Member States – requiring that Member States exercise their competence in a manner that is consistent with Community law.² This means that, when implementing national anti-avoidance provisions, these rules

must comply with the restrictions imposed by European law through, for example, the fundamental freedoms, of which the contours are clarified by the CJEU through its competence for treaty interpretation.³ It is recognized by the CJEU as part of the idea of the single market that taxpayers should be able to 'choose to structure their business so as to limit their tax liability',⁴ but, as Advocate General Poiares Maduro stated in his Opinion in the *Halifax* case (2006), it is also true that (European) tax law should not become a 'legal "wild-west" in which virtually any kind of opportunistic behaviour has to be tolerated as long as it conforms with a strict formalistic interpretation of the relevant tax provisions and the legislature has not expressly taken measures to prevent such behaviour'.⁵

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¹ Combating tax evasion, avoidance, and possible abuse is an objective recognized and promoted by Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, OJ EU 11 Dec. 2006, L 347/1 (VAT Directive). In this regard, the CJEU has held that fraudulent or abusive reliance on Union law is not permitted and that national authorities and courts must therefore deny the right to deduct value added tax where it is established on the basis of objective facts that this right is being relied on fraudulently or abusively. See e.g., CJEU Joined Cases C-487/01 and C-7/02, *Gemeente Leusden and Holin Groep*, 29 Apr. 2004, ECLI:EU:C:2004:263, para. 76.

² See e.g., CJEU Joined Cases C-397/98 and C-410/98, *Metallgesellschaft and Others*, 8 Mar. 2001, ECLI:EU:C:2001:134, para. 37; CJEU Case C-446/03, *Marks & Spencer*, 13 Dec. 2005, ECLI:EU:C:2005:763, para. 29; CJEU Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, 13 Mar. 2007, ECLI:EU:C:2007:161, para. 25.

³ See e.g., Ivan Lazarov, *Ch. 3: The Relevance of the Fundamental Freedoms for Direct Taxation*, in *Introduction to European Tax Law on Direct Taxation*, paras 280–285 (Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, Alexander Rust, Georg Kofler & Karoline Spies eds, 7th ed., Linde 2022).

⁴ See CJEU Case C-255/02, *Halifax*, 21 Feb. 2006, ECLI:EU:C:2006:121, para. 73.

⁵ Opinion of AG Maduro in Case C-255/02, *Halifax*, 7 Apr. 2005, ECLI:EU:C:2005:200, para. 77.

The CJEU is traditionally perceived to be dedicated to European autonomy.⁶ In recent direct tax judgments – specifically in the *X-GmbH* case (2019)⁷ and in the *Danish cases* (2019)⁸ – however, the court seems to have abandoned the consistent development of its anti-avoidance jurisprudence. It has shifted the limits of the concept of anti-abuse in a sudden reaction to international developments towards stricter anti-avoidance rules.⁹ In these cases, the CJEU has simultaneously broadened the criteria of avoidance to which Member States can (or must) react and revolutionized the general nature of the anti-abuse concept in the EU context. These, in combination, lead to a more rigorous approach of anti-avoidance under EU law.¹⁰ This jurisprudence, however, comes into direct confrontation with the principle of legal certainty, and it is questionable to what extent this shift, while answering to a public and political outcry for more ‘fairness’ in international and European taxation,¹¹ is accompanied by careful weighing of technical considerations that take taxpayers’ rights and the consistency of the court’s jurisprudence into account. This article discusses the recent disruption in the anti-avoidance jurisprudence in EU tax law and expands the reception of the mentioned cases through a link to issues of legitimacy in the CJEU’s decision-making process in the international context. It specifically shows how a yielding of the CJEU to the (perceived) pressure of international actors impairs the

legitimacy within the EU by having the court acting as a political player which interferes especially with legal certainty.

2 THE CJEU’S ANTI-AVOIDANCE JURISPRUDENCE IN THE CONTEXT OF LEGITIMACY

2.1 The Substance of Anti-Avoidance in the Jurisprudence from *Avoir Fiscal* to *Cadbury Schweppes* and the Disruption Through *X-GmbH*

Legitimacy is a multilayered concept.¹² It broadly refers to the connection between a governed population and a political system with its components such as laws and policies.¹³ It grants specific institutions the authority to create and interpret regulations.¹⁴ In the context of the EU, the idea of legitimacy can be broken down into the two main components of output and input legitimacy.¹⁵ Output legitimacy in this framework is tied to the EU’s essential functions that entail the Union effectively contributing to the attainment of objectives that enjoy broad public backing such as promoting economic growth and also combating tax avoidance.¹⁶ On the other hand, the approach to accomplishing these tasks is interconnected with input legitimacy that revolves around the well-

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⁶ See e.g., Szilárd Gáspár-Szilágyi, *The CJEU: An Overzealous Architect of the Relationship Between the European Union Legal Order and the International Order*, *Revista de Drept Constitutional* 44 (2016).

⁷ CJEU Case C-135/17, *X-GmbH*, 26 Feb. 2019, ECLI:EU:C:2019:136.

⁸ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1*, 26 Feb. 2019, ECLI:EU:C:2019:134; CJEU Joined Cases C-116/16 and C-117/16, *T Danmark*, 26 Feb. 2019, ECLI:EU:C:2019:135.

⁹ At this point, a note on the terminology is useful because avoidance and abuse are opaque terms. This article is concerned with the CJEU’s anti-avoidance jurisprudence in the context of the anti-abuse doctrine that has been shaped by the court and with the connection of this jurisprudence to the broader international development towards increased measures to counter avoidance and abuse. In the literature, attempts have been made to analyse the (terminological) interrelation of abuse of rights and tax avoidance; see e.g., Cihat Öner, *Is Tax Avoidance the Theory of Everything in Tax Law? A Terminological Analysis of EU Legislation and Case Law*, 27 *EC Tax Rev.* 96 (2018), doi: 10.54648/ECTA2018011; Erik Stessens, *European VAT Law as Interpreted by the Court of Justice*, 62 (Wolters Kluwer 2023); compare also Adolfo Martín Jiménez, *Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law*, 66 *Bull. Int’l Tax’n* 270 (2012), doi: 10.59403/1s3q0g7; Dorota Leczykiewicz, *Prohibition of Abusive Practices as a ‘General Principle’ of EU Law*, 56 *Common Mkt. L. Rev.* 703 (2019), doi: 10.54648/COLA2019053. For this article, the broader anti-avoidance idea that is dominant in the current tax discussion is seen as the framework within which the anti-abuse doctrine operates in the tax context – therefore the mentioned terms and concepts are not always clearly separable.

¹⁰ For details, see *infra* ss 2.1, 2.2.

¹¹ Tied to the idea of output legitimacy; see *infra* s. 2.1. This has also reverberated, e.g., within the EU Commission that has increasingly been using references to ‘tax fairness’ in policy discussions; see in this context, Alice Pirlot, *The Vagueness of Tax Fairness: A Discursive Analysis of the Commission’s ‘Fair Tax Agenda’*, 48 *Intertax* 402 (2020), doi: 10.54648/TAXI2020036. For the broader context, see e.g., David Coletto, *Les Canadiens et les Canadiennes pensent que leur système d’imposition est inéquitable et sont en faveur de nouvelles sources de revenus qui réduisent le déficit et les inégalités maintenant*, Abacus Data, *Sondage d’Opinion Publique* (2021), https://abacusdata.ca/wp-content/uploads/2021/08/Abacus-Release-Broadbent-Institute_Tax-Fairness-July-2021_v1-FR.pdf (accessed 01 Dec. 2023); J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling that Some Corporations, Wealthy People Don’t Pay Fair Share*, *Pew Research Center* (2023), <https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share> (accessed 01 Dec. 2023).

¹² For an overview, see e.g., Cees Peters, *On the Legitimacy of International Tax Law* (IBFD 2014), para. 1.3.3; Lena Schneller, *Conceptions of Democratic Legitimate Governance in the Multilateral Realm: The Case of the WTO*, 2 *Living Reviews in Democracy* (2010).

¹³ See Patrizia Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, in *Constitutionalism, Multilevel Trade Governance and Social Regulation, Studies in International Trade Law Vol. 9*, 59, 61 (Christian Joerges and Ernst-Ulrich Petersmann eds, Hart Publishing 2006). See also Peters, *supra* n. 12, para. 1.3.3.

¹⁴ See Nanz, *supra* n. 13, at 61. See also Peters, *supra* n. 12, para. 1.3.3.

¹⁵ For an overview, see Catherine Barnard & Steve Peers, *Ch. 1: Introduction*, in *European Union Law*, 5–7 (Catherine Barnard & Steve Peers eds, Oxford University Press 2023). For earlier accounts, see Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 *J. Eur. Pub. Pol’y* 19 (1997), doi: 10.1080/135017697344217. For details and further aspects of throughput-legitimacy, see e.g., Ingo Take, *Legitimacy in Global Governance: International, Transnational and Private Institutions Compared*, 18 *Swiss Pol. Sci. Rev.* 220, 222–223 (2012), doi: 10.1111/j.1662-6370.2012.02064.x. For the broader international tax context, see e.g., Irma Johanna Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 *World Tax J.* 335 (2015), doi: 10.59403/3mqgt50; Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime*, 12 *World Tax J.* 53 (2020), doi: 10.59403/2ft4wzd.

¹⁶ See Barnard & Peers, *supra* n. 15, at 6–7.

founded and democratic nature of the decision-making process employed by the EU.¹⁷ The CJEU is endowed with an independent source of legitimacy and was entrusted with the role of being a ‘guardian of the treaties’.¹⁸ As a European institution vested with this authority,¹⁹ it possesses the capability to ensure that Member States adhere to what is to be regarded as the fundamental provisions of the treaties through determining the correct interpretation of EU law.²⁰ In this context, it is essential that the CJEU, when deciding cases involving EU primary and secondary law, also stays within the limits of its competence (and therefore its legitimacy)²¹ stipulated in the treaties.

