RIGA GRADUATE SCHOOL OF LAW

Investigating the borderline between illegal tax evasion and lawful tax planning under article 49 of TFEU (freedom of establishment principle).

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) …….

RIGA, 2023

ABSTRACT

Aim of this research was to achieve a thorough analysis of what could be a borderline between illegal tax avoidance and lawful tax planning. Within the process of research some indicators to shape the borders of lawful tax planning were found, however, by the end of the day it was understood that in the international tax law landscape there is still no uniform common explanation of tax evasion and tax planning. The root of this can be found in the Article 6 of ATAD (Anti-tax avoidance directive). Which constitutes standards for national laws to oppose tax avoidance. While bearing the burden of tackling tax avoidance MSs shall not come to abuse of EU fundamental freedoms by too strict national tax legislation. It was concluded that absence of uniformity in understanding tax planning and tax evasion is contributing to countries' sovereignty in a way how their tax authorities and judiciary choose to exercise their powers and cherish the supremacy of EU law.

Keywords: Tax evasion, tax avoidance, tax planning, jurisdiction to tax, freedom of establishment, anti-abuse rules, digital economy, international cooperation.

Summary

The aim of this research was to achieve a thorough analysis of what could be a borderline between illegal tax avoidance and lawful tax planning within a context of the Freedom of Establishment, by being one of fundamental freedoms provided by the TFEU. As to the topicality of the research, it is conducted according to the finest canons of academic world, since the lion's share of sources is up to date, the research itself is conducted through the lenses of contemporary gradually digitalising tax law arena and modern challenges are taken into account. The research consists of three main parts, which headings are speaking for themselves.

The first chapter is navigating tax avoidance and tax planning landscape in EU and beyond. Which expands to the meaning of relevant tax law terms with definitions from OECD glossary and prominent scholars. Followed by the synopsis of tax nature including examples of tax avoidance methods, after that the international tax law structure is introduced. Which is wrapped up with the most relevant and recent legal measures to tackle tax avoidance. Those are namely: OECD BEPS project, OECD MLI, Pillar I and Pillar II to address tax challenges arising from digitalisation, CCCTB (BEFIT), and the synopsis of GAARs in national legal systems. Within the process it was found out that with the flow of time some instruments have failed and were later on altered to more concise and contemporary versions. In addition, since it is known that tax rates do affect government tax revenues. In order to access how slight changes in tax rates have affected national GDPs, a curious graphical representation of ratio of some countries' tax revenues is shown as a percent of each countries' GDP. Altogether the first section is concluded with the idea that despite all failed versions of instruments designed for combating illegal tax practices, the ongoing process of considering how to create a uniform and efficient international tax policy shall lead to aligning taxing nexus with the respective establishment or let it be significant digital presence. Anyways, the taxing nexus shall be connected to physical or digital place where economic value is created.

Given the solid foundation for further investigation, the second chapter is providing an analysis of anti-avoidance measures compliance with general freedoms of the EU. It begins with the judicial practice within the tax avoidance context, arriving to thorough ECJ practice analysis on examples of the following case-law: Halif, Cadbury Schweppes, Halifax, Kofoed, 3 M Italia Spa, Skatteministreriet, Centros, Marks & Spenser, Gallaher Limited and additionally Google Ireland Limited v. Hungary later in sub-section 3.2. Each of precedents are pivotal to this research, however here are extracts from some of them. In case of Skatteministreriet the Court acknowledged that national anti-tax abuse rules (GAAR) shall not cancelled by the existence of fundamental freedoms of the EU. Whereas, completely opposite to mentioned hereinabove case appeared in Google Ireland Limited v. Hungary, where Hungary had "lost" to Google's European subsidiary when it tried to impose disproportional advertisement tax on advertisements in Hungarian with penalties for foreign company for not paying in-time and what Google did was to file a lawsuit with regard to discrimination of a foreign MNE and a failure to denote a taxing nexus. Hence, there are cases when national tax laws were acknowledged to be abusing EU fundamental freedoms and vice versa.

Third chapter constituted recent initiatives for structuring and systematising corporate tax lawfully. Opportunities for future evolution of legal framework regarding aggressive tax planning included such initiatives as DEBRA, BEFIT along with a concern about the rapidly developing AI integration in all areas around the globe. As it goes without saying that huge investments are made to its development from both sides, taxpayers and taxation policy institutions. Some of relevant concluding considerations is idea that there is a need to devote attention and distinguish political nature of tax formation, activities promoting transparency and management of cross-border tax competition that as a spin-off shapes prospects for tax avoidance.

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LIST OF ABBRIVEATIONS

ATAD	Anti-Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
BEPS action plan	15 actions to address tax avoidance
(BEPS) IF	(BEPS) Inclusive Framework
BEFIT	Business in Europe: Framework for Income Taxation
CCCTB	Common Consolidated Corporate Tax Base
CFC	Controlled Foreign Corporation
CIT	Corporate Income Tax
CRS	Common Reporting Standard
DEBRA	Debt-Equity bias reduction allowance
ECJ	European Court of Justice
EU	European Union
G20	Group of Twenty
GAAR	General Anti-Avoidance Rule
IBFD	International Bureau of Fiscal Documentation
MNE	Multinational enterprise
MS	Member State country to the EU
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PwC	PricewaterhouseCoopers
TFEU	Treaty on the Functioning of the European Union
TT	Tax Treaty
SDP	Significant Digital Presence
UN	United Nations

Introduction

Digital economy has added a plethora of implications to the quite recent format of globalized arena of economic relations. Along with the gradual global shift to digital form of transactions it has become more difficult to trace money inflows and outflows between countries. However, difficult does not imply impossible. Thus, such world-scale institutions as IBFD, OECD, etc. incorporate dozens of hours and resources to tackle corporate taxation issues arising from free-trade in digital era and a number of national tax systems which occasionally undermine one another. Issues addressed are tax evasion, tax avoidance and tax planning when it comes to taxing profits of multinational enterprises (hereinafter referred to as "MNE"), *i.e.*, corporate income tax. The question of deciding upon correct taxation approach to beneficiary's income is rather complex since approaches vary. It could be beneficiary's place of inhabitation or it can be the place of establishment where value is being created, or from another perspective – it can still be the place where revenue is made or where it is collected.

Treaty on the Functioning of the European Union with its Article 49 was chosen as the main legislative act for this research.[1] It is referring to the freedom of establishment principle and its implementation through EU policies. Diving into teleological means of this article opens up additional space for interpreting the biggest legal problem of this research, *id est,* when it comes to deciding upon where to tax income generated by MNEs – shall freedom of establishment principle allow for free choice of tax jurisdictions that could be more favourable for the beneficiary than the initial inhabitation country jurisdiction or shall the General Anti-Avoidance Rule (hereinafter referred to as "GAAR") literally rule over tax avoidance practices as it shall according to *lex specialis* principle? In other words, does freedom of establishment under article 49 of TFEU presume only the need to keep MNEs their right to freely choose markets and jurisdictions they enter, or does it allow even protection of MNEs beneficiaries' incomes when they are freely allowed to choose the jurisdiction where the income would be generated and afterwards taxed. The more you dive into the problem – the more complex it might seem, *id est,* does freedom of establishment cover only the place of establishment of MNE when it comes to taxing rights or it includes also the place where value is created, a place where income is being generated and the beneficiary's inhabitation country?

These questions represent the extensiveness of due diligence required when it comes to accessing taxation of income generated by MNEs. To solve the mentioned hereinabove legal problem, the following methodology is going to be utilized through the chapters. In the first section of respective research, the author implements a doctrinal legal research methodology in order to investigate legislation using historical approach to assess development of legal recognition of tax avoidance and tax planning concepts. Whereas, the second section implies the use of analytical approach for interpretation of the Freedom of establishment principle and connecting its teleological side to both tax law concepts which are principal to this research. Lastly the non-doctrinal comparative approach serving as a qualitative method, which will be based on case studies shall be implemented to answer the research question and draw the line between tax avoidance and tax planning under the freedom of establishment principle. At the same time, disciplinarity of the research lies in the heart of this research, which is tax law. Meaning that the paper would connect legal, economic and finance disciplines.

[1] European Union. Consolidated version of the Treaty on the Functioning of the European Union. 13 December 2007, 2008/C 115/01. Available on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF. Accessed: May 10, 2023.

Legal research question to this thesis is the following. *What is the borderline between tax avoidance and tax planning in corporate taxation under the freedom of establishment principle (Art. 49 of TFEU), noting that one is strictly illegal and another is lawful?*

Whereas the aim of this research is hidden in the legal research question, it is to achieve a thorough analysis of what could be a borderline between illegal tax avoidance and lawful tax planning. The main legislative act to be used in this paper is Treaty on the Functioning of the European Union, and to be more precise an Article 49. Which stands for the Freedom of establishment principle. Limitation scope of this research includes, but is not limited to absence of one commonly recognized tax system to ease conflicts of a tax nature, constant changes in geopolitical arena speaking of sanctions and modifications in countries accesses to world banking systems, necessity to support states in decarbonization, current worldwide trend on shifting to digital payment methods less cash. New legal tools being created and implemented in order to keep up with the global trend of unification and to create an internationally recognized fair tax system.

As to the structure of this thesis, it consists of three principal parts organised in a consequential way, so that the reader would dive into the topic in the most natural way starting from description of respective notions and elaborating on international legal instruments to combat tax avoidance followed by EJC practice in resolving tax evasion cases and ending up with the future propositions in the area. Whereas each chapter headline speaks for itself. The first section provides a description of tax avoidance concepts, speaks of tax avoidance nature and is concluded by international legal measures used to tackle illegal tax avoidance, which altogether is a navigation through tax avoidance and tax planning landscape in EU. The second section is concentrated around Freedom of Establishment principle and judicial practices when applying it to tax evasion cases. There, author presents cases regarding such notion as "wholly artificial arrangement" in relation to freedom of establishment principle. This chapter concludes on an identification of a conflict between tax avoidance and tax planning given court decisions in studied case law. Last but not least is the third section which discusses recent initiatives to structure and systematize corporate taxes lawfully, since a transparent tax system could accelerate the process of assimilation to a most contemporary approach to treat income, pay and receive taxes.