In the CJEU’s case law on the assessment of national direct tax rules, certain justifications are relevant in ensuring that a restriction of the fundamental freedoms is still in accordance with EU law. Particularly relevant are the need to combat tax avoidance and/or evasion,²² as well as the preservation of a balanced allocation of taxing rights.²³ The recent emphasis has been on anti-avoidance, and this is associated with a political will of Member States to resolutely contend with base erosion and profit shifting,²⁴ closely resembling the work of international

organizations such as the Organisation for Economic Co-operation and Development (OECD) and landmark tax projects like the Base Erosion and Profit Shifting (BEPS)²⁵ Project and follow-up initiatives.²⁶ This trend is related to popular dissatisfaction associated with tax scandals such as the Panama Papers,²⁷ and, more recently, it is exacerbated by the need to raise revenue due to subsequent crises such as the Covid-19 pandemic.²⁸

Historically, the CJEU has always refused to exclude national anti-avoidance measures from the scope of EU law;²⁹ and the court in the *Avoir Fiscal* case (1986)³⁰ rejected a discretion of Member States to derogate from the freedom of establishment in order to prevent the risk of tax avoidance.³¹ Later, the court slightly weakened this statement and created the often cited ‘wholly artificial arrangements’ requirement;³² and in the *Cadbury Schweppes* case (2006),³³ the CJEU emphasized that an intention to save taxes does not inherently constitute such an arrangement.³⁴ Instead, the court looks, in addition to a subjective element consisting of the intention to obtain a tax advantage, for genuine economic activities regarding certain objective factors and circumstances (for

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¹⁷ See *ibid.*, at 5–6.

¹⁸ See e.g., Timm Beichelt, *Ch. 7: Delegation to the EU: Participation Versus Efficiency in German EU-Policy*, in *In Search of Legitimacy*, 156 (Ingolfur Blühdorn ed., Barbara Budrich Publishers 2009).

¹⁹ Article 19 of the Treaty of the European Union (TEU) specifically entrusts the CJEU with the responsibility to ensure that European law is interpreted and applied uniformly across all Member States while also conferring upon the court the authority to adjudicate in cases involving the interpretation and application of EU law; for further details, see *infra* s. 2.2.

²⁰ Beichelt, *supra* n. 18, at 156–157.

²¹ Especially considering input legitimacy.

²² See e.g., CJEU Case C-9/02, *de Lasteyrie du Saillant*, 11 Mar. 2004, ECLI:EU:C:2004:138; CJEU Case C-446/03, *supra* n. 2; CJEU Case C-196/04, *Cadbury Schweppes*, 12 Sep. 2006, ECLI:EU:C:2006:544.

²³ See e.g., CJEU Case C-446/03, *supra* n. 2; CJEU Case C-231/05, *Oy AA*, 18 Jul. 2007, ECLI:EU:C:2007:439; CJEU Case C-414/06, *Lidl Belgium*, 15 May 2008, ECLI:EU:C:2008:278; CJEU Case C-337/08, *X-Holding*, 25 Feb. 2010, ECLI:EU:C:2010:89. There are further recognized justifications like protecting the coherence of the tax system and the effectiveness of fiscal supervision; generally for (potential) justifications, see Joachim Englisch, *Ch. 7: Diskriminierungs- und Beschränkungsverbote im Recht der Steuern auf Waren und Dienstleistungen*, in *Europäisches Steuerrecht*, paras 7.224–7.228 (Harald Schaumburg & Joachim Englisch eds, 2d ed., Otto Schmidt 2020); Harald Schaumburg, *Ch. 4: Gleichbehandlungsgebote und Diskriminierungsverbote im Internationalen Steuerrecht*, in *Internationales Steuerrecht*, paras 4.18–4.20 (Harald Schaumburg ed., 5th ed., Otto Schmidt 2023).

²⁴ One manifestation of this political will is the creation of Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ EU 19 Jul. 2016, L 193/1 (ATAD). For the implementation in different EU Member States, see Séverine Lauratet, *La clause anti-abus générale de la directive ATAD: comparaison des transpositions dans 5 États membres (France, Allemagne, Irlande, Luxembourg et Pays-Bas)*, 2 *Fiscalité Internationale* 12 (2020).

²⁵ For details on the BEPS Actions and the participants in the OECD/G20 Inclusive Framework on BEPS, see OECD, *Inclusive Framework on Base Erosion and Profit Shifting*, <https://www.oecd.org/tax/beps/> (accessed 01 Dec. 2023).

²⁶ For the Two-Pillar-Solution currently at the centre of the international discussion, see generally OECD, *Action 1, Tax Challenges Arising from Digitalisation*, <https://www.oecd.org/tax/beps/beps-actions/action1/> (accessed 01 Dec. 2023); and see recently OECD, *Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (2023), <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf> (accessed 01 Dec. 2023).

²⁷ See International Consortium of Investigative Journalists, *The Panama Papers*, <https://www.icij.org/investigations/panama-papers/> (accessed 01 Dec. 2023).

²⁸ While the decisions addressed by this article were handed down before more recent crises, the need for an increase in revenue exerts further (political) pressure on institutions to address concerns related to tax avoidance. See in this context, OECD, *Tax and Fiscal Policies After the COVID-19 Crisis* (2021), <https://www.oecd.org/coronavirus/policy-responses/tax-and-fiscal-policies-after-the-covid-19-crisis-5a8f24c3/> (accessed 01 Dec. 2023).

²⁹ For details, see Servaas van Thiel, *Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules that Can Be Readily Applied by National Courts – Part 1*, 48 *Eur. Tax'n* 279, 283–284 (2008).

³⁰ CJEU Case C-279/83, *Commission v. France (Avoir Fiscal)*, 28 Jan. 1986, ECLI:EU:C:1986:37.

³¹ CJEU Case C-279/83, *supra* n. 30, para. 25. For the resulting discussion in the *Daily Mail* case (CJEU Case C-81/87, *Daily Mail*, 27 Nov. 1988, ECLI:EU:C:1988:456), see van Thiel, *supra* n. 29, at 285, 288.

³² See CJEU Case C-264/96, *ICI*, 16 Jul. 1998, ECLI:EU:C:1998:370; CJEU Case C-324/00, *Lankhorst*, 12 Dec. 2002, ECLI:EU:C:2002:749; CJEU Case C-9/02, *supra* n. 22. For an overview, see Michael Lang, *Cadbury Schweppes’ Line of Case Law From the Member States’ Perspective in Prohibition of Abuse of Law: A New General Principle of EU Law?*, 435, 435–441 (Rita de la Feria & Stefan Vogenaer eds, Hart Publishing 2011); van Thiel, *supra* n. 29, at 286.

³³ CJEU Case C-196/04, *supra* n. 22.

³⁴ CJEU Case C-196/04, *supra* n. 22, paras 64–67. For explanations and for a reduction of the requirements by aiming for a ‘balanced allocation of taxing rights’ in the CJEU’s case law (CJEU Case C-446/03, *supra* n. 2; CJEU Case C-231/05, *supra* n. 23; CJEU Case C-311/08, *SGL*, 21 Jan. 2010, ECLI:EU:C:2010:26), see Jiménez, *supra* n. 9, at 273–274.

example, a company as a ‘fictitious establishment’ or as ‘physically exist[ing] in terms of premises, staff and equipment’).³⁵ In the more recent *X-GmbH* case (2019),³⁶ however, the CJEU departs from the established standard and instead formulates that ‘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’³⁷ is not protected by the freedom of movement of capital. This statement contradicts Advocate General Paolo Mengozzi’s Opinion in this case who (in accordance with the *Cadbury Schweppes* case)³⁸ insisted on maintaining that a restriction of a fundamental freedom is only justified regarding schemes for which the ‘only purpose is to escape the tax normally due or to obtain a tax advantage’.³⁹ The court instead clearly draws from the language of the BEPS Project (‘one of the principal purposes’)⁴⁰ and Article 6 of the Anti-Tax Avoidance Directive (ATAD)⁴¹ (‘one of the main purposes’).⁴²

It is clear that the CJEU’s attitude in its recent jurisprudence has changed regarding the substance and concepts of anti-abuse measures.⁴³ The court in the described case law employs different – notably more generous – standards for justifying restrictions of a fundamental freedom (in the *X-GmbH* case specifically of the free movement of capital)⁴⁴ through national rules aimed at combating tax avoidance.

Just as obvious, however, seems the EU external influence leading to this. In this context, even the language of the OECD’s respective international projects is employed by the CJEU, and since the shift in the court’s position is in accordance with the guidelines developed at the international level, there are strong indications that the court has allowed itself to be indirectly influenced by this. It can be argued that European law is generally evolving towards a logic of anti-avoidance through legislative means on the EU level that is clearly and openly influenced by tax initiatives at the international level. Especially the anti-tax avoidance directives (ATAD and ATAD 2)⁴⁵ are largely a by-product of discussions held at the OECD level in the BEPS Project.⁴⁶ Prior to these, individual EU Member States were at liberty to adopt anti-BEPS measures as they deemed appropriate; however, the EU aimed to promote a more cohesive and streamlined approach to combat tax avoidance across the region,⁴⁷ and in this course the EU clearly embraced the anti-avoidance rationale of the BEPS Project. These developments on the EU legislative level naturally result in decisions by the CJEU reflecting this logic, particularly in its jurisprudence on EU secondary law. However, in the more recent decisions on anti-avoidance, the court transfers this logic to the primary law context and the substance of the justification for restrictions of a fundamental freedom with regard to avoidance.⁴⁸ This modification of the anti-abuse standards through the CJEU

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³⁵ CJEU Case C-196/04, *supra* n. 22, paras 67–68. See Susi Baerentzen, *Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest: A New Test to Disentangle Abuse from Real Economic Activity?*, 12 *World Tax J.* 3, 21–22 (2020), doi: 10.59403/2ps84bf; Joachim Englisch, *The Danish Tax Avoidance Cases: New Milestones in the Court’s Anti-Abuse Doctrine*, 57 *Common Mkt. L. Rev.* 503, 528 (2020), doi: 10.54648/COLA2020035; Tridimas Takis, *Abuse of Right in EU Law: Some Reflections With particular Reference to Financial Law*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 27/2009, 17–19 (2009). For the relation to landmark company law cases (CJEU Case C-212/97, *Centros*, 9 Mar. 1999, ECLI:EU:C:1999:126; CJEU Case C-208/00, *Überseering*, 5 Nov. 2002, ECLI:EU:C:2002:632; CJEU Case C-167/01, *Inspire Art*, 30 Sep. 2003, ECLI:EU:C:2003:512), see Jiménez, *supra* n. 9, at 272. For objective and subjective factors, see Jiménez, *supra* n. 9, at 274–286; van Thiel, *supra* n. 29, at 286–287.

³⁶ CJEU Case C-135/17, *supra* n. 7.

³⁷ *Ibid.*, *supra* n. 7, para. 84.

³⁸ CJEU Case C-196/04, *supra* n. 22, para. 63. For details, see Philip Simpson, *Cadbury Schweppes Plc v. Commissioners of Inland Revenue*, *Brit. Tax Rev.* 677, 681 (2006).

³⁹ Opinion of AG Mengozzi in Case C-135/17, *X-GmbH*, 5 Jun. 2018, ECLI:EU:C:2018:389, para. 90. See Wolfgang Schön, *Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit Shifting Action Plan*, 74 *Bull. Int’l Tax’n*, 286, 300 (2020), doi: 10.59403/3202szr.

⁴⁰ See Art. 29(9) OECD Model 2017; Art. 7(1) MLI. See also OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project* (2015), <http://dx.doi.org/10.1787/9789264241695-en> (accessed 01 Dec. 2023). For details, see Edward Barret & Maikel Evers, *OECD Report in Anti-Avoidance Measures of General Nature and Scope* (IFA Cahiers 103A 2018); Schön, *supra* n. 39, at 299.

⁴¹ Council Directive (EU) 2016/1164 (ATAD), *supra* n. 24.

⁴² Schön, *supra* n. 39, at 299–300. For details on the ATAD, see Luc De Broe & Dorien Beckers, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice’s Case Law on Abuse of EU Law*, 26 *EC Tax Rev.* 133, 140–144 (2017), doi: 10.54648/ECTA2017015. For the ATAD and *Cadbury Schweppes*, see Gianluigi Bizioli, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?*, 26 *EC Tax Rev.* 167, 174 (2017), doi: 10.54648/ECTA2017018.

⁴³ For the two aspects of the concept of abuse of law, specifically the ‘substantive scope’ and the ‘methodological and constitutional nature’, see Wolfgang Schön, *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective*, in *The Dynamics of Taxation, Essays in Honour of Judith Freedman*, 185, 186 (Glen Loutzenhiser & Rita de La Feria eds, Hart Publishing 2020).

⁴⁴ For the differentiation of situations between Member States and third country cases, see *infra* s. 4. For BEPS language in the context of the substance of the general anti-abuse principle, see *infra* s. 2.2.

⁴⁵ See Council Directive (EU) 2016/1164 (ATAD), *supra* n. 24; Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, *OJ EU* 7 Jun. 2017, L 144/1 (ATAD 2).

⁴⁶ See Recitals 1–3 of Council Directive (EU) 2016/1164 (ATAD), *supra* n. 24; Recitals 1–6 of Council Directive (EU) 2017/952 (ATAD 2), *supra* n. 45. For details on the development of the ATAD, see Daniel Fehling, *Ch. 17: ATAD*, in *Europäisches Steuerrecht*, paras 17.1–17.12 (Harald Schaumburg & Joachim Englisch eds, 2d ed., Otto Schmidt 2020).

⁴⁷ Robert Goulder, *Lost in the Shuffle: Is ATAD Producing the Desired Results?*, 99 *Tax Notes Int’l* 1247, 1247 (2020).

⁴⁸ This is exacerbated by the rupture in the CJEU’s stance regarding the methodological aspect of anti-avoidance measures in the EU that becomes obvious in the *Danish cases*; see *infra* s. 2.2; for these two issues (substance and method) in the CJEU jurisprudence, see Schön, *supra* n. 43, at 186.

is not a natural evolution of the jurisprudence (in line with new rules of secondary law) but represents a break with the court's previously sedimented understanding.⁴⁹ In this sense, the CJEU behaves like a political player reacting to the current anti-avoidance zeitgeist.⁵⁰ While it is legitimate for the EU in general to implement ideas and concepts developed on the broader international level,⁵¹ these ideas run into a question of (input) legitimacy and become problematic insofar as they are advanced by the court without adequate legal and technical justification.⁵²

2.2 The Methodology of Anti-Avoidance in Kofoed and the Disruption Through the Danish Cases

Another relevant development in the CJEU's case law regards a general 'anti-abuse principle'⁵³ that applies across different areas of EU law,⁵⁴ and that also extends beyond the tax context.⁵⁵ The development of the principle dates from some time ago. Already in the *van Binsbergen* case (1974),⁵⁶ the CJEU referred to abusive practices,⁵⁷ and, since then, the court repeatedly mentioned the principle.⁵⁸ In the *Emsland-Stärke* case (2000),⁵⁹ the first attempts to define the substance of the concept were made by requiring, for abuse, 'a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community

rules, the purpose of those rules has not been achieved' and 'a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it' (known as the two-pronged test);⁶⁰ and until recently, the already outlined *Cadbury Schweppes* decision was considered the 'cornerstone of the theory of abuse in the field of direct taxes and EU law'.⁶¹ In the mentioned *Danish cases*, the CJEU states that:

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.⁶²

The court emphasizes the 'actual economic activity (...) in the light of the specific features of the economic activity in question'⁶³ and, similar to the *X-GmbH* case (and thus again adhering to BEPS language),⁶⁴ focuses on the transaction's 'principal objective or one of its principal objectives'.⁶⁵ The ruling in the *Danish cases* is widely understood as a clear expansion of the *Cadbury Schweppes* standard because it includes arrangements that would not have been 'wholly artificial'⁶⁶ and based solely on tax motives but are considered abusive regarding the commercial reasons for the transaction.⁶⁷

Notes

⁴⁹ See Schön, *supra* n. 39, at 299–300.

⁵⁰ For the politicization of CJEU decisions in other fields, see Carolyn Moser & Berthold Rittberger, *The CJEU and EU (de-)constitutionalization: Unpacking jurisprudential responses*, 20 Int'l J. Const. L. 1038 (2022), doi: 10.1093/icon/moac061.

⁵¹ In the context of the ATAD, see Fehling, *supra* n. 46, para. 17.127.

⁵² For a more favourable interpretation of the coherence of the development of the abuse concept, see Luc De Broe, *Tax Abuse in the European Union: The Current State of Affairs*, 14 World Tax J. 435, 441–447 (2022), doi: 10.59403/29ecse5.

⁵³ For a differentiated view on avoidance and abuse, see Leczykiewicz, *supra* n. 9; Öner, *supra* n. 9. See also generally *supra* n. 9.

⁵⁴ This has been made clear recently by the court; see CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 96–102.

⁵⁵ See Rita de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a General Principle of EC Law Through Tax*, 45 Common Mkt. L. Rev. 395 (2008), doi: 10.54648/COLA2008027.

⁵⁶ CJEU Case C-33/74, *van Binsbergen*, 3 Dec. 1974, ECLI:EU:C:1974:131.

⁵⁷ CJEU Case C-33/74, *supra* n. 56, paras 12–13. For comments, see Baerentzen, *supra* n. 35, at 20.

⁵⁸ See CJEU Case C-206/94, *Paletta*, 2 May 1996, ECLI:EU:C:1996:182; CJEU Case C-212/97, *supra* n. 35. See also Enrique Sánchez de Castro Martín-Luengo, *The ECJ's Danish Cases and the Spanish Withholding Tax Exemption in Respect of Interest Payments to EU Lenders: Some Reflections and Practical Implications*, 60 Eur. Tax'n 8, 10 (2020), doi: 10.59403/2cbqdbn.

⁵⁹ CJEU Case C-110/99, *Emsland-Stärke*, 14 Dec. 2000, ECLI:EU:C:2000:695.

⁶⁰ CJEU Case C-110/99, *supra* n. 59, paras 52–53. For comments, see Baerentzen, *supra* n. 35, at 19–23; Robert Danon, Daniel Gutmann, Margriet Lukkien, Guglielmo Maisto, Adolfo Martín Jiménez & Benjamin Malek, *The Prohibition of Abuse of Rights After the ECJ Danish Cases*, 49 Intertax 482, 490–491 (2021), doi: 10.54648/TAXI2021050; Sánchez de Castro Martín-Luengo, *supra* n. 58, at 10.

⁶¹ Jiménez, *supra* n. 9, at 270. For the indirect tax context, see CJEU Case C-255/02, *supra* n. 4. For comments, see de la Feria, *supra* n. 55, at 418–425.

⁶² CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, para. 117; CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, para. 100.

⁶³ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, para. 131.

⁶⁴ See *supra* s. 2.1.

⁶⁵ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, para. 127. See also Schön, *supra* n. 39, at 300.

⁶⁶ In the literature, the *Danish cases* are understood to still rely on the artificiality benchmark 'but wholly appears to be missing'; see Lee A. Sheppard, *European Union 2019 in Review: CJEU Rectifies Mistakes*, 96 Tax Notes Int'l 1067, 1073 (2019).