Given the fact that tax policy as a kind of social contract between a taxpayer and a country, consequently it follows that such relations shall be maintained decently in order to serve best interests of both parties, as well as stay neutral, efficient, effective, fair and flexible as it is according to OECD publishing.[2] Which means that unreasonable implications better be eliminated from this type of social contract in order to achieve a better transparency and faithful fulfilment of obligations from each side. Mentioned hereinabove tax transparency is a notion that presume transparency of borders when it comes to tackling tax evasion with the help of multicultural cooperation. In addition, flexibility principle in this regard is what stands for the need to keep up with recent changes in the world economic and political arena and still maintain sustainable taxing environment in the epoque of digitalised economy. Referring back to the idea of a contract between a state and a taxpayer – it is called nexus, a connection between a tax jurisdiction. As to the rule of the law, if there is no connection among a taxpayer and a state –

[2] OECD, *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2014, p. 30. Available at: https://doi.org/10.1787/9789264218789-en. Accessed: June 6, 2022.

then no tax can be imposed on a taxpayer. In addition, the notion of tax nexus is beautifully mentioned in chapters 1 and 3 in case of Google vs. Hungary.[3]

Keeping in mind the rule of law principle and separation of powers, as well as the need for undisputably fair exercise of controlled powers of tax authorities given by tax law, the legislation both national (GAARs) and supranational shall be synchronized in such a way that could minimize illegal avoidance and maximise the fairness through every page of legislation piece. There is such a need for that since it has been noted that tax avoidance consequences affect distribution of wealth and income since authorities gather seemingly less in public resources.[4] Hence, GAAR by being a legal tool aimed at ensuring fair and transparent tax administration has all potential to empower supranational requirements in it and to strengthen transborder economies.

[3] Section 3.2. “Recent challenges in tax evasion and tackling tax avoidance”.
[4] Wouter Leenders, Arjan Lejour, Simon Rabaté, Maarten van ’t Riet, "Offshore tax evasion and wealth inequality: Evidence from a tax amnesty in the Netherlands", Journal of Public Economics, Volume 217, 2023. Available at: https://doi.org/10.1016/j.jpubeco.2022.104785. Accessed: March 16, 2023.

1. Navigating Tax avoidance and Tax planning landscape in EU and beyond

It is known that economic feasibility and legal coherence is an utmost thing that shall characterize all legal tools aimed at addressing disputes of tax nature. Navigating tax landscape in the context of this paper stands for overviewing practices of countering aggressive tax behaviour together with practices that ensure compliance with respective tax provisions. In general, tax law is a constantly expanding and developing legal framework dealing with jurisdictions for tax disputes and tax charges globally. Such framework is constantly developing since organisations as e.g., OECD is in a permanent process of addressing issues of economic co-operation for member states and even third-world countries. For instance, BEPS IF is an Inclusive Framework is a society of around 130 countries willing to implement standards proposed by BEPS action plan, which, in addition, is much more than initial number of countries that re deemed to be OECD members.[5]

Moving forward, apart from a UN tool tool for addressing the respective issue (United Nations Model Double Taxation Convention Between Developed and Developing Countries, 1980)[6], there is a OECD model treaty, i.e., a Model Tax Convention on Income and Capital[7] that countries utilise to come together with fair approach to taxing rights and solutions which are needed to resolve tax conflicts that arise between their countries' inhabitants or address circumstances with double taxation and double non-taxation, along with proper approach to credit methods on each side. Such bilateral treaties are extending the borders of its usage across various countries' borderlines, since TTs by providing a legal regulatory framework for taxing capitals, profits and investments ensure a decent commitment consolidation given by states transnationally. Even more relevant is that OECD by request of G20 has provided a BEPS initiative with a BEPS action plan of 15 actions aimed at tackling tax avoidance.[8] The need for such tool was undoubtful since it was noted by OECD that the number of countries were seemingly affected my MNEs active exploitation of mismatches and opportunities for no-tax gaps in various countries' tax jurisdictions.[9] Mentioned hereinabove gaps are so-called offshore tax jurisdictions with lowered or even not at all tax rates on e.g., dividends, royalties or income. In Latvian legislation respective matter is described in section 4 *id est* Taxable Base under the "Enterprise Income Law"[10]. Which is complemented with the list of concrete countries in the provision named "Regulations Regarding Low-Tax or Tax-Free Countries and Territories (with amendments to 11.01.2022)".[11]

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[5] OECD, "International Collaboration to end tax avoidance". Available at: https://www.oecd.org/tax/beps/. Accessed: May 9, 2023.

[6] UN, "United Nations Model Double Taxation Convention between developed and Developing Countries". New York: 2017. Available on: https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf. Accessed: May 9, 2023.

[7] OECD, "Model Tax Convention on Income and Capital" (Condesed Version), (2017). Available on: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page27. Accessed: March 10, 2023.

[8] *Supra*, note 2.

[9] *Supra*, note 5.

[10] Uzņēmumu ienākuma nodokļa likums (Enterprise Income Law): adopted by Saeima on 27.07.2017. Available on: https://likumi.lv/ta/en/en/id/292700-enterprise-income-tax-law. Assessed: March 15, 2023.

[11] Noteikumi par zemu nodokļu vai beznodokļu valstīm un teritorijām (Regulations Regarding Low-Tax or Tax-Free Countries and Territories): Ministru kabineta 2020.gada 17.decembra noteikumi nr.819. Available at: https://likumi.lv/ta/en/en/id/319726-regulations-regarding-low-tax-or-tax-free-countries-and-territories. Accessed: March 15, 2023.

Notedly, all mentioned hereinabove has become a ground for OECD coming up together with a thorough and effective solution to end or at least minimize tax avoidance by base erosion and profit shifting. Moreover, tools for addressing the situation include another OECD/G20 proposition which is a Two-Pillar solution focused on combating tax challenges that arose from digitalised economy discussed in section 1.3.2. in more details.[12] It is stated that to November 2021 more than 135 countries have admitted and become involved in this Two-Pillar plan in order to ensure that in any country of MNE operation, the international income tax would be paid fairly and proportionally as to where the MNE income was generated.[13] This section reviews tax avoidance and tax planning landscape predominantly in EU MS, by beginning with respective notions descriptions, followed by tax avoidance nature on example of transfer pricing and concluding with international legal measures to tackle tax avoidance issues.

1.1. The meaning of tax avoidance related concepts

When it comes to tax behaviours, there is a range of them which could be split into legal and illegal. Those are namely tax evasion (i.e., tax fraud), tax avoidance, tax planning. This sub-section provides definitions of relevant concepts, a synopsis of tax avoidance nature and legal measures to tackle tax avoidance nationally and internationally. It was mentioned earlier hereinabove that tax planning is an only permissible form of tax behaviour, however there is such a notion as aggressive tax planning. Which is when an advantage is taken of mismatches between tax jurisdictions with a purpose to reduce a taxpayer's tax liability. Additionally, it needs to be mentioned that when discussing upon tax jurisdictions the attention point would be local substance and economic substance. In brief, it is an understanding that MNEs shall bear a decent volume of economic activity along with undisputable presence in the country where their tax jurisdictions were chosen. The following sub-sections would contain thoughts and examples from such prominent institutions and authors as IBFD, OECD, CJEU as well as Raffaele Russo, Ana Paolo Dourado and Janis Zelmenis.

1.1.1. Tax evasion

Tax evasion is commonly considered as intentional and illegal tax behaviour which constitutes an evil ntent to evade tax payment and minimize tax liability to its minimum amount.[14] Minimization of tax liability in such case is mostly achieved by illegal arrangements which ensures that tax liability would be hidden by concealing relevant information from domestic tax authorities or by concealing generated income and wealth in tax havens.[15] The OECD glossary does not offer any concise or not so elaboration for tax evasion, however it mentions that, "shell company [is] a company set up by fraudulent operators as a front to conceal tax evasion schemes."[16] Consequently, tax evasion is a subject to penalties, fines or even imprisonment since it is a tax scheme of a fraudulent nature. Speaking of tax evasion, it is just a kind of tax fraud. Whereas tax fraud is a much bigger crime constituting purposeful dishonest fraudulent activity, cheating by submission of false financial statements and fake documentation or even

[12] OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy", October 8, 2021. Available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf. Accessed: March 15, 2023.
[13] *Ibid*.
[14] *Supra*, note 4.
[15] *Ibid*.
[16] OECD, Glossary of Tax Terms. Available at: https://www.oecd.org/ctp/glossaryoftaxterms.htm. Accessed: May 9, 2023.

an intent to reduce a liability to pay tax to zero. In its turn tax evasion constitutes not only direct taxation field cases but also indirect, for instance ones of the loudest VAT fraud cases were Halifax and Italimoda, where in the last the question posed was whether tax authorities and national legislative bodies can decide to refuse a tax exception when the tax fraud was committed.[17,18]

1.1.2. Tax avoidance

In its turn, tax avoidance is a term that lies between tax evasion and tax planning as a grey area, since the first is strictly illegal and the second is lawful. It is said that, "[a]voidance can be described as an arrangement leading to tax advantages, the granting of which is not intended by the legal system."[19] GAARs by national tax jurisdictions usually clarify obstacles in which a taxpayer would be denied in special tax arrangements. Such obstacles could be absence of economic and legal substance, *fraus legis*, etc. Tax avoidance shall bear a part of an answer to proposed research question by being a grey area between criminal or administrative tax evasion and tax planning which is said to be a "fundamental right"[20] of a taxpayer. As example, the Supreme Administrative Court of Austria has established that tax avoidance corresponds to such tax behaviours which tend to seem not normal and inadequate in relation to its commercial outcome, addressed with the aim to avoid the imposition of taxes and more often in a shape of numerous transactions. Which is not contradicting the principle of abuse.[21] To be more precise, the date when GAARs were introduced might be regarded as a moment of accoutrement and recognition of tax avoidance. It was the CJEU where pressure was put to the recognition process while concluding decisions in such cases as Halifax[22] and Cadbury Schweppes[23] (discussed later in section 2) which became landmark case-law in International Tax Law discipline.