⁶⁷ See Baerentzen, *supra* n. 35, at 25; Schön, *supra* n. 39, at 300. See also Englisch, *supra* n. 35, at 528–530. For an alignment of the concepts of the *Emsland Stärke* case, the *Cadbury Schweppes* case, and the *Danish cases*, see Danon, Gutmann, Lukkien, Maisto, Martín Jiménez & Malek, *supra* n. 60, at 491–493; Blazej Kuzniacki, *The C.J.E.U. Case Law Relevant to the General Anti-Avoidance Rule (G.A.A.R.) Under the Anti-Tax Avoidance Directive (A.T.A.D.)*, 4 U. Bologna L. Rev. 261, 272 (2019).

The most significant aspect of the *Danish cases*, however, extends beyond the substance of the anti-abuse standard and concerns the court's view on the methodological quality of the anti-abuse principle.⁶⁸ The *Danish cases* make it clear that the CJEU recognized the need to combat tax avoidance not only as a justification for infringements on the fundamental freedoms but as a general principle of EU law within the framework of direct taxation that leads to an obligation of Member States to fight tax avoidance.⁶⁹ In the earlier *Kofoed* case (2007),⁷⁰ on the contrary, the CJEU initially denied the application of a directive's anti-avoidance rule without a respective domestic provision in light of the principle of legal certainty.⁷¹ Statements in the *Italmoda* case (2014)⁷² and in the *Cussens* case (2017),⁷³ where the CJEU relied on an anti-abuse principle independent of domestic anti-avoidance principles in the context of indirect taxation,⁷⁴ are to be distinguished from the direct tax jurisprudence.⁷⁵ The same is true for the ruling in the *Mangold* case (2005)⁷⁶ regarding equal treatment in the relation of individuals.⁷⁷ The *Danish cases* are a turnaround because the court innovated by countering attempts for 'directive shopping' through an application of an anti-abuse principle without a domestic reference point (due to a lack of implementation in the respective cases) in the direct tax context.⁷⁸ Therefore, the

obligation of Member States to fight tax avoidance would supersede the need for the existence of specific (national) rules to deny benefits within EU secondary law.⁷⁹ While this leads to a convergence between the case law regarding value added tax (VAT) directives and direct taxation,⁸⁰ there is a complete subversion of the decision issued in the *Kofoed* case that Advocate General Juliane Kokott attempted to reproduce in the *Danish cases*.⁸¹ The CJEU reached the conclusion that a general anti-abuse evaluation should, in fact, have priority over the application of the pertinent directive rather than the other way around, as the latter would give taxpayers an implied permission to use their benefits.⁸²

The CJEU in the *Cadbury Schweppes* case and in later decisions assumed a justification of Member States in the context of restrictions of the fundamental freedoms to contend with abuse.⁸³ However, this did not directly answer the dogmatic question of the nature of the principle as a self-standing justification or a source of interpretation.⁸⁴ In the VAT context, as has been indicated already, the CJEU assumed that the general anti-abuse principle can be applied irrespective of the domestic implementation of anti-avoidance measures;⁸⁵ but Advocate General Poiares Maduro in the *Halifax* case, in accordance with voices in the literature,⁸⁶ still considered

Notes

⁶⁸ For this aspect of abuse of law, see again Schön, *supra* n. 43, at 186.

⁶⁹ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 100–101; CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, paras 82–83. For an analysis, see e.g., Schön, *supra* n. 43. See also Luc De Broe & Sam Gommers, *Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases*, EC Tax Rev. 270, 280–282 (2019), doi: 10.54648/ECTA2019032.

⁷⁰ CJEU Case C-321/05, *Kofoed*, 5 Jul. 2007, ECLI:EU:C:2007:408.

⁷¹ *Ibid.*, paras 42–48.

⁷² CJEU Joined Cases C-131/13, C-163/13 and C-164/13, *Italmoda*, 18 Dec. 2014, ECLI:EU:C:2014:2455. For the 'creation and development of principles in EU law' in the *Italmoda* context, see Rita de la Feria & Rebecca Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, Brit. Tax Rev. 262, 268–270 (2016).

⁷³ CJEU Case C-251/16, *Cussens*, 22 Nov. 2017, ECLI:EU:C:2017:881.

⁷⁴ See CJEU Joined Cases C-131/13, C-163/13 and C-164/13, *supra* n. 72, paras 41–62; CJEU Case C-251/16, *supra* n. 73, paras 25–44.

⁷⁵ See Opinion of AG Kokott in CJEU Case C-115/16, *N Luxembourg 1*, 1 Mar. 2018, ECLI:EU:C:2018:143, paras 105–107. See also Pablo A. Hernández González-Barreda, *Holding Companies and Leveraged Buy-Outs in the European Union Following BEPS: Beneficial Ownership, Abuse of Law and the Single Taxation Principle*, 59 Eur. Tax'n 409, 418 (2019); Georg Kofler, *Ch. 13: Auslegung und Anwendung des harmonisierten Steuerrechts*, in *Europäisches Steuerrecht*, para. 13.20 (Harald Schaumburg & Joachim Englisch eds, 2d ed., Otto Schmidt 2020).

⁷⁶ CJEU Case C-144/04, *Mangold*, 22 Nov. 2005, ECLI:EU:C:2005:709.

⁷⁷ See Takis, *supra* n. 35, at 11–12.

⁷⁸ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 104, 111. For an overview, see Sánchez de Castro Martín-Luengo, *supra* n. 58, at 9–10; Hernández González-Barreda, *supra* n. 75, at 412–413.

⁷⁹ This would mean, for instance, that Member States can apply general anti-abuse principles already foreseen in national legislation or even OECD concepts of beneficial ownership to deny relief based on directives; see Sheppard, *supra* n. 66, at 1072.

⁸⁰ See Danon, Gutmann, Lukkien, Maisto, Jiménez & Malek, *supra* n. 60, at 484; De Broe & Gommers, *supra* n. 69, at 275–276. See in this context also De Broe, *supra* n. 52 (arguing for a single anti-abuse concept in EU law with a similar standard for abuse of directive cases and for VAT as well as for third country free movement of capital cases but with a different standard for freedom of establishment cases); see also *infra* n. 191.

⁸¹ See Opinion of AG Kokott in CJEU Case C-116/16, *T Danmark*, 1 Mar. 2018, ECLI:EU:C:2018:144, para. 100; Opinion of AG Kokott in CJEU Case C-115/16, *supra* n. 75, para. 104. See also De Broe & Gommers, *supra* n. 69.

⁸² Lee A. Sheppard, *Investment Fund Effects of the CJEU Danish Cases*, 96 Tax Notes Int'l 867, 869 (2019).

⁸³ CJEU Case C-196/04, *supra* n. 22, para. 51. See also CJEU Case C-524/04, *supra* n. 2, para. 72; CJEU Case C-311/08, *supra* n. 34, para. 65. For further analysis, see Schön, *supra* n. 43, at 194.

⁸⁴ Schön, *supra* n. 43, at 194.

⁸⁵ See again, e.g., CJEU Case C-251/16, *supra* n. 73, paras 25–44. See also CJEU Case C-255/02, *supra* n. 4, paras 67–86; Opinion of AG Maduro in Case C-255/02, *supra* n. 5, paras 76–80. The abuse of rights doctrine in the field of VAT was mentioned in CJEU Joined Cases C-487/01 and C-487/02, *Leusden*, ECLI:EU:C:2004:263; CJEU Case C-32/03, *I/S Fini*, ECLI:EU:C:2005:128; but it was later further developed in the *Halifax* case. For details, see Stessens, *supra* n. 9, at 59.

⁸⁶ See Joachim Englisch, *Ch. 12: Einwirkung allgemeiner Rechtsgrundsätze des EU-Rechts*, in *Europäisches Steuerrecht*, paras 12.45–12.46 (Harald Schaumburg & Joachim Englisch eds, 2d ed., Otto Schmidt 2020); Juliane Kokott, *Das Steuerrecht der Europäischen Union*, § 2, paras 72–77 (C. H. Beck 2018).

the principle as one of interpretation.⁸⁷ The relevance mentioned previously of the anti-abuse principle in the VAT context can be understood in the specific context of the harmonized field of indirect taxation.⁸⁸ However, the situation is different in the direct tax context. In this field, there is also increasing harmonization in sub-areas and particularly regarding anti-avoidance measures by way of secondary legislation.⁸⁹ However, the specific anti-avoidance rules in the respective directives enable but do not necessarily obligate Member States to address avoidance.⁹⁰ Thus, in line with a convincing view in the literature,⁹¹ it must be concluded that there is no possibility for overlaying these rules with an autonomous anti-abuse principle.⁹² Acting the opposite way makes it obvious that the court, in accordance with the decision in the *X-GmbH* case, conceded to the (indirect) international pressure to fight tax avoidance.⁹³ By considering the anti-abuse principle as a self-standing concept, which is independent from a provision in national legislation, the court has created a powerful instrument for a more 'holistic approach'⁹⁴ to fight tax avoidance within EU (primary)⁹⁵ law.

The scepticism towards the CJEU's approach is further substantiated by a discussion in the *Danish cases* specifically concerning the concept of beneficial ownership. In this context, the CJEU extends its reliance on OECD statements for defining the concept of beneficial

ownership as outlined in EU secondary law. It even employs a dynamic reference to those materials,⁹⁶ and, by this, the court contradicts Advocate General Juliane Kokott who had previously held a contrary perspective regarding the use of OECD materials.⁹⁷ Concerning the central issue of the anti-abuse principle under discussion, the reference to OECD statements is less direct, but it has been pointed out in the literature how the CJEU draws from analogous instances found in the OECD Commentaries in its illustrative examples supporting the general anti-abuse principle.⁹⁸ This emphasizes the degree to which the CJEU currently relies on OECD terminology and ideas despite the mentioned reservations against basing the European concept of abuse on OECD concepts, especially through judicial means.

The court's turnaround in the anti-avoidance jurisprudence can be explained in the context of the current state of affairs regarding the international pressure on (aggressive) tax planning, especially by the OECD's BEPS Project.⁹⁹ Advocate General Juliane Kokott accurately identified this 'political mood'¹⁰⁰ as a difficulty for the CJEU. The political pressure exerted by the OECD affects the members of the Inclusive Framework on BEPS in developing national anti-avoidance measures that align with the BEPS Project.¹⁰¹ This influence has a bearing on the EU's own legislative projects, and some of the OECD measures are reflected in European secondary

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⁸⁷ See Opinion of AG Maduro in Case C-255/02, *supra* n. 5, paras 62–82. For explanations, see Schön, *supra* n. 43, at 194. For different functions of general principles of EU law including the interpretative function, see Koen Lenaerts & Jose A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 *Common Mkt. L. Rev.* 1629 (2010), doi: 10.54648/COLA2010069.

⁸⁸ See e.g., Hernández González-Barreda, *supra* n. 75, at 418; Schön, *supra* n. 43, at 196–197. See also Kevin Joder, *Das allgemeine Missbrauchsverbot als Auslegungsziel und seine Bedeutung im europäischen Ertragssteuerrecht*, *Internationales Steuerrecht* 10, 12 (2023).

⁸⁹ See Joder, *supra* n. 88, at 12; Kofler, *supra* n. 75, para. 13.20. Relevant are, e.g., the provisions in Art. 1 of the Council Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ EU 29 Dec. 2011, L 345/08 as amended by Council Directive (EU) 2015/121 of 27 Jan. 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ EU 28 Jan. 2015, L 21/1 (Parent-Subsidiary Directive) and in Art. 5 of the Council Directive 2003/49/EC of 3 Jun. 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ EU 26 Jun. 2003, L 157/49 (Interest and Royalty Directive) which were at issue in the *Danish cases*.

⁹⁰ For the obligation to implement anti-avoidance measures only after the amendment of Council Directive 2011/96/EU as amended by Council Directive (EU) 2015/121 (Parent Subsidiary Directive), *supra* n. 89, which, however, does not dispense the implementation, see De Broe & Gommers, *supra* n. 69, at 275; Schön, *supra* n. 43, at 197, 204.

⁹¹ See Schön, *supra* n. 43, at 197–198.

⁹² For a nuanced view on the relation of the general anti-avoidance principle and specific anti-avoidance rules in directives, see Danon, Gutmann, Lukkien, Maisto, Martín Jiménez & Malek, *supra* n. 60, at 485.

⁹³ For the CJEU's following of the international trend, see again Hernández González-Barreda, *supra* n. 75, at 416; Schön, *supra* n. 43, at 198.

⁹⁴ Barry Larking, *CJEU Decisions on Tax Avoidance and Conduits: More Questions Than Answers*, 95 *Tax Notes Int'l* 25, 26 (2019).

⁹⁵ For the question of the rank of principles within the European legal order, the CJEU generally believes general principles to be principles of primary law; however, this general view is contested and nuanced in the literature for the specific case and beyond; see Englisch, *supra* n. 86, para. 12.46; Schön, *supra* n. 43.

⁹⁶ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 84–94.

⁹⁷ See Opinion of AG Kokott in CJEU Case C-115/16, *supra* n. 75, para. 48–55.

⁹⁸ See Larking, *supra* n. 94, para. 31. In this context, the question has arisen in the literature whether, in the determination of abuse, the OECD materials can also serve as a reference point; see Larking, *supra* n. 94, para. 31.

⁹⁹ See Baerentzen, *supra* n. 35, at 14. See also Hernández González-Barreda, *supra* n. 75, at 416; Schön, *supra* n. 43, at 198. For the 'big picture' of the EU and BEPS, see Schön, *supra* n. 39.

¹⁰⁰ Opinion of AG Kokott in CJEU Case C-115/16, *supra* n. 75, para. 4.

¹⁰¹ This influence is naturally on the political level, and the problem addressed in this article arises when the CJEU permits itself to be influenced. For the further and more general questions of legitimacy regarding the OECD's role in developing the international tax law, see e.g., Linda Brosens & Jasper Bossuyt, *Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms?*, 12 *World Tax J.* 313 (2020), doi: 10.59403/8jtx0e; Irma Johanna Mosquera Valderrama, *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 *Bull. Int'l Tax'n* 160 (2018), doi: 10.59403/se9pt3; Mosquera Valderrama, *supra* n. 15; Ozai, *supra* n. 15.

law.¹⁰² However, while the European legislature is free to decide which international projects it relies upon to further develop the EU's tax policy, the judiciary lacks (institutional)¹⁰³ legitimacy to develop (tax) policies by itself.¹⁰⁴ As has already been indicated,¹⁰⁵ in the context of the powers and competences within and in-between the Union and the Member States, according to Article 19 of the Treaty of the European Union (TEU), the CJEU is called to ensure that the law (i.e., the Union legal order) is observed.¹⁰⁶ The court is responsible for the interpretation of EU law,¹⁰⁷ and it has a (limited)¹⁰⁸ role in developing the law through its case law and in finding general principles of EU law.¹⁰⁹ The CJEU's approach in the *Danish cases* in this context, however, is methodologically problematic; and it is striking that the effect of general principles typically lies in the protection of rights of individuals, and to use this tool against taxpayers is therefore a misrepresentation of the CJEU's role.¹¹⁰ Acting as a political player takes place at the limits of the CJEU's competences.¹¹¹ The court is not a legitimate body to advocate political views and instead should focus on exercising a sober and technical application of the EU's primary and secondary law.¹¹²

The *Danish cases* underscore a conflict between input and output legitimacy. To effectively achieve objectives in a specific policy domain within the EU, the

respective acting body must possess the necessary powers and the capacity to exercise them according to its discretion;¹¹³ this is problematic, however, with the CJEU concerning the recent decisions. The imbalance between the two facets of legitimacy can, as a result, jeopardize legal certainty for taxpayers and tax administrations alike,¹¹⁴ and it can signify an interference with the internal balance of the Union. In that sense, the CJEU's approach in its recent jurisdiction represents an overreach into the sovereignty of the Member States that is expressed through the competence to implement rules on their own terms.¹¹⁵ The CJEU undermines the clear language of pertinent directives and turns the options originally granted to Member States to address abusive behaviour into obligatory measures which denies the Member States the discretion to structure their domestic tax systems as they deem most suitable.¹¹⁶ The legitimacy of this jurisprudence is all the more doubtful since, with the ATAD, a general anti-avoidance rule exists on the European level of which the CJEU bypasses the implementation.¹¹⁷ Even assuming that European law must correct abuse in the context of tax competition within the single market,¹¹⁸ it is doubtful that the CJEU is the legitimate body in the institutional framework of the EU to establish such a far-reaching anti-abuse principle out of its own authority.¹¹⁹

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¹⁰² This is true for the ATAD and ATAD 2; see Fehling, *supra* n. 46. It is also the case for the more recent implementation of the OECD Global Anti-Base Erosion (GloBE) Project on the EU level; see Recitals 1–34 of Council Directive (EU) 2022/2523 of 14 Dec. 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ EU 22 Dec. 2022, L 328/1.

¹⁰³ For broader questions of courts and institutional legitimacy (regarding state-like institutions and the courts themselves) and considering immunity to political influence, see Allen Buchanan, *Ch. 3: Institutional Legitimacy in Oxford Studies in Political Philosophy Vol. 4*, 53 (David Sobel, Peter Vallentyne & Steven Wall eds, Oxford University Press 2018). Again, in terms of political influence, this article is concerned about the CJEU allowing itself to be influenced.

¹⁰⁴ For an overview of the role of different bodies in the EU tax decision-making, see Lorenzo Del Federico, *Ch. 6: Monitoring Decision-Making, Enforcement and Application of EU Tax Law: The Role of Intermediate Bodies and Lobbies in European Tax Integration: Law, Policy and Politics*, 181 (Pasquale Pistone ed., IBFD 2018).

¹⁰⁵ See *supra* s. 2.1.

¹⁰⁶ For explanations, see Bernhard W. Wegener, *Art. 19: Gerichtshof der Europäischen Union in EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta*, para. 25 (Christian Calliess & Matthias Ruffert eds, 6th ed., C. H. Beck 2022).

¹⁰⁷ See e.g., *ibid.*, paras 25–33.

¹⁰⁸ For intra and ultra vires action of the court, see e.g., *ibid.*, paras 25–33.

¹⁰⁹ See e.g., *ibid.*, para. 58.

¹¹⁰ Schön, *supra* n. 43, at 205–206.

¹¹¹ For recent accounts of the (political) role of the CJEU, compare Michael Blauberger & Susanne K. Schmidt, *The European Court of Justice and Its Political Impact*, 40 *West Eur. Pol.* 907 (2017), doi: 10.1080/01402382.2017.1281652; Sabine Saurugger & Fabien Terpan, *The EU's Legal Identities and the Court of Justice of the EU*, 17 *Comp. Eur. Pol.* 548 (2019), doi: 10.1057/s41295-019-00178-1.

¹¹² For an analysis of AG Kokott's 'words of caution', see Baerentzen, *supra* n. 35, at 10.

¹¹³ Compare Barnard & Peers, *supra* n. 15, at 6–7.

¹¹⁴ See *infra* s. 3.

¹¹⁵ Danon, Gutmann, Lukkien, Maisto, Martín Jiménez & Malek, *supra* n. 60, at 484–485; De Broe & Gommers, *supra* n. 69, at 278.

¹¹⁶ Schön, *supra* n. 43, at 200–201.

¹¹⁷ The ATAD can be seen as bypassed because, while it entails a minimum standard of anti-avoidance measures in Art. 6, it can be deduced from the nature of a directive that it first has to be implemented in domestic law; see Kofler, *supra* n. 75, para. 13.20. For the relation of the different anti-avoidance maxims, see *infra* s. 3.2.

¹¹⁸ Compare Fehling, *supra* n. 46, para. 17.127; Joder, *supra* n. 88, at 12.