1.1.3. Tax planning

While it is generally considered that lawful tax planning is deemed as the one and only lawful tax behaviour to deliberately change tax base that so that it would be permittable to tax authorities, the OECD glossary provides the following definition for tax planning, "[a]rrangement of a person's business and /or private affairs in order to minimize tax liability."[24]. PwC Latvia has provided information on the situation in Latvia, stating that "[e]ffective tax planning can be challenging, given the complexity of the Latvian tax code. However, done properly, tax planning can provide significant benefits for your overall financial picture"[25], consequentially if in Latvia tax planning is a rather complex activity to carry out, then more

[17] Judgement of 21 February 2006. *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd* v *Commissioners of Customs & Excise*. Case no. C-255/02.
[18] Judgment of the Court (First Chamber), 18 December 2014, Staatssecretaris van Financiën v Schoenimport 'Italmoda' Mariano Previti vof and Turbu.com BV and Turbu.com Mobile Phone's BV v Staatssecretaris van Financiën, Joined Cases C-131/13, C-163/13 and C-164/13. ECLI:EU:C:2014:2455.
[19] Ana Paula Dourado, *Tax Avoidance Revisited in the EU BEPS Context*, IBFD: EATLP Annual Congress Munich, June 2016, Volume 15. Available at: https://www.ibfd.org/sites/default/files/2021-04/17_036_tax_avoidence_revisited_EATLP_15_final_web.pdf. Accessed: March 16, 2023.
[20] *Ibid*.
[21] *Ibid*.
[22] *Supra*, note 17.
[23] Judgement of 12 September 2006. *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd* v. *Commissioners of Ireland Revenue.* Case no. C-196/04, EU:C:2006:544.
[24] *Supra*, note 16.
[25] PwC, on Tax Planning. Available at: https://www.pwc.com/lv/en/about/services/tax/tax-planning.html. Accessed: May 9, 2023.

significant aspects of questionable tax behaviour shall better be forgotten in the context of Latvian tax legislation. Latvian Attorney Janis Zelmenis in his paper provides concisely that,

> "[t]raditionally, types of tax planning include the classic and legitimate tax planning (aimed at ensuring correct and timely payment of taxes, accounting systems and reports), optimisation of tax planning (tax avoidance/tax mitigation), illegitimate tax planning (tax evasion). The focus of this article is legitimate tax planning."[26]

As the most lawful tax behaviour, tax planning is studied from various surprising angles, for instance it was found that "tax department human capital is a central determinant of tax-planning outcomes"[27] and that researched company's tax behaviour was changing to aggressive tax planning side when an employee was hired from a company known for conducting aggressive tax planning actions. Within the context of the IBFD book on tax avoidance mentioned hereinabove, it was mentioned that tax planning itself is not a legal concept and that it is on each MS tax administration to decide whether a tax behaviour is a lawful tax planning or not. To continue, also in the view of IBFD it is considered that arm's length principle and PE are the fundaments of tax planning.[28] Overall, tax planning is a strategy implemented by MNEs in order to reduce taxes legally inasmuch possible for staying within the borders of what is deemed permitted.[29,30]

1.2. Synopsis of tax avoidance nature (tax credits and deductions, transfer pricing, income exclusion, "patent box" utilisation and tax competition)

Overall tax avoidance nature could be explained through greed and avarice, since each party i.e., either MNE's or individual versus the state government wishes to collect inasmuch as possible. Without a thorough investigation and analysis, it could be imagined that a vicious circle of taxes would exist as follows – state's government wishes to fulfil treasuries with public revenues and what they come up with is exactly to rise a tax rate. In response a taxpayer feels unwillingness to share earning with the state and go for tax avoidance schemes. As a post-effect, less taxes are being paid meaning that less resources are injected into state's economy and thus, both grey and shadow economies are being stimulated. Consequently, a conclusion would be that tax does potentially influence whole corporate behaviour. However, since it is just an imagined path of thought, by looking at real life example it becomes understandable that tax is the biggest obligation to pay or a bill that a MNE has to pay by the end of an accounting period, which most of the times is a year period.[31] Since various countries choose various approached to legislation and administrative power exercise, as a result tax legislation also varies. Which creates a plethora of opportunities for tax avoidance by finding loopholes between tax jurisdictions. Fortunately for government treasuries and common good in the shape of wealth

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[26] Jānis Zelmenis, "Definition of Tax Planning in the Case Law of the Court of Justice of the EU (ECJ)", SOCRATES, 2022, Nr. 2 (23), p. 135. Available at: https://dspace.rsu.lv/jspui/bitstream/123456789/9654/1/Socrates-23_10_Zelmenis-Jaanis_132-144.pdf. Accessed: May 2, 2022.

[27] John M. Barrios , John Gallemore, "Tax Planning Knowledge Diffusion via the Labor Market", Management Science, 7 April 2023. Available at: https://doi.org/10.1287/mnsc.2023.4741. Accessed: April 9, 2023.

[28] Russo Raffaele, C. Finnerty, P. Merks, M. Petriccione, *Fundamentals of International Tax Planning*, Amstaerdam: IBFD (2007), ISBN: 9789087220167.

[29] *Ibid*.

[30] Maggie Cooper, Quyen T.K. Nguyen, "Multinational enterprises and corporate tax planning: A review of literature and suggestions for a future research agenda", International Business Review, Volume 29, Issue 3, 2020. Available at: https://doi.org/10.1016/j.ibusrev.2020.101692. Accessed: March 16, 2023.

[31] *Ibid*.

distribution[32], those loopholes are being plugged by respective legislation (discussed in sections 1.3-1.5) and international cooperation i.e., collection and exchange of information for tax authorities. Nevertheless, it is known that for countries it's better to receive less via taxes, but to boost the economy via enlarging it with the usage of supporting measures to maintain enterprises.

However, as long as there would exist the need to give away financial resources, there would appear those enterprises and individuals who are willing to risk their welfare by trying to: utilise a low-tax jurisdiction by registering there an artificial affiliate of holding companies and conducting a royalty-dividend scheme there (e.g. double Irish with a Dutch scheme)[33], eroding tax base by shifting profits to offshores, make a fortune on any of transfer pricing methods (e.g. comparable uncontrolled price method, resale price method, cost plus methos, transactional net margin method, profit split method) which is known as a "vehicle in corporate tax avoidance"[34], exploit tax credits and deductions in a sense of double non-taxation (covering OECD Model Tax convention Articles 23 A, 23 B)[35], income exclusion (i.e. falsifying that requirements for non-taxable income are met), putting revenues in a "patent box"[36] (i.e. a tax regime created for IP needs and support of R&D in a number of countries). Companies place financial resources in so-called patent box by registering money as a resource for R&D and as a result the tax is either not levied from patent box or the tax rate is minimal. Countries with "patent box" allowances include such countries as Lithuania, Luxembourg, Belgium, Switzerland and others. A figure 1.2.1. reflects a visible contrast between patent box tax rates and CIT tax rates in several EU MS countries. Which makes it unquestionable – why companies choose such path to navigate their taxing behaviour.

Figure 1.2.1.

Patent box regimes and Corporate Income Tax rates in some Europe's countries (2022)[37,38]

Country name	Tax rate under patent box regime	Corporate Income Tax rate
Belgium	3,75%	25%
Lithuania	5%	15%
Luxembourg	4,99%	24,94%
Switzerland	from 8,11% to 11%	varies from 11,9% to 21%
San Marino	from 0% to 8,5%	17%
Malta	1,75%	35%
Portugal	3,15%	21%

[32] *Supra*, note 14.
[33] Danielle Thorne, "The Double Irish and Dutch Sandwich tax strategies: Could a general anti-avoidance rule contract the problems caused by utilisation of these structures?", Victoria University of Wellington: LLM Research paper, Laws 516 (2013), pp. 23-24. Available at: https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/3252/thesis.pdf?sequence=2. Accessed: March 25, 2023.
[34] Barker Joel, Kwadwo Asare, and Sharon Brickman, "Transfer Pricing As A Vehicle In Corporate Tax Avoidance". *Journal of Applied Business Research (JABR)* 33 (1):9-16, 2016. Available at: https://doi.org/10.19030/jabr.v33i1.9863. Accessed: March 16, 2023.
[35] *Supra*, note 7.
[36] Daniel Bunn, "Patent box regimes in Europe", *Tax Foundation*, August 23, 2022. Available at: https://taxfoundation.org/patent-box-regimes-europe-2022/. Accessed: March 17, 2023.
[37] OCED, Table II.1. Statutory Corporate Income Tax rate. Available at: https://stats.oecd.org/Index.aspx?DataSetCode=TABLE_II1. Accessed: March 17, 2023.
[38] OECD, Table of Intellectual Property Regimes. Available at: https://qdd.oecd.org/data/IP_Regimes. Accessed: March 17, 2023.

Moreover, speaking of tax avoidance even a distortion of competition takes place. For instance, in a situation where two countries are promoting their low-tax jurisdictions and by means of which distorting healthy competition. Since the aim to set up the EU was to create a single market with provided freedoms for movement of goods, services, capital and labour across the union – on such basis MS view some tax measures as their opportunities for attracting foreign enterprises to carry out economic activities in a given MS. One of such measures would be exactly unfair tax competition. In this sense it is when countries are attracting foreign capital into domestic economy by creating visibly better environment for legitimate economic activity. Hence, unfair it is since on a background of a single market economy it is a tax rate what determines inflows of enterprises and their fiscal resources and no other economic indicators such as demand. Thus, tax competition is a notion that correlate negatively with the initial essence of a single market ecosystem. It was said that tax competition is a kind of activity that involves a country which tends to unlawfully encourage some inflow of taxable profits into its domestic economy by utilising the means either of lowered tax rates or similar to neighbouring countries' tax advantages. This paragraph was inspired by "Corporate Tax Systems and Cross Country Profit Shifting" Oxford economic paper.[39]

There are residences which tax jurisdiction are not difficult in attempt of determination, however there are the opposites called tax havens. Tax havens are known as hidden avenues utilised actively for inflows of funds from their owners' residence states to states in which foreign investments are injected. It is also a place where tax competition takes place and enters a game. In order to attract additional funds, source countries choose to abolish withholding taxes on income of nature described in a previous line. Which altogether results in a situation where e.g. a wealthy individual navigate his or her investment via tax haven path – that would result in a no taxation situation. In such example, the erosion of tax base could be eliminated via exchange of information between tax haven and ordinary tax rate jurisdictions. For the reason that access to tax information would prevent a situation where source tax jurisdiction country has no withholding tax and a residence country do not possess information regarding investment made in tax haven jurisdiction. This paragraph was inspired by the "Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight" journal article.[40]

1.3. International Tax law structure and legal measures in international taxation relevant to tackle tax avoidance

To begin with legal measures in international taxation aimed at addressing tax avoidance it is worth illustrating the structure of International Tax Law. As shown in Figure 1.3.1. the hierarchy is the following. These three levels co-exist together, namely National tax law, TT and EU tax law together with with multilateral agreements.[41] To be more precise, domestic tax law this structure is the weakest part, since taxation treaties and EU laws are overriding national MS laws – and so is visualised in the figure. Prominent academic researcher Dr. Katia Cejie in her book is writing about how these three parts of international tax law co-exist together, as

[39] Andreas Haufler and Guttorm Schjelderup, "Corporate Tax Systems and Cross Country Profit Shifting," *Oxford Economic Papers* 52, no. 2 (2000): 306–25. Available at: http://www.jstor.org/stable/3488688. Accessed: March 17, 2023.