¹¹⁹ See also *infra* s. 3.2. Another issue in this context is that this approach not only interferes with the balance of powers between the CJEU and the Member States but also between different branches of the government if judges override national legislation based on the general EU principle; see Werner Haslehner & Georg W. Kofler, *Three Observations on the Danish Beneficial Ownership Cases* (2019), para. I, <http://kluwertaxblog.com/2019/03/13/three-observations-on-the-danish-beneficial-ownership-cases/> (accessed 01 Dec. 2023); see also De Broe & Gommers, *supra* n. 69, at 278–279.

3 THE CJEU'S ANTI-AVOIDANCE JURISPRUDENCE AND LEGAL CERTAINTY

3.1 Clarity and Precision as Aspects of Certainty

The deviation from the consistent evolution of the *Cadbury Schweppes* standard, especially for the justification of restrictions of a fundamental freedom with regard to tax-avoidance, must be measured against the principle of certainty.¹²⁰ This is essential insofar as, in the *X-GmbH* case, the scope for determining what would be a 'wholly artificial arrangement' was suddenly broadened by the court. It established that any scheme that has not necessarily exclusively as its primary objective, but merely as one of its primary objectives, the artificial transfer of profits to a low-tax jurisdiction, could be considered an artificial arrangement that would allow for a justification of a restriction of a fundamental freedom (in this case the free movement of capital)¹²¹ by a national rule.¹²² Since *Cadbury Schweppes*, there has been a certain lack of clarity on how to carry out the substance test relevant in this context.¹²³ Thus, instead of using the opportunity in the *X-GmbH* case to refine this criterion and giving it greater clarity and precision, the court decided to expand a measure that already lacked clear contours. In this sense, due to (indirect)¹²⁴ external influence, *X-GmbH* changed an unclear standard into another of the same.

The principle of certainty has the status of a general principle of EU law and can be traced back to the *SNUPAT* case (1961).¹²⁵ It requires, according to the CJEU, 'that rules of law be clear, precise and

predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings'.¹²⁶ The CJEU has ruled on numerous occasions that the legislation must be precise and its application foreseeable by those subject to it,¹²⁷ but this requirement of legal certainty must be observed even more strictly in the case of rules liable to result in financial consequences, so that concerned taxpayers may precisely know the extent of the obligations that are imposed on them.¹²⁸ Based on the court's significant role of ensuring legal certainty, it also has to be concluded that the CJEU itself must not contradict this but, instead, should be consistent in its case law.¹²⁹ The revision of the substance of the anti-avoidance standards in the tax context therefore necessitates careful consideration of legal certainty as a general principle on the EU level.¹³⁰ If the CJEU, in contrast, argues on the relation of the principles of certainty and anti-abuse (specifically in the context of the dismissal of the *Kofoed* maxim) that an abusive arrangement cannot invoke legal certainty,¹³¹ this is not very helpful at this point of the analysis. It is exactly the substance of the anti-abuse principle that is at issue here and, since the court's jurisprudence has taken a surprising turn for the definition of this vague concept, this reasoning is overly simplistic.¹³²

As stated by Advocate General Michal Bobek in the *Cussons* case, '[t]here is no disguising the fact that the principle of prohibition of abuse of law is in tension with the principle of legality and legal certainty. It is therefore important that its conditions are as clear as possible'.¹³³ The practical application of the anti-abuse principle, however, is considered challenging (despite the existing body of CJEU decisions on the

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¹²⁰ A trend has been identified in the last years in the case law of the CJEU itself that the court happens to be more generous in its assessment of the grounds for which Member States can justify a possible violation of the fundamental freedoms but puts more emphasis on legal certainty; see Maria Hilling, *Justifications and Proportionality: An Analysis of the ECJ's Assessment of National Rules for the Prevention of Tax Avoidance*, 41 *Intertax* 294 (2013), doi: 10.54648/TAXI2013025.

¹²¹ For the substance of anti-avoidance regarding fundamental freedoms, see *supra* s. 2.1. For the differentiation of situations between Member States and third country cases, see *infra* s. 4. For the substance of the general anti-abuse principle, see *infra* s. 2.2.

¹²² See CJEU Case C-135/17, *supra* n. 7, para. 84.

¹²³ Daniel Smit, *The Anti-Tax-Avoidance Directive (ATAD)*, in *Terra/Wattel European Tax Law*, 262 (Peter J. Wattel, Otto Marres & Hein Vermeulen eds, 7th ed., Wolters Kluwer 2018).

¹²⁴ See *supra* s. 2.

¹²⁵ CJEU Joined Cases C-42/59 and C-49/59, *SNUPAT*, 22 Mar. 1961, ECLI:EU:C:1961:5. For details, see Pablo Martín Rodríguez, *The Principle of Legal Certainty and the Limits to the Applicability of EU Law*, 50 *Cahiers de Droit Européen* 115, 121–128 (2016); Jérémie van Meerbeeck, *The Principle of Legal Certainty in the Case-Law of the European Court of Justice*, 41 *Eur. L. Rev.* 275, 280 (2016).

¹²⁶ See e.g., CJEU Joint Cases C-72/10 and C-77/10, *Costa and Cifone*, 16 Feb. 2012, ECLI:EU:C:2012:80, para. 74; CJEU Case C-318/10, *Siat*, 5 Jul. 2012, ECLI:EU:C:2012:415, para. 58. For details, see van Meerbeeck, *supra* n. 125, at 280–282.

¹²⁷ See e.g., CJEU Case 325/85, *Ireland v. Commission*, 15 Dec. 1987, ECLI:EU:C:1987:546, para. 18; CJEU Joined Cases C-182/03 and C-217/03, *Belgium v. Commission*, 22 Jun. 2006, ECLI:EU:C:2006:416, para. 69; CJEU Case C-183/14, *Salomie and Oltean*, 9 Jul. 2015, ECLI:EU:C:2015:454, para. 31.

¹²⁸ See e.g., CJEU Case 325/85, *supra* n. 127, para. 18; CJEU Case C-183/14, *supra* n. 127, para. 31. See also Öner, *supra* n. 9, at 105.

¹²⁹ In this context, see Englisch, *supra* n. 86, para. 12.31.

¹³⁰ See Baerentzen, *supra* n. 35, at 24; van Meerbeeck, *supra* n. 125, at 287.

¹³¹ CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, paras 86–95; CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 114–122. For further comments on this line of reasoning of the CJEU, see *infra* s. 3.2. See also *supra* s. 2.2.

¹³² Schön, *supra* n. 43, at 205.

¹³³ Opinion of AG Bobek in Case C-251/16, *Cussons and Others*, 7 Sep. 2017, ECLI:EU:C:2017:648, para. 80.

issue)¹³⁴ due to remaining uncertainties;¹³⁵ and, in the outlined recent jurisprudence, the CJEU failed to seize the opportunity to provide clarity and precision.¹³⁶ Advocate General Juliane Kokott points out that recourse to a general principle that is less clear and precise would risk undermining the harmonization through directives containing specific anti-avoidance rules.¹³⁷ However, an overarching definition of anti-abuse (for the primary and secondary law context and not being linked to a specific fundamental freedom)¹³⁸ could also help to achieve much-needed further clarity, particularly in comparison to individual domestic provisions in the Member States.¹³⁹ It will take time to make the statements and principles from the *X-GmbH* case and the *Danish cases* on the substance of anti-avoidance workable in practice.¹⁴⁰ After this process, however, the new standard does not have to be more vague than that of *Cadbury Schweppes* (which also left unanswered questions).¹⁴¹ It should be acknowledged in this context that the CJEU actually provides a list of factors in the *Danish cases* to help to determine what would be considered abusive transactions.¹⁴² However, still, the CJEU's recent considerations cannot be the final destination in light of clarity and precision; and without genuine improvement in this respect, a by-product of submitting to the external political pressure by changing the standards of avoidance is actually the opposite of a gain in certainty.

3.2 Predictability as an Aspect of Certainty

The *Danish cases* constitute a serious disruption in the jurisprudence that obscures the boundaries between direct and indirect, harmonized and non-harmonized fields of

taxation.¹⁴³ They create issues of legitimacy and also of certainty. The concerns about the latter – while being a distinct problem of the discussed jurisprudence – arise specifically as a consequence of the (illegitimate)¹⁴⁴ acting by the court as a political player. Due to exceeding what is expected of the judiciary, the predictability in the CJEU's decisions is reduced. The *Kofoed* decision was based specifically on the principle of certainty and the awareness of taxpayers of their rights and obligations.¹⁴⁵ In the *Danish cases*, the CJEU is thus in contradiction to its own decision,¹⁴⁶ because, as Advocate General Juliane Kokott shows, it is inconsistent to decline the direct application of a directive's anti-avoidance provision but to directly apply a general principle to achieve the same conclusion.¹⁴⁷ The court's formal reasoning is logical on its face.¹⁴⁸ The 'trick' of differentiating between the general anti-abuse principle and anti-avoidance provisions in secondary and domestic law, however, is hardly in the benefit of certainty. The directives in question in the *Danish cases* gave Member States the choice to implement anti-avoidance clauses that the Danish legislature did not use. To now change this clear domestic situation by resorting to the expanded anti-abuse principle conflicts with the principle of legal certainty.¹⁴⁹ The *Danish cases* are not a mere evolution of the anti-avoidance jurisprudence but a (surprising)¹⁵⁰ departure from the previous standard. It had been applied until very recently, for example, in the *Eqiom and Enka* case (2017)¹⁵¹ or the *Deister Holding* case (2017).¹⁵² Both relied on the implementation of anti-avoidance provisions in domestic law in terms of the

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¹³⁴ See *supra* ss 2.1, 2.2. For further rulings concerning abuse in the field of VAT and their interpretation as an attempt by the CJEU to balance the anti-abuse doctrine and legal certainty; see Michael Lang & Draga Turic, *Fraud and Abuse in Recent CJEU Case Law on VAT in CJEU – Recent Developments in Value Added Tax 2014*, 187 (Michael Lang, Alexander Rust, Pasquale Pistone, Joseph Schuch, Claus Staringer & Donato Raponi eds, Linde 2015); however, in this context, the implementation of the anti-abuse doctrine in the field of indirect taxation has been recognized to be fraught with challenges; see *ibid.*

¹³⁵ See Larking, *supra* n. 94, at 26–27.

¹³⁶ *Ibid.*, at 27.

¹³⁷ Opinion of AG Kokott in CJEU Case C-115/16, *supra* n. 75, para. 104.

¹³⁸ See Englisch, *supra* n. 35, at 528. For the formulation of a universal concept but with different specificities, see De Broe, *supra* n. 52; see also *supra* n. 80; *infra* n. 191.

¹³⁹ Baerentzen, *supra* n. 35, at 24, 35; Hernández González-Barreda, *supra* n. 75, at 419–420.

¹⁴⁰ See CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2019 on the ECJ Decisions of 26 February 2019 in N Luxembourg I et al. (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16) and T Danmark et al. (Joined Cases C-116/16 and C-117/17), concerning the 'beneficial ownership' requirement and the anti-abuse principle in the company tax directives*, 59 Eur. Tax'n 487 (2019). For the issues of legal certainty regarding the nature of the principle, see *infra* s. 3.2.

¹⁴¹ For details, see Baerentzen, *supra* n. 35, at 24–25, 38–50. For open questions under *Cadbury Schweppes*, see Jiménez, *supra* n. 9, at 274, 286–290.

¹⁴² CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8. See also Hernández González-Barreda, *supra* n. 75, at 420.

¹⁴³ Hernández González-Barreda, *supra* n. 75, at 419. See *supra* s. 2.2.

¹⁴⁴ See *supra* s. 2.

¹⁴⁵ CJEU Case C-321/05, *supra* n. 70, paras 42–46. See Hernández González-Barreda, *supra* n. 75, at 418.

¹⁴⁶ For details, see Baerentzen, *supra* n. 35, at 10–12, 24. But see Danon, Gutmann, Lukkien, Maisto, Martín Jiménez & Malek, *supra* n. 60, at 492–493.

¹⁴⁷ Opinion of AG Kokott in CJEU Case C-115/16, *supra* n. 75, para. 104. For comments, see Englisch, *supra* n. 35, at 529.

¹⁴⁸ See Englisch, *supra* n. 35, at 533.

¹⁴⁹ Schön, *supra* n. 43, at 202–203.

¹⁵⁰ Haslehner & Kofler, *supra* n. 119, para. I ('unwelcome surprise').

¹⁵¹ CJEU Case C-6/16, *Eqiom and Enka*, 7 Sep. 2017, ECLI:EU:C:2017:641.

¹⁵² CJEU Joined Cases C-504/16 and C-613/16, *Deister Holding*, 20 Dec. 2017, ECLI:EU:C:2017:1009.

methodology,¹⁵³ and they relied on the *Cadbury Schweppes* standard in terms of substance.¹⁵⁴

The CJEU fails to disclose this;¹⁵⁵ and, in the literature, it is instructively demonstrated how the court covers the discontinuity in its case law with an ‘impression of continuity’.¹⁵⁶ By even refusing to openly recognize its change in stance, the court goes beyond attempting to ensure compliance to a concept of anti-abuse thereby contradicting legal certainty in the form of predictability.¹⁵⁷ The already mentioned reliance on the idea that abusive arrangements do not deserve the protection of the principle of legal certainty (which, of course, would require defining the substance of abuse first – something that is problematic in itself)¹⁵⁸ seems like a politically influenced claim rather than a carefully constructed argument.¹⁵⁹ Elevating the fight against avoidance to a new significance under the relegation of principles previously believed to be settled doctrines needs careful justification. The CJEU, however, only argues that no additional obligations are imposed on taxpayers and that, instead, merely formally existing advantages are denied.¹⁶⁰ However, this reasoning is plausibly criticized by the literature as, after all, the effect of the application of the anti-abuse principle is a tax obligation regardless of whether this technically follows from denying a benefit or from imposing an obligation.¹⁶¹

The court’s acting as a political player is problematic in light of the limits of the court’s competences.¹⁶² The CJEU should instead focus on its role of acting independently from (indirect)¹⁶³ external political influence in

order to defend the fundamental freedoms even against a concept of avoidance that follows from the BEPS context.¹⁶⁴ The court must therefore refuse to follow political trends under disregard for other fundamental principles of EU law – specifically legal certainty.¹⁶⁵ While BEPS concepts have been incorporated into EU law,¹⁶⁶ they have been developed outside of the EU framework and may even be contrary to EU principles. This is made especially clear insofar as the CJEU has, until now, held a distinct perspective on the idea of abusive practices compared to the one outlined in the BEPS Actions. Embracing that tax competition among EU Member States is permissible provided that the cross-border engagement is substantively genuine, the CJEU has acknowledged until recently that EU law necessitates an assessment based on economic reality through which the preservation of the fundamental freedoms is ensured.¹⁶⁷ The anti-avoidance approach of the BEPS Actions, on the other hand, is understood as more broadly condemning tax-motivated arrangements.¹⁶⁸ This dynamic shifted with the judgments in the *X-GmbH* case and in the *Danish cases*,¹⁶⁹ where the CJEU draws upon BEPS terminology and concepts to shape a comprehensive EU anti-abuse principle that operates below the *Cadbury Schweppes* threshold.¹⁷⁰ If this is understood as an attempt by the CJEU to align EU and BEPS concepts in the pursuit of curtailing abusive practices in accordance with the BEPS understanding, however, the ‘effective functioning of the internal market’¹⁷¹ invoked by the CJEU is not an

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¹⁵³ CJEU Case C-6/16, *supra* n. 151, paras 24–30; CJEU Joined Cases C-504/16 and C-613/16, *supra* n. 152, paras 51–61. For explanations, see Schön, *supra* n. 43, at 188. It should be noted that, while the *Egiom and Enka* and *Deister Holding* cases concern the compatibility of national anti-avoidance measures with EU primary and secondary law, the *Danish cases* discuss the applicability of the EU general principle of anti-abuse when there actually is no national anti-avoidance legislation.

¹⁵⁴ CJEU Case C-6/16, *supra* n. 151, para. 30; CJEU Joined Cases C-504/16 and C-613/16, *supra* n. 152, para. 60. For explanations, see Englisch, *supra* n. 35, at 528. See also Baerentzen, *supra* n. 35, at 24; Blazej Kuzniacki, *The ECJ as a Protector of Tax Optimization via Holding Companies*, 47 Intertax 312 (2019), doi: 10.54648/TAXI2019029; Schön, *supra* n. 39, at 300.

¹⁵⁵ See CFE ECJ Task Force, *supra* n. 140, at 491, 499–500.

¹⁵⁶ Englisch, *supra* n. 35, at 529–530. For the presentation of the jurisprudence as a coherent body, see also Hernández González-Barreda, *supra* n. 75, at 419. For an ‘attempt to harmonize’ the approaches, see José Calderón & João Sérgio Ribeiro, *The Complex Situation of Intermediary Holding Companies in the EU After the CJEU Landmark Decisions on the ‘Danish Cases’*, 6 UNIO EU L.J. 68, 72 (2020).

¹⁵⁷ For predictability as part of certainty, see Rodríguez, *supra* n. 125, at 118–120.

¹⁵⁸ See CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, paras 86–95; CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, paras 114–122. See *supra* s. 3.1.

¹⁵⁹ Still, the CJEU’s balancing of the two principles is accepted by authors in the literature; see e.g., Joder, *supra* n. 88, at 14.

¹⁶⁰ See CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, para. 91; CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, para. 119.

¹⁶¹ See Schön, *supra* n. 43 at 205.

¹⁶² See *supra* s. 2.

¹⁶³ See *ibid.*

¹⁶⁴ Schön, *supra* n. 39, at 301.

¹⁶⁵ See Schön, *supra* n. 43, at 207–208.

¹⁶⁶ See *supra* s. 2.1.

¹⁶⁷ See CJEU Case C-196/04, *supra* n. 22. For explanations, see Schön, *supra* n. 39, at 299–300. See also *supra* s. 2.1.

¹⁶⁸ See Schön, *supra* n. 39, at 299.

¹⁶⁹ See again CJEU C-135/17, *supra* n. 7; CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8; CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8.

¹⁷⁰ See also *supra* ss 2.1., 2.2. For an analysis of the lower threshold of the OECD standard compared to the classic CJEU standard, see Schön, *supra* n. 43, 299. For different standards within a uniform principle of anti-abuse, see De Broe, *supra* n. 52; see also *supra* n. 80; *infra* n. 191.