[40] Reuven S. Avi-Yonah; Haiyan Xu, "Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight," Harvard Business Law Review 6, no. 2 (Summer 2016): 185-238, pp. 189-190. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/hbusrew6&collection=journals&id=195&startid=&endid=248. Accessed: March 18, 2023.

[41] *Supra*, note 39.

well as that at different levels of the structure different solutions are proposed to arising tax law issues, nonetheless all three levels shall be constantly regarded.[42] As shown in the figure 1.3.1. if domestic tax law was compared to EU tax law, it would not be seemingly as authoritative and powerful, which is so due to the supremacy of international law over national law. It is a principal tradition in EU that international law is supra-national, which means prevails national laws. Which is a European Union doctrine of supremacy of EU laws domination over EU MS domestic laws which the CJEU has established in a case-law of Costa v. ENEL[43].

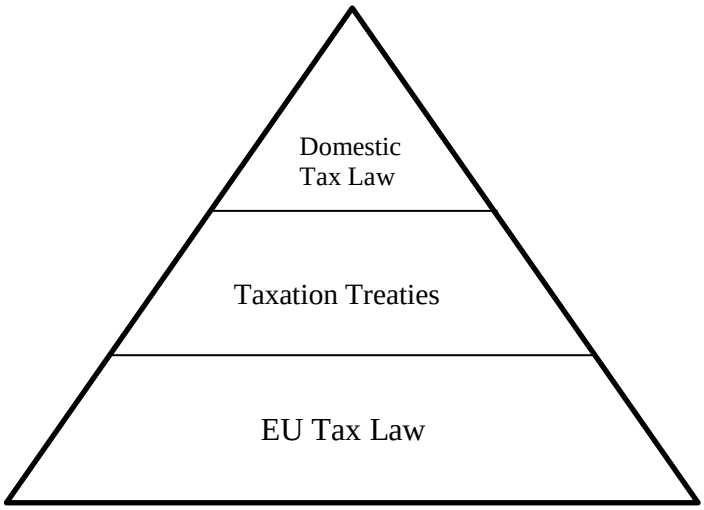

Figure 1.3.1. P. Busarova, Structure of International Tax law.[44]

For the means of this paper, domestic tax law in this hierarchy would be mostly viewed on example of GAARs, which are domestic tax law would be represented as General Anti-Abuse Rules that are provisions that gives powers to national tax authorities to deny reduction of taxes (tax benefit) for illegal arrangements with a pure intention to reduce the tax, i.e. no economic substance. Structure of the pyramid is gradually leading to Double Taxation Treaties which are concluded by countries primarily to mitigate such situations along with tax avoidance. Hence, it is important to underline the urge to recall fundamental legal tools for the most correct interpretation of TT. Which is Vienna Convention on the Law of Treaties and to be more specific, its articles from 31st to 33rd. Such importance to mention is dictated by the fact that this convention has established principles utilised for all treaties including the ones which regard taxes.[45] Mowing forward, an additional tool was developed to supplement and correctly implement the OECD/G20 BEPS project – *id est* MLI, Multilateral Convention to Implement Tax Treaty (hereinafter, referred to as "TT") Related Measures to Prevent Base Erosion and Profit Shifting. Worth mentioning that MLI instrument still allows countries to select their special prerequisites when it comes to resolving cross-border tax conflicts. To wrap up, national tax laws shall be applied afterwards the ones stated by TTs.[46]

[42] Katia Cejie, Martin Berglund, *Basics of International Taxation, From a Methodological Point of View*, *Iustus:* (2018) , pp. 14-15. Available at: https://iustus.se/book/basics-of-international-taxation/. Accessed: May 9, 2023.
[43] Judgement of 15 July 1964. *Flaminio Costa* v *E.N.E.L*. Case no. 6-64.
[44] Peter Harris, "Fundamentals and Sources of International Tax Law," Chapter In *International Commercial Tax*, 2nd ed., 9-60. Cambridge Tax Law Series. Cambridge: Cambridge University Press, 2020, p. 9. Available at: doi:10.1017/9781108774994.003. Accessed: March 18, 2023.
[45] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, p. 331, pp. 12-13. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Accessed: March 18, 2023.
[46] *Ibid*.

1.3.1. OECD: MLI and BEPS action plan representing latest standards to tackle Tax Avoidance

This sub-section is devoted to assessment of an OECD/G20 BEPS action plan consisting of 15 actions aimed at tackling tax avoidance in a plethora of countries as well as an assessment of an overall response to tax avoidance in BEPS context. OECD inclusive framework along with BEPS action plan shall be interpreted as a development of a most contemporary nexus acknowledged on a multinational level, which is of utmost importance since with the trend on significant digital presence (hereinafter, referred to as "SDP"), digitalised economy new nexus in context of tax avoidance is one of top notions to discuss.[47] Whereas BEPS IF is a commitment of 140+ countries to counter monetary revenue losses from BEPS which is counted to be 100-240 USD billion annually according to the recent data available of 2022.[48,49] Moreover, mentioned 100-240 USD billion is about 10% of the global corporate tax revenue.[50,51] Moving on with the key indicators, it is known that 100 countries signed MLI from which 79 ratified, with its articles being principally effective for withholding taxes in 2023.[52,53] It is said that MLI holds a huge role in bringing changes to international taxation systems and is thought to give tax authorities all over the globe to question and contest taxation structures and most transaction in the most efficient and contemporary manner.[54] The most crucial is that MLI instrument would have an effect on almost 2000 TT which means that it is in MNEs best interest to research deeply future effects that MLI will cause on them – since "cross-border dividend, interest and royalty transactions, and existing business operations" would not left untouched.[55]

Mentioned hereinabove 15 actions proposes development of soft law norms for tackling tax avoidance via amendments to national and TT hard laws. To be more precise, mentioned norms counter widely-used avoidance schemes as well as suggest the usage of disclosure rules and anti-avoidance provisions, which are considered as sufficient limitation tools for restricting illegal tax behaviour. It is not a secret that such aims would take a long time before it would become manifested in full. Because MNEs are in possession of huge fiscal resources, which in a current state of world means everything, since principally all economic relations currently are tied on money and thus, can be resolved by it. Which leads to conclusion, that lobbying is still an existing thing and moreover, it will be a continuous notion further. Hence, governments and MNEs are strongly tied together and it is only a question of time to see, how this clash will happen. Since one are interested in hiding savings and another are interested in fulfilling state treasuries in such a way that MNEs would still pay them and continue conducting their economic activities within country's borders.

Altogether this leads to assumption that there is much more possibility to implement transparency laws easier and faster than anti-avoidance rulings. As for instance, a country-by-

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[47] PwC Global, "Base Erosion and Profit Shifting (BEPS) Action Plan", Available at: https://www.pwc.com/gx/en/services/tax/tax-policy-administration/beps.html. Accessed: March 18, 2023.
[48] OECD, Members of the OECD/G20 Inclusive Framework on BEPS, updated December 2022. Available at: https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf. Accessed: March 19, 2023.
[49] OECD, "What is BEPS?". Available at: https://www.oecd.org/tax/beps/about/. Accessed: March 19, 2023.
[50] *Ibid.*
[51] Tax Foundation, "What the OECD's Pillar Two Impact Assessment Misses", January 23, 2023. Available at: https://taxfoundation.org/global-minimum-tax-revenue-impact-assessment/. Assessed: March 18, 2023.
[52] *Supra*, note 48, 51.
[53] Deloitte, "Implementation of the Multilateral Convention", March 15, 2023. Available at: https://www.deloitte.com/global/en/services/tax/perspectives/implementation-of-the-multilateral-convention.html. Accessed: March 18, 2023.
[54] *Ibid.*
[55] *Ibid.*

country reporting and mutual agreement procedures are of a high prospect nature if being compared to e.g., combating TT abuse on example of implementation of BEPS action 7 report which investigates principal methods of abusing PE notion and provides special anti-avoidance norms in relation to Art. 5 of OECD Model Treaty in order to eliminate presence of such abuses.[56,57] In its turn, MLI is a remarkable convention which is about to save tax jurisdictions decades in re-negotiation processes of bilateral TT. By being a tool that bears a potential to increase efficiency if compared to the only existing previous alternative, it establishes the most contemporary approach to addressing tax challenges, amending and altering TT, which altogether was never practiced in taxation world before. Consequently, Multilateral Instrument is admitted to be a progressive move towards performing the BEPS reform. However, since MLI allows for a number of opt-out options, this tool would definitely ease overall treaty network, but not necessarily will it provide a resolution for issues innate of BEPS. Thus, an assumption regarding MLI successfulness by the end of a day is rather pessimistic, since it is highly likely that the instrument would attain only limited triumph in addressing problematics and challenges of contemporary digitalised international tax regime.[58] Overall, it is believed that BEPS context is a first huge step to ensure that contemporary world-wide tax governance is being developed keeping up with the pace of time.[59]

1.3.2. OECD: Two pillar solution to address tax challenges arising from digitalization

An OECD Two-Pillar Solution is a proposal of a tax scheme which will be applied by countries above their national corporate tax policies that was discussed in 2021 within the OECD/G20 Inclusive Framework on BEPS, afterwards, 138 jurisdictions accepted it by December 2022, however not all IF member jurisdictions agreed and joined the respective proposal.[60,61,62] The aim of 138 IF jurisdiction which have agreed on new solution is to achieve a more fair distribution of rights to impose taxes amid jurisdictions for prosperous and huge MNEs, as well as to establish a fundament of "tax competition by creating a global minimum 15 percent effective corporate tax rate".[63,64] Which effect is awaited to be an increase in tax revenue. On January 19, 2023 on International Tax Review, it was published that "[t]he increase in tax revenue from pillar two's global minimum corporate tax rate is now expected to be about $220

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[56] OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. Available at: https://doi.org/10.1787/9789264241220-en. Accessed: March 18, 2023.

[57] Rifat Azam, "Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS," Suffolk University Law Review 50, no. 4 (2017): 517-586, pp. 575-579. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/sufflr50&collection=journals&id=559&startid=&endid=628. Accessed: March 18, 2023.

[58] *Ibid*, pp. 581-584.

[59] *Supra*, note 40, p.208.

[60] OECD, "Statement on a Two-Pillar Solution to address the tax challenges arising from the Digitalisation of the economy – 8 October 2021". Available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm. Accessed: March 18, 2023.

[61] OECD/G20, "Statement on a Two-Pillar Solution to address the tax challenges arising from the Digitalisation of the economy", *Base Erosion and Profit Shifting Project*, 8 October 2021.Available at: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf. Accessed: March 18, 2023.

[62] *Supra*, note 60.

[63] *Supra*, note 53.

[64] James Nurton, "Two-Pillar solution will lead to more tax revenues, says OECD", *Internatinoal Tax Review*, January 19, 2023. Available at: https://www.internationaltaxreview.com/article/2b62j2k0h83umnht5bw1s/two-pillar-solution-will-lead-to-more-tax-revenues-says-oecd. Accessed: March 18, 2023.

million annually (9% of global corporate tax revenues). This is based on 2018 data and compares with $150 billion a year in the previous estimate, which was published in 2020."[65,66] Additionally, it was mentioned that a half of profits in tax revenue would be collected from digital enterprises, hence it is going to be the MNEs with either SDP or total commerce conduced online. [67] It is known that the EU has also agreed upon enforcement of the global minimum tax, thus it is awaited that by implementating global minimum tax – the overall world tax system would experience a positive effect of stabilisation.[68]

It is worth mentioning that this OECD unified approach is targeted towards taxing contemporary forms of businesses forming new way of conducting economic activity on the market and granting more taxing rights to smaller jurisdictions. MNEs falling withing the scope of this Pillar will meet three-tiers of profit attribution amongst tax jurisdictions. Those are namely: Amount A, B and C.[69] Where amount A regards to a share of considered residual profits which might be distributed to market jurisdictions notwithstanding physical presence in accordance with updated tax legislation and provided rights.[70] Amount B relates to fixed payment rate for baseline marketing is carried out inside the jurisdiction.[71] Lastly, Amount C extends implementation of Amount B, since it covers all extra profits when in-country functions go beyond the baseline.[72] Altogether, this pillar suggestions are centred on the way how successful and extra-profitable internet enterprises can access markets from a distance. In this context every suggestion's purpose is to reassign taxing authorities' rights in favour to the market jurisdiction. Hence, each suggestion calls for updated nexus regulations which do not require actual physical presence in the respective jurisdiction. In other words, to revisit permanent establishment (hereinafter, referred to as "PE") is obligatory.[73,74]

An opposing view to described hereinabove suggestions is provided by the PwC International which reads that there is nothing new in recognition of the presented "Unified Approach" as radical. Since if underlying concepts of each suggestion would not be integrated coherently, then appears risks in attempt to combine norms of each suggestion logically in order to establish a political compromise. An impact if which will have an effect on administration, compliance and long-term stability of the global tax policy. Thus, known benefits shall be compared to these hazards. In addition, it was underlined that dynamics and consequences of new tax policy on enterprises is awaited to be quite diverse. Moreover, interrelationship of effects by Pillar One income redistribution on effective tax rates by Pillar II and the other way around are not discussed. It is stated that the scope of Pillar Two action is outside the aims of the BEPS project in a way that it separates nexus from value creation which leads to lowered

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[65] *Ibid.*
[66] OECD, "Revenue impact of international tax reform better than expected", 18 January 2023. Available at: https://www.oecd.org/tax/beps/revenue-impact-of-international-tax-reform-better-than-expected.htm. Accessed: March 18, 2023.
[67] *Supra*, note 64.
[68] *Ibid.*
[69] OECD, "Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy", OECD/G20 Inclusive Framework on BEPS, OECD, Paris, January 2020, p. 8. Available at: https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf. Accessed: March 18, 2023.
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] Josh White, "OECD presents 'unified approach' to profit allocation", International Tax Review, October 9, 2019. Available at: https://www.internationaltaxreview.com/article/2a6a3wdiumi40dtkhu3up/oecd-presents-unified-approach-to-profit-allocation. Accessed: March 18, 2023.
[74] *Supra*, note 72, p. 8.

taxes in coordinated level. Hence Pillar Two is considered to apply a huge confusion to existing global tax policy, which seems unnecessary, noting that revoking measures that are no more needed (speaking of BEPS actions which are no more needed with Pillar Two in post BEPS world) shall alleviate unneeded supplementary intricacy.[75,76]

1.3.3. EU Anti-Tax Avoidance Directive

The European Union Anti-Tax Avoidance Directive[77] (ATAD) is also known as "Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market"[78]. With intention to address tax avoidance and implement BEPS action plan the Council of European Union adapted an ATAD in 2016.[79] Since initial purpose behind the creation of EU was to establish a single market, with this directive the Council of European Union has created binding rules which shall ensure a minimum protection of EU's single internal market against tax avoidance and aggressive tax planning. ATAD provided a minimal set of rules for harmonization of a single market, namely CFCs, hybrid mismatches, introduction of corporate GAAR, exit tax and interest expense deductions. Where GAAR and exit tax are not within the BEPS context. Moreover, in 2017 the Council designed provisions regarding offsetting "hybrid mismatches" when it comes to cooperation of Member States tax policies and the ones of a third country.[80] By supplementing existing hybrid mismatches in initial ATAD version, the amendment to it (ATAD II) represent a coverage of PE problems, and thus, is a substantial action to ensure anti-avoidance policy, as well as tax transparency in any MS. This directive is deemed as a set of provisions made for preventing MNEs of aggressive tax planning. What it does is, it makes liable tax persons abstain from utilising mismatches among tax jurisdictions with intention to decrease burden of taxation. Which would otherwise constitute a base erosion by MNE's or individual tax-payers in MS.[81]

Every tax jurisdiction by being a sovereign can work on their own GAARs. Respecting that and the EU MS, enforcement of ATAD shall not change the way this is. It is so, for the reason that the Art. 6 envisages a GAAR which is a *de minimis* rule (insignificant) and thus will possibly not be chosen by MS which have own GAARs in force. It is happening in a such way due to variety of legal customs in respective jurisdictions, specific approach to law in each MS,

[75] PwC, Reaction to the OECD secretariat's consultation paper on the unified approach under Pillar 1 of the Work Programme on the Tax Challenges of the Digitalisation of the Economy, England, 12 November 2019. Available at: https://www.pwc.com/gx/en/tax/pdf/oecd-pillar-1-pwc-response.pdf. Accessed: March 18, 2023.

[76] PwC, Reaction to the OECD Secretariat's Consultation Document ("CD") on Pillar Two of the Work Programme on the Tax Challenges of the Digitalisation of the Economy (together with Pillar One, "the Project"), England, 2 December 2019. Available at: https://www.pwc.com/gx/en/tax/pdf/oecd-pillar-2-paper-pwc-response-december-2019.pdf. Accessed: March 18, 2023.

[77] Council of European Union, Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.193.01.0001.01.ENG&toc=OJ:L:2016:193:TOC. Accessed: March 19, 2023

[78] *Ibid.*

[79] *Ibid.*

[80] Council of European Union, Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32017L0952. Accessed: March 19, 2023.

[81] European Commission, Impact assessment accompanying Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, Brussels, 21.06.2017, SWD(2017) 236 final, p. 6. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0236&rid=2. Accessed: March 19, 2023.

tax transparency, the rule of law and separation of powers.[82] Legal Certainty, fairness of a CIT in MSs, urge to make taxpayers pay taxes to tax authorities in countries where both profits and value were created are altogether a common need and a driving force for ATAD and other legal instruments in combating aggressive tax planning.

An article 6 of ATAD on General Anti-Abuse Rule represent a MS clear obligation to combat tax abuse. From one perspective MS shall address aggressive tax planning, from the other its national legislation shall not contradict fundamental EU freedoms.[83] Nonetheless, a critique for ATAD has become an exact spot in international legislation that has raised questions on compliance with the free movement principle. Which has consequently become a research question for this thesis. Namely, what is the borderline between illegal tax avoidance and lawful tax planning under article 49 of the TFEU. As it was published in an article by professionals from Institute for Austrian and International Tax Law, they present a view that is opposing the ATAD directive by underlying its non-compliance with the EU primary law, especially the primary principle of anti-abuse created by CJEU and other things, namely:

> "[it] considers the Directive to not comply with the requirements of Article 115 TFEU as it does not contribute to the 'establishment and functioning of the internal market' per accepted case law of the CJEU. Third, the Directive is at odds with the principle of subsidiarity, as the Commission put forward no convincing evidence regarding the need for such a directive at an EU level. Finally, several provisions of the Directive go beyond what is necessary to combat artificial arrangements in a tailor-made fashion, thereby making it incompatible with the principle of proportionality."[84]

Consequently, it can be concluded that with ATAD directive the possibilities of national MS tax authorities have become mode wide, yet it is now known that its provisions do not correspond to the EU primary law and to be more specific, EU free movement principles. Thus, from the perspective of TFEU the ATAD shall not be effective.[85] However, it did not end with ATAD II and this the revised ATAD III was approved in January 2023 by the EU Parliament.[86] In its turn, the third Anti-Tax Avoidance directive is aimed at putting an end to shell companies. It is awaited that the third ATAD is about to be implemented as to 30 June 2023 latest.[87] The good thing about this directive is the uniformity, since it provides member states with a clear seven step protocol to be used in order to see whether an enterprise is compliant with the economic and legal substance requirements and is not abusing it in the context of gaining tax benefits. The procedure presumes that as long as substance conditions are not followed, then an enterprise shall be considered a Shell entity and will be awarded with tax audits and penalties

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[82] *Supra*, note 21, p. 8.
[83] Diane de Charette, "The Anti-Tax Avoidance Directive General Anti-Abuse Rule: A Legal Basis for a Duty on Member States to Fight Tax Abuse in EU Corporate Direct Tax Law", (2019), 28, EC Tax Review, Issue 4, pp. 176-182, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019021. Accessed: March 19, 2023.
[84] Lazarov, Ivan and Govind, Sriram, "Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law", 47 *Intertax*, Issue 10, 2019, Available at: https://ssrn.com/abstract=3569793. Accessed: March 21, 2023.
[85] *Ibid*.
[86] European Parliament, DRAFT REPORT on the proposal for a Council directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, (COM(2021)0565 – C9-0041/2022 – 2021/0434(CNS)), Strasbourg: 12 May 2022. Available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ECON/PR/2022/06-13/1255648EN.pdf. Accessed: March 22, 2023.
[87] Christos P. Kinanis and Marios Pelesis, "The Third Anti-Tax Avoidance Directive (ATAD 3) The EU Parliament Recommendations The End of Shell Companies", Kinanis Law Firm, Cyprus, March 9, 2023. Available at: https://www.lexology.com/library/detail.aspx?g=f7217e72-51f3-4920-8873-4ccb97781690. Accessed: March 22, 2023.

or otherwise – unpleasant tax consequences. The procedure itself consists of "[i]dentification […], substance reporting requirements, exemption […], presumption of being […] shell entity or not, […] rebuttal […], tax consequences […], exchange of information, tax audits and penalties."[88] By the end of the day it was concluded that this directive's provisions do not comply with the EU primary law, to be more precise, with EU's "principles of proportionality and subsidiarity"[89]. Anyways, it is undeniable that existing holding companies within the EU which do not comply with minimum substance requirements will consequently end up being pursued with tax consequences and penalties. Which in its turn will lead to redistribution of taxes amongst European union member states.[90]

1.3.4. From CCCTB to BEFIT to combat tax avoidance

CCCTB is a Common Consolidated Corporate Tax Base directive that was among EU proposals aimed at regulating digital single market and combating tax avoidance. Considering the newest for that time nexus rules (i.e. where a taxpayer will be taxed) the European Commission Digital Significant Presence directive (DSP)[91] and CCCTB directive. Teleological view to these directives shows that those are legal tools of a supplementary nature to e.g. ATAD and national rules. It was promised that CCCTB would erase such attractive to tax avoidant MNE's loopholes among domestic tax policies and vague and obscure tax provisions, as well as decrease tax administration burden. By such means it was thought that such measure would lead to a situation where no transfer pricing is needed, noting that it is counted as one of the ultimate paths for profit shifting. Proposed in 2011 by European Commission, CCCTB is pack of provisions for MNE's comfort to weight out the volume of their taxable profits across EU without the need to cope with national tax policies. Complying with the formula CCCTB was intended to distribute a particular amount of income to the respective business, by calculating the share of every involved individual's contribution to the entire holding structure and its genuine activity. Later it was acknowledged that propositions of a one step, namely CCCTB were too ambitious and that more steps are needed in order to achieve a set goal.[92,93,94]

An opposition view to CCCTB counts arguments contra its sufficient possibility to tackle aggressive tax planning by this tool and for instance, pro OECD BEPS initiative approach for addressing such global scale problems as tax avoidance.[95] In its turn the SDP directive addresses that CCCTB is insufficient when it comes to the scope of application, adding to the fact that it was initially created exclusively for MNE's. Requirements for CCCTB at first were for an enterprise to be a part of the holding structure, income for the accounting period (accounting year) had to be 750,000,000 EUR as well as a requirement for PE in a set space.[96]

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[88] *Ibid*, p. 4.
[89] *Ibid*, p. 25.
[90] *Ibid.*
[91] European Commission, Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence 2018/0072(CNS), Brussels, 21 March 2023. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0147. Accessed: March 21, 2023.
[92] European Commission, Proposal for a COUNCIL DIRECTIVE on a Common Consolidated Corporate Tax Base (CCCTB) 2016/0336(CNS), Strasbourg, 25 October 2016. Available on: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52016PC0683. Accessed: March 21, 2023.
[93] PwC, "CCTB or CCCTB? – That is the Question.", United Kingdom. Available at: https://www.pwc.com/gx/en/services/tax/publications/ccctb-newsletter.html. Accessed: March 21, 2023.
[94] European Commission, "Questions and Answers on the CCCTB re-launch", Brussels, 17 June 2015. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5174. Accessed: March 21, 2023.
[95] TaxJournal, "Latest proposal for CCCTB", Issue 1390, 7 March 2018. Available at: https://www.taxjournal.com/articles/latest-proposal-ccctb-07032018. Accessed: March 21, 2023.
[96] *Supra*, note 92.

Consequently, speaking of PE and taking into account the current digitalised world, those common nexus rules had to become even more sufficient for implementation with digital MNE's. Thus, SDP directive was presented by the European Commission for the newest PE recognition provisions.

In the mid of 2021 the EU Commission prepared to re-launch the CCCTB under the name BEFIT standing for Business in Europe: Framework for Income Taxation. BEFIT promises a coherent approach to corporate tax policy with an intention to build it on the Pillar I basis agreed within the context of the OECD agreement.[97] It is worth to mention that for the new directive to proceed through all stages of processing it is necessary to acquire unanimous agreement in the European Council (i.e. among all 27 MS). Nonetheless, knowing that the BEFIT is made on the basis of OECD Pillar One initiative which is agreed and joined globally by 135+ jurisdictions, it should not raise a huge wave of concerns amongst EU MS.[98,99] In addition it was stated in the document provided by the European Parliamentary Research Service, formula to address mentioned hereinabove challenges is not going to be the same as in CCCTB. It shall regard the question on how to ensure an appropriate weight to sale and assets with intangibles and labour including both employees and their remuneration.[100] Provisions on all mentioned hereinabove shall be included in the BEFIT.

It is known, that changes in tax rates would affect amounts of government earnings. Hence, it is worth to draw attention to the graphical representation of volatility of countries' income tax revenues shown as a percent of changing GDP indicators. *Figure 1.3.4.1.* below illustrates how the ratio of countries' income tax revenues as a percent of national GDP was changing through the four years which were the latest available at the EUROSTAT. In addition, for the purposes of vivid illustration, the countries taken are the ones which respective indicators have experienced the biggest increment rate, i.e. outliers. Further considerations on this matter lead to the thesis that even particular actions carried out by legislators (such as drafting legislation both compliant and non-compliant to known international standards) do affect the whole national gross domestic product. Numbers say that revenue from taxes on the income or profits of corporations including holding gains can be viewed as a 10 percent of GDP as it happened in Norway in 2021. Whereas, tax revenues itself if we zoom them out could be regarded even as 48,8 percent of the whole national GDP, as it was in Denmark in 2021. Such Denmark's ratio is among the biggest numbers across the Europe together with France (47 percent), Belgium (46 percent).[101] The comparison of government revenues to national GDP is an accurate approach for accessing how national earnings relate to the overall value of a country's output.

Thus, any given particular actions performed with legislation shall affect the tax revenue collected and consequentially the national GDP. Moreover, it occasionally occurs in such a way

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[97] European Parliament, "Corporate taxation reform: What comes next?", *EPRS: European Parliamentary Research Service*, October 2022. Available at: https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/733699/EPRS_ATA(2022)733699_EN.pdf. Accessed: March 25, 2023.

[98] Sasha Kerins, "BEFIT – Business in Europe: Framework for Income Taxation", *GrantThornton*, 8 February 2023. Available at: https://www.grantthornton.ie/insights/factsheets/business-in-europe-framework-for-income-taxation/. Accessed: March 25, 2023.

[99] Tanja Velling, "From CCCTB to BEFIT: the European Commision's plan to future-proof taxation", *European Tax*, 19 May 2021. Available at: https://www.europeantax.blog/post/102gyij/from-ccctb-to-befit-the-european-commissions-plan-to-future-proof-taxation. Accessed: March 25, 2023.

[100] *Supra*, note 97.

[101] Eurostat, Total tax revenue by EU Member States and EFTA countries (2021) as percent of GDP. Available at: https://ec.europa.eu/eurostat/databrowser/view/gov_10a_taxag/default/table?lang=en. Accessed: April 30, 2023.

that legal arrangements around profit taxation is not compliant with international standards. Or on top of it, some arrangements around taxation are interconnected with the establishment of IP patent box policies bear a capacity to provide an option for tax avoidance, which leads to a consequence where harmful competition is prospering amongst EU MS. Which then becomes a matter of competition law which distorts natural pace of trade and money transfers across the single EU economic market. It is curious how tight is the interconnection of micro and macro-economic notions, such as GDP, corporate tax revenue, country's overall tax revenue, countries output. Indeed, since tax revenue can be viewed as up to 48,8 percent of a country's GDP (as in the Denmark case) it goes without saying that rise in tax rates is tied together with the consequential fall in earned tax revenues. Hence, taking into account all mentioned hereinabove, corporate income tax correlates with the gross domestic product positively. For the purposes of a thorough research an assessment of Cyprus in the respective figure 1.3.4.1., it can be regarded even more expanded if taken into account one aspect of country's economy.

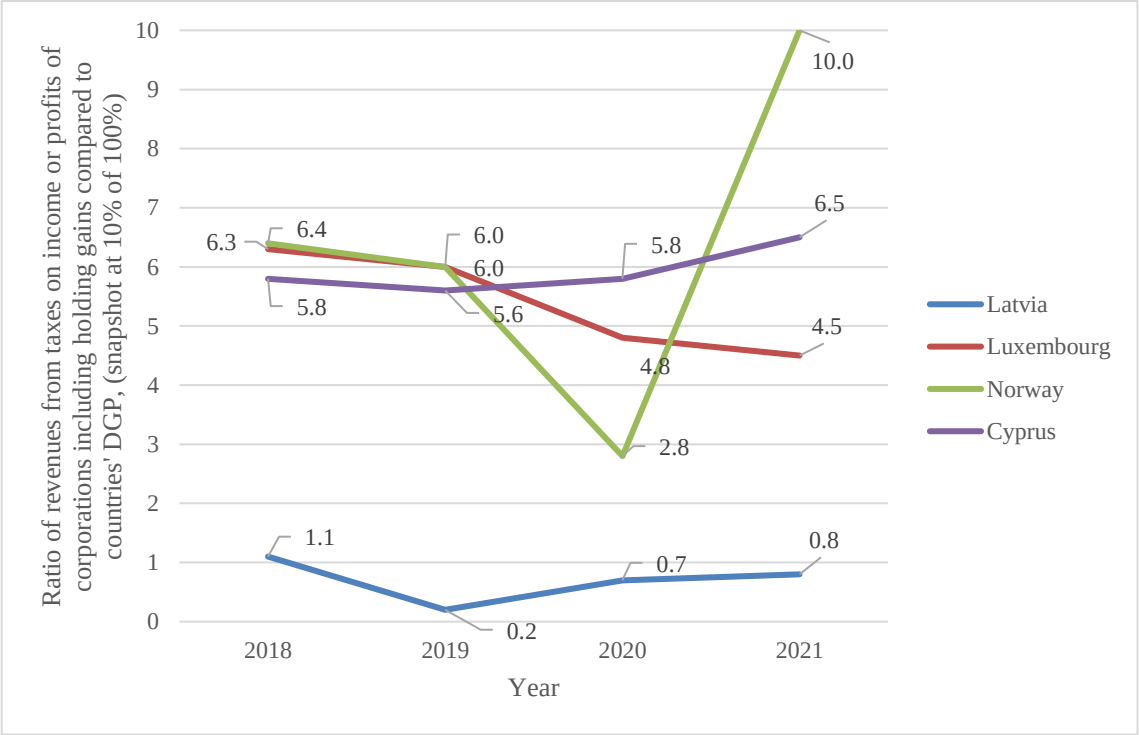

Figure 1.3.4.1. P. Busarova, Snapshot of revenue from taxes on the income or profits of corporations including holding gains as percent of GDP in Latvia, Luxembourg, Norway and Cyprus (2018-2021)[102]

Revenue from taxes on the income or profits of corporations including holding gains as percent of GDP in Cyprus was around 6 percent in 2021 not only owing to particular tax policy of Cyprus but also owing to loopholes that are present in its tax legislation. Which makes Cyprus very appealing to foreign corporations along with their patent box regime. Moving forward the huge incline in Norway's indicators, from 2,8 percent to 10 percent is translating how huge has become a tax revenue share to the whole country's GDP. Which is very opposite to the shrinking economy indications. When looking at figures with such a visible increment rate, one question crosses mind. The why question. Why and how did the Norway's revenue from taxes as a

[102] Figure is made by the thesis author. Indications are captured at 10% from 100% for visualisation purposes. Data taken from EUROSTAT. Data on Tax Revenues of a percentage of Gross Domestic Product. Available at: https://ec.europa.eu/eurostat/databrowser/view/GOV_10A_TAXAG__custom_6107160/default/table?lang=en. Accessed May 1, 2023.

percentage of GDP have arisen so fast by 7,2. The answer to this question lies in the changes presented by Norway's legislation in 2021. It is said that in 2021 Norway has presented a new Income tax reduced by 6 percent for natural and legal persons.[103] Old Norway's income tax rate was 28 percent, while the new one respectively is a quite appealing for investment 22 percent.[104] Hence, noting that Norway's indicator went from 2,8 to 10 it means that the country has gained a fortune on that particular legislation change. Unlike Norway, Latvia's indicators are very different, which makes an effect of a huge contrast. During mentioned four-year time period Latvia's income from taxes on the income and or profits of corporations including holding gains is constituting to only one slightly fluctuating percent in terms of a country's GDP. It lies on the surface that from the taken sample of four countries Latvia's indicator is the smallest if compared to Luxembourg, Norway and Cyprus. Observing this excerpt from a bigger table with all EU and EEA countries it can be concluded that Latvia's economy is on amongst the smallest in the EU and EEA list, with one of the lowest revenue gains from tax on the earnings or revenues of MNEs with holding gains. This discussion opens a space for further investigation with the main question – what is the cause for such a little indicator of a particular "company" tax revenue in terms of GDP in Latvia? Presumably an answer to this question would also be a part of the solution for a discussion on question whether Latvian market is not too welcoming for large MNEs.

1.4. Synopsis of the role of GAARs in national legal systems and abuse of the anti-abuse law

Prior to all aspects, it is worth mentioning that GAAR is a rule that seeks for compliance with the *bona fide* principle, which is a good faith principle. Thus, the application of GAAR requires to look at the nature of an action in question (transaction) in order to find out whether a tax arrangement is concluded in good faith to effectively carry out economic activities, or does it constitute a wholly artificial arrangement which has nothing to do with a good faith principle. To identify the applicability of GAAR an assessment of a tax benefits arising from a transaction is held, also action in question shall not bear in it a nature of an arrangement made solely for obtaining tax benefit instead of following the general *bona fide* principle, also avoidance action in question shall not be abusive.

The date of tax avoidance recognition is said to be indicated by the date of GAAR introduction. Also, it is widely known that by deciding upon *Halifax* and *Cadbury Schweppes* landmark cases, the CJEU have put an indirect pressure on the recognition process of tax avoidance. As a common rule, every tax jurisdiction executes its own somehow different from other jurisdictions approach. Nonetheless, the *bona fide* principle is what shall be seen through any legislation piece not dependant on domestic legislation customary traditions. Consequently, it is a right of every tax jurisdiction to use their sovereignty and conclude their own GAARs. It is also known that the ATAD directive is not going to change the way it is regarding the sovereignty to draft own GAARs. To be more precise, it is. A matter of how each country is treating the rule of law, separation of powers, legal certainty and tax policy transparency. Nonetheless, there are existing common grounds when it comes to the notion of tax avoidance and aggressive tax planning in national GAARs as well as judicial instruments known for

[103] Norwegian Ministry of Finance, On Changes in Norway's legislation, *Norwegian governmental website*. Available at: https://www.regjeringen.no/en/dokumenter/prop.-1-ls-20212022/id2875345/?ch=1#:~:text=The%20changes%20introduced%20by%20the,stimulate%20both%20saving%20and%20investment. Accessed: May 1, 2023.
[104] *Ibid*.

establishing precedents and a way of conduct. Altogether, those could be viewed as groups pursuant to specific legal principles and doctrines. There is such a common practice of accessing judicial GAARs as a substance-over-form check to acknowledge tax avoidant behaviour, which serves as a primary purpose test – where the aim of avoided rule is being put in comparison together with the taxpayer's intention of saving taxes.[105] Here is the way how normative GAAR's are sorted in regard with the next doctrines on tax avoidant behaviour:

> "[a]buse of law (Austria, France, Germany, Luxembourg and Portugal); *fraus legis* (Netherlands, Portugal and Spain); business purpose or principal purpose test (Belgium, Finland, Sweden and the United Kingdom), equivalent to genuine commercial reasons (Finland); substance over form (Czech Republic); and more recently, due to CJEU case law and EC Recommendation 8806/ EU, genuine transactions (Greece and Italy) or artificiality are playing a relevant role in some jurisdictions (France, Netherlands and Spain). The concept of abuse in EU law is also influencing the United Kingdom in VAT cases (the main purpose test)."[106]

When it comes to the application of GAAR it goes without the saying that they would have differences in shape and wording due to linguistics and differing approaches. Nonetheless, there are three wide categories which tax authorities recognise when deciding upon appeal to the GAAR. The fist would be the case when a taxpayer performs an intention to change the shape of a transaction in order to move to another tax rule. It is a situation when tax legislation allows for numerous tax consequences looking at the arrangement of a transaction, where taxpayers go for arrangements to take advantage of one decreased tax rate instead of taking tax authorities variant that would come down with a bigger tax obligation. Examples would be "interposition of entities between a service provider and clients so the income can be diverted to related individuals facing lower marginal tax rates"[107] and establishment of IP e.g., a copyright in order to transform a compensation payment for individual provision of labour supply into property rights, which afterwards could be moved to a cross-border enterprise, leading to such outcome that the revenue produced is allocated to linked individuals in low-tax jurisdictions.[108]

Whereas the second category of GAAR application would deal with such aggressive tax planning strategies as when a shift of transaction is made to a more favourable tax jurisdiction by not even creating an additional form and a settlement, but just via renaming a transaction so that its form would become a completely different than the initial one. A keyword of such transaction is recharacterization. One more example would be a situation where under Hungarian law an individual offering labour supply would be entitled to a smaller tax rate, if under the contract he or she was a contractor instead of an "employee". Hence, with no significant changes to labour contract an employer and employee could simply do recharacterization by substituting words employee with an independent contractor and gaining in a form of lower tax obligation. Lastly, the third category when GAAR could be applied is a situation where a taxpayer is sticking to such specific wordings from interpretations of laws written by judicial powers, which are not necessarily compatible with teleological means of those laws. For instance, it is known that all tax laws among all tax policies permit deductions for such expenses that were made for gaining income, so that just net earnings would be taxed.

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[105] *Supra*, note 82, p. 9.
[106] *Ibid*, pp. 8-9.
[107] Lang Michael, Alexander Rust, Josef Schuch, Claus Staringer, Jeffrey Owens and Pasquale Pistone, *GAARs : A Key Element of Tax Systems in the Post-Beps World*, Amsterdam: IBFD, April/May 2016, p. 6. Available at: https://www.ibfd.org/sites/default/files/2021-12/16_001_GAARs_-_A_Key_Element_final_web.pdf. Accessed: March 26, 2023.
[108] *Ibid.*

Which in financial accounting it is indicated in the (PnL) Profit and Loss statement, where net profit is calculated generally speaking by subtracting Cost of Goods Sold (COGS), Operating expenses and at the end tax expenses are subtracted from the revenue to get to the net profit. By means of which, a GAAR might be used to conquer such interpretation which would avoid the purpose behind deduction part and would rather permit deduction for expenses that intentionally surpass the anticipated income to seek other tax purposes.[109]

The landmark case-law which elaborated how to implement GAAR is a Supreme Court decision in *Ben Nevis Forestry Ventures Ltd & Others* v *Commissioner of Inland Revenue (Ben Nevis)*[110]. The court of New Zealand has established a three-step approach to identify the applicability of a GAAR to the case.[111] Prior start it is necessary to check whether transactions in question comply with the Rule of Law, then follows the first step.[112] Which is to access whether an arrangement was made, which could be any agreement. The second is to objectively access the aim of the respective arrangement, which engages the utilisation of the definition for tax avoidance arrangement. In New Zealand the Income Tax Act includes such definition.[113] While determining the presence of tax avoidance intention, for a negative test result an arrangement shall be driven by a lawful genuinely tax-purpose. Where the third and the last step constitutes identification if the commissioner would implement his powers of reorganisation to alter the arrangement. If the arrangement was recognised as null and void, the commissioner might alter net income of an individual engaged in the arrangement with the purpose to resist tax benefit obtained from the arrangement.[114]

1.5. Overview of corporate tax avoidance and tax planning landscape in the EU

This subsection navigated tax avoidance landscapes along with dynamics and it is concluding the first chapter of this thesis. A thorough overview of corporate tax avoidance and tax planning landscape in the EU and with some additional examples from outside of EU to provide a more vivid illustration of the situation and the most wide-open approach to accessing the state of art within the context of tax avoidance. Taken into account the base structure of the International Tax Law, the multitude of concluded bilateral tax treaties between countries were raising some concerns regarding how to approach their unification and alteration for the most recent common and to some extend unified tax policy standards. Nonetheless, even such concern was eliminated by one of the instruments suggested by the OECD and that is called MLI. A number of tax policies were presented, agreed upon and implemented, for instance OECD BEPS plan and EU CCCTB which later on was altered to the form of BEFIT. Moreover, some of reforms overlap one another, by example of the Pillar One and Pillar Two, from which the second is overlapping some prospects of the BEPS project framework. The principal question would be concerning the effectiveness of all mentioned hereinabove reforms with their numerous amendments (as e.g., ATAD I-III) in the matter of decreasing the extent of tax avoidance? Unfortunately, despite any professional commentaries, by the end of the day it could be only time, which would show how effective one or another measure was and how consequences in

[109] *Ibid*, p. 7.
[110] *Ben Nevis Forestry Ventures Ltd & Others* v *Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [106].
[111] *Ibid*.
[112] *Ibid*.
[113] New Zealand Income Tax Act 2007, s BG 1(1).
[114] *Supra*, note 33.

e.g., post-BEPS world look like.[115] Since, the problem is lying in the disconnect between the countries' tax jurisdictions and also in a mismatch between places of value creation and where taxpayers appear to be subjected to taxes. Then there is a BEPS project which comes after this exact situation. Since its purpose is to secure that tax jurisdictions implement its action plan items in such a way that taxes would become aligned with places of value creation. Speaking of BEPS, notwithstanding that it was launched in 2013 by G20/OECD, the work is still in process. Countries around the world say no to schemes allowing to shift profits to other jurisdictions and say yes to taxes being paid specifically to the state where economic activity is carried-out. The sub-section on GAARs provided a plethora of examples on how specific tax avoidance schemes are being utilised in different countries with respect to their domestic anti-tax avoidance provisions. In brief, the purpose behind legal instruments created to tackle aggressive tax planning is to align the nexus of taxing income corresponding to the place where commercial operations are performed and where the value is created.

[115] James Nebus, "Will tax reforms alone solve the tax avoidance and tax haven problems?," *Journal of International Business Policy*, Palgrave Macmillan, vol. 2(3), pages 258-271, September 2019. Available at: https://doi.org/10.1057/s42214-019-00027-8. Accessed: March 28, 2023.

2. Analysis of anti-avoidance measures compliance with general freedoms of the EU: ECJ practice

This chapter will be devoted to the close and in-depth review and analysis of the case-law on aggressive tax planning with regard to general freedoms of the EU, from which the most relevant for this paper is freedom of establishment. To begin with EU freedoms, it is important to mention that International Tax law modernisation is something that currently in is a status of constant progress. Which in its turn whispers the adaptability and responsiveness of an international taxation policy that go hand in hand with the contemporary digital economic development. From a positive point of view, digital economy is implying the most active usage of freedoms of movement, including capital, goods, services and labour speaking of EU single market or beyond. While the previous chapter was providing a decent overview of legal instruments utilised for tackling tax avoidance, this chapter is devoted to illustrative assessment of how judiciary addresses and resolves cases on aggressive tax planning arrangements with respect to fundamental freedoms of the EU. Given the variety of possible tax avoidance methods, which include the usage of Controlled Foreign Companies (hereinafter, referred to as CFC), tax treaty shopping, transfer pricing and wholly artificial arrangements, MNEs tend to exploit the strategy which encounters profit shifting from one tax jurisdiction to the another considered as e.g., a low corporate income tax country. As it was discussed in subsection 1.2. one of schemes utilised is when an intellectual property is located to countries which offer patent box regimes or by exploiting one of transfer pricing methods within holding group enterprises.

European Commission sources on the ATAD suggests that it is exactly a Controlled Foreign Company rule, which is considered to be one of classic profit shift schemes and the figure shows how CFC would be treated within the context of CFC rules in ATAD directive, see Figure 2.1.

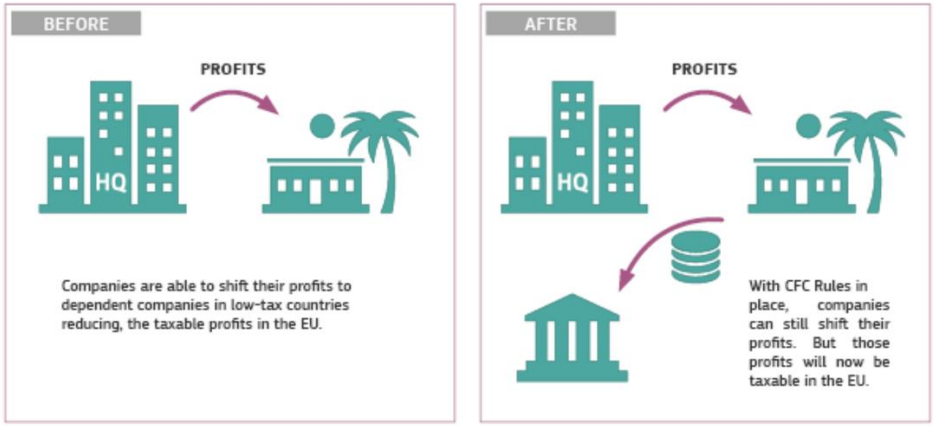

Figure 2.1. European Commission, "The Classic Profit Shift: Controlled Foreign Companies (CFC) Rules."[116]

Provided hereinabove figure illustrated not complicated and yet classical Profit shift scheme. Whereas a more complex scheme would be a Double Irish with a Dutch sandwich. Which up until recent times is a commonly-known tax avoidance scheme located in four tax jurisdictions

[116] European Commission, "The Anti-Tax Avoidance Directive", short description. Available at: https://taxation-customs.ec.europa.eu/anti-tax-avoidance-directive_en. Accessed: April 2, 2023.

at the same time where key aspects are Netherlands as a transit jurisdiction and Ireland as a lawful tax loophole. In brief, on example of Google corporation, it utilised the possibility of establishing in Dublin along with 0% levy tax on royalties in Holland with Ireland. Initially the corporation by being established in US decided to license possessed patents on IT solutions to its direct affiliate daughter company in Ireland and additional group company in Bermuda without real PE but with zero CIT. Added up with one more company already in Netherlands needed for sublicensing intellectual property rights from the Irish established Google affiliate company. What the Dutch daughter company did is it sublicensed the intellectual property back to the Irish one to utilise low tax rate of license fees between the Netherlands and Ireland. Keeping in mind that at in Netherlands no taxes are charged for interest and royalties, Google made those transactions at a zero-tax rate when transferring the money back to USA via Bermuda company. Which altogether has saved Google up to 3,7 billion EUR from not paying a tax. Which means that Ireland and Netherlands have lost nearly 3,7 billion EUR tax revenue in common.[117] As to the Double Irish with a Dutch tax avoidance scheme, after EU authorities had given multinationals a three-year period to end taking a multimillion advantage from exploiting a loophole in the Irish legislation, this tax scheme has come to an end in 2020.[118]

2.1. Judicial practice in Tax Avoidance context

When it comes to judicial practice in Tax Avoidance context it is acknowledged that tax abuse was a legal notion established by the ECJ that precludes a taxpayer from confiding on entitlement provided by legislation which consequences would have a shape of an abuse of the mentioned right.[119] Judicial practice of EU has a very curious precedent of Halif case, where no penalties had to be paid after the court judgement but instead a whole sum of a missing tax payment needed to be repaid.[120] Moving forward, double jeopardy is a widely known legal principle established by a maxim *Nemo bis punitur pro eodem delicto and non bis in idem* that states that nobody shall be punished two times for one thing.[121] It is relevant to this chapter since if country's authority obliges a prosecuted taxpayer to repay missing amount in taxes and put a criminal penalty on top of it for the same action in question, then it logically follows that such pack of a "penalty" and a criminal charge would result in breach of a legal maxim stated hereinabove. Consequentially, the CJEU underlined that it is just criminal charges that can bear a punitive nature, whereas administrative shall be of a compensatory nature. And what is more important, whatever penalties ought to always be proportionate to the committed action in question, to cherish the proportionality principle. [122]

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[117] Robert W. Wood, "How Google Saved $3.6 Billion Taxes From Paper 'Dutch Sandwich'", Forbes: 22 December 2016. Available at: https://www.forbes.com/sites/robertwood/2016/12/22/how-google-saved-3-6-billion-taxes-from-paper-dutch-sandwich/?sh=3b014bc11c19. Accessed: April 3, 2023.

[118] Jack Gramenz, "Double Irish, Dutch Sandwich tax loophole finally closes after three-year grace period", Australian news, 3 January 2020. Available at: https://www.news.com.au/technology/online/security/double-irish-dutch-sandwich-tax-loophole-finally-closes-after-threeyear-grace-period/news-story/2963949f4525e13a8ac2cb8339361f80. Accessed: May 1, 2023.

[119] Paolo Piantavigna, "Tax Abuse in European Union Law: A Theory", (2011), 20, EC Tax Review, Issue 3, pp. 134-147. Available at: https://kluwerlawonline.com/journalarticle/EC+Tax+Review/20.3/ECTA2011015. Accessed: April 5, 2023.

[120] Judgement in *Halif* case, C-255/02, ECLI:EU:C:2006:121.

[121] Elodie Thereon and Amandine Scherrer, "Member States' capacity to fight tax crimes," Brussels: *European Parliamentary Research Service*, PE 603.257, July 2016. Available on: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf. Accessed: April 5, 2023.

[122] *Ibid*, p.47.

It was said that the CJEU established and collected a number of precedents in which the borders of intervention are more or less indicated.[123] To be more precise, those borders are showing MS where they are allowed to step in and intervene EU fundamental freedoms, which is relevant since in such case the abuse of law is seem as a protective mechanism for MS.[124] When it comes to debating around CJEU practice on the application of the abuse of tax law principle, there are known considerations regarding the need to separate approaches to deciding upon it as to direct and non-direct taxation, however even those were not crystal clear and established, for instance in the landmark international tax law case of Cadbury Schweppes[125], the court was referring to inasmuch widely known VAT fraudulent evasion case of Halifax[126]. The base for reference was a concern around EU fundamental freedoms there. That is mentioned to represent how in deciding upon direct taxation case, some references were used even from indirect taxation case (on VAT fraudulent evasion), thus the general anti-abuse principle