¹⁷¹ CJEU Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *supra* n. 8, para. 107; CJEU Joined Cases C-116/16 and C-117/16, *supra* n. 8, para. 79.

obvious justification for this change of view. This is especially true since the uncertainty caused by the court's change in the anti-avoidance standard and the associated circumvention of the competences within the EU (and the national sovereignty in implementing directives) disturbs this same market.¹⁷² Commentators are therefore right to argue that an anti-abuse principle of this substance and reach as it is reimagined by the CJEU should follow from the treaties,¹⁷³ but it should not come from an invention of the court based on tax policy ideals.¹⁷⁴

The criticism is all the more warranted since (effective) anti-avoidance measures already exist in domestic provisions (partly through transposition of EU directives); and the fact that this did not apply to the individual cases at hand does not justify eliminating long-standing, established standards.¹⁷⁵ Furthermore, the actual political decision-makers on the EU level already launched corresponding initiatives on broadening the scope of anti-avoidance measures that are (arguably)¹⁷⁶ reflected in Article 6 of the ATAD. The literature on anti-avoidance measures in the EU identified developments towards stricter anti-avoidance policies,¹⁷⁷ however, how strictly the standard of Article 6 of the ATAD actually has to be interpreted is up for discussion.¹⁷⁸ In this context, the CJEU should indeed provide a workable interpretation, at least to foster legal certainty.¹⁷⁹ The potential loss of practical relevance of the recent CJEU jurisprudence through the implementation of the ATAD, however, does not eliminate the discussed problem considering that the damage to certainty is already done.¹⁸⁰

Furthermore, the creation of an overlap of anti-abuse regulations by applying the general anti-abuse principle despite the creation of a general anti-avoidance rule at the level of written European (secondary) law raises issues. One open question is whether the implementation of

Article 6 of the ATAD in the Member States is in any way relevant in light of the recent CJEU jurisprudence.¹⁸¹ Another is whether other anti-avoidance provisions in directives are to be interpreted in the same way as the CJEU's general principle.¹⁸² The parallelism of the anti-avoidance principles is dismantled in the literature by pointing to the scope of the general principle of the CJEU that goes beyond the range of Article 6 of the ATAD in that it is not limited to the corporate tax context.¹⁸³ However, on the other hand, the application of domestic rules implementing directives is not limited to the European legal domain.¹⁸⁴ The overlapping of the principles introduced by different bodies within the EU (legislative and judiciary, Union and Member States) in any case shows again how the CJEU interferes with the competences of other European authorities in a reaction to political pressure.¹⁸⁵ The CJEU is not (and cannot be) directly influenced, for example, by the OECD, but the decision-making process of the CJEU appears to be clearly shaped by external influences without legitimacy within the European system.¹⁸⁶ The CJEU's resulting operation at the limits of its competences does legal certainty a disservice.

4 THE CJEU'S ANTI-AVOIDANCE JURISPRUDENCE AND THIRD COUNTRIES

Regarding the *X-GmbH* decision, specifically concerning the derogation from the prohibition on restrictions to the free movement of capital with non-EU countries, a different view can be adopted than the one represented in this article thus far. In this case, the CJEU determined a controlled foreign company (CFC) rule that stipulated an essentially irrebuttable attribution of income from invested capital from the controlled company in a third

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¹⁷² Compare Haslehner & Kofler, *supra* n. 119, para. I; Sánchez de Castro Martín-Luengo, *supra* n. 58, at 11–12. See also CFE ECJ Task Force, *supra* n. 140, at 495–497.

¹⁷³ See Englisch, *supra* n. 35, at 534. Compare also Leczykiewicz, *supra* n. 9, at 729–730.

¹⁷⁴ See also *supra* s. 2.2.

¹⁷⁵ See Sánchez de Castro Martín-Luengo, *supra* n. 58, at 13.

¹⁷⁶ But see Schön, *supra* n. 39, at 301.

¹⁷⁷ *Ibid.*

¹⁷⁸ See Schön, *supra* n. 39, at 301. See also Johanna Hey, *Harmonisierung der Missbrauchsabwehr durch die Anti-Tax-Avoidance-Directive (ATAD): Rechtsmethodische, kompetenzielle und verfassungsrechtliche Fragen unter besonderer Berücksichtigung der Auswirkungen auf § 42 AO, 94 Steuer und Wirtschaft* 248, 258–265 (2017), doi: 10.9785/stuw-2017-940304.

¹⁷⁹ Axel Cordewener, *Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards under Treaty Freedoms and EU Directives?*, 26 *EC Tax Rev.* 60, 66 (2017), doi: 10.54648/ECTA2017007; Alfredo García Prats, Werner Haslehner, Volker Heydt, Eric Kemmeren, Georg Kofler, Michael Lang, Jürgen Lüdicke, João Nogueira, Pasquale Pistone, Stella Raventos-Calvo, Emmanuel Raingard de la Blétière, Isabelle Richelle, Alexander Rust, Rupert Shiers & Piergiorgio Valente, *EU Report in Anti-Avoidance Measures of General Nature and Scope* (IFA Cahiers 103A 2018) 16–18. For the benefits of EU-wide anti-avoidance rules, see Anzhela Cédelle, *The EU Anti-Tax Avoidance Directive: A UK Perspective*, *Brit. Tax Rev.* 490, 493 (2016).

¹⁸⁰ For the practical relevance, see CFE ECJ Task Force, *supra* n. 140, at 495–497; De Broe & Gommers, *supra* n. 69, at 275; Haslehner & Kofler, *supra* n. 119, para. I.

¹⁸¹ Schön, *supra* n. 43, at 207. Compare also De Broe & Gommers, *supra* n. 69, at 276 ('Hence, a cynical may now ask why the PSD and the ATAD do provide for a GAAR?').

¹⁸² Larking, *supra* n. 94, at 30–31.

¹⁸³ See Art. 3 and Recital 3–4 of Council Directive (EU) 2016/1164 (ATAD), *supra* n. 24. See in this context, Hey, *supra* n. 178, at 252–253; Joder, *supra* n. 88, at 14.

¹⁸⁴ Joder, *supra* n. 88, at 14. For further details, see also Larking, *supra* n. 94, at 31.

¹⁸⁵ See *supra* s. 2.

¹⁸⁶ See *ibid.*

country as not violating EU law.¹⁸⁷ In this sense, Member States are actually allowed under EU law, up to a certain point and on a case-by-case basis, to apply rules that contain irrebuttable assumptions of tax avoidance or tax abuse in relation to third countries. The concept of ensuring the effectiveness of fiscal supervision used as a justification for possible infringements of a fundamental freedom gains, in this regard,¹⁸⁸ a far-reaching leeway for Member States to introduce anti-avoidance rules in third-country situations.¹⁸⁹ This court decision could be justified with a differentiation of the rules between Member States (for which a stricter standard for restrictions is appropriate) and in third-country situations (with the *X-GmbH* standard).¹⁹⁰ A different standard for a justification of restrictions on the free movement of capital in third country cases could be explained by a distinct EU substance of the anti-abuse principle linked to the characteristics of the internal market.¹⁹¹ However, this again reinforces the general purport of this article that leaning on EU external standards is problematic,¹⁹² and the further associated problems of legitimacy and legal certainty demonstrated in this article regarding the change in the substance and the methodology of anti-avoidance in the CJEU's jurisprudence (particularly through the *Danish cases*) would still remain.

5 CONCLUSION

As Philip Baker remarked a few years ago, '[t]he CJEU is not cut off from international developments'.¹⁹³ This becomes evident in the recent CJEU jurisprudence on anti-avoidance in direct taxation where the court, seemingly impressed by the international political atmosphere, fails to consistently maintain and evolve its anti-avoidance standard. Instead, it broadened the substantive scope and the methodological grounds of the standard without a corresponding development in

clarity and legal certainty. There is evidence that the court was influenced by the international discussion in the court's use of terms that are very similar to those used in the BEPS Project, thereby leading to a shift in the court's position by aligning itself with OECD standards. Instead of focusing only on narrow cases of 'wholly artificial arrangements' as has been the standard thus far, actual arrangements that might also fulfil a commercial purpose become problematic. The court establishes an obligation for Member States to contend with tax avoidance without the need for a respective domestic provision. It develops, through its jurisprudence, what seems to rather be the reaffirmation of a political will than a consequence of a technical, well-founded interpretation of the case law presented so far and of the treaties' content.

This accords with a shift of priorities in international and European taxation through the influence mainly from the OECD. While these anti-avoidance objectives are not as such illegitimate or susceptible to criticism, the actual problems are the lack of legitimacy of international organizations like the OECD to influence the court and the limits of the legitimacy of the CJEU within the legal framework of the EU to implement these political ideas.¹⁹⁴ This consequently leads to a lack of legal certainty for taxpayers arising from this change of stance by the court. While it cannot be said that the fight against avoidance, even with recourse to a general principle of anti-abuse, is fundamentally new, what is proposed by the CJEU represents a mixture of disconnected concepts and ideas. It blends OECD concepts and EU (secondary and primary) law,¹⁹⁵ while simultaneously disregarding previous case law dealing with these same issues.¹⁹⁶ This is made in an ambiguous and uncertain manner which is particularly unfortunate since the decisions in question were handed down by the grand chamber and therefore seem to be the last word for now.¹⁹⁷

Notes

¹⁸⁷ CJEU Case C-135/17, *supra* n. 7, paras 86, 89.

¹⁸⁸ See generally *supra* s. 2.1.

¹⁸⁹ See Stefanie Geringer, *The EU's Uncoordinated Approach to Tax Avoidance and Tax Abuse in Relation to 'Uncooperative' Tax Jurisdictions*, 50 Intertax 208 (2022), doi: 10.54648/TAXI2022020.

¹⁹⁰ See Schön, *supra* n. 39, at 300. See in this context also CJEU Case C-484/19, *Lexel*, 20 Jan. 2021, ECLI:EU:C:2021:34, paras 49–57, where the court used the 'wholly artificial arrangements' wording again in a freedom of establishment case.

¹⁹¹ See in this context De Broe, *supra* n. 52 (arguing for a single anti-abuse concept in EU law with distinct effects in different areas of law and with a different test in third country cases of free movement of capital than in freedom of establishment cases) under reference to CJEU Case C-484/19, *supra* n. 190. See also *supra* n. 80.

¹⁹² Compare Schön, *supra* n. 39, at 299.

¹⁹³ Philip Baker, *The BEPS Action Plan in the Light of EU Law: Treaty Abuse*, Brit. Tax Rev. 408, 416 (2015).

¹⁹⁴ For the conflict of input and output legitimacy, see *supra* s. 2.2.

¹⁹⁵ Much like a legal transplant from a foreign jurisdiction – in this case, through the judiciary. For details on legal transplants and the influence of international organizations in shaping legal reform, see Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765 (2021).

¹⁹⁶ For the unclear compilation of anti-avoidance concepts in recent CJEU decisions, see Larking, *supra* n. 94, at 27.

¹⁹⁷ See Englisch, *supra* n. 35, at 517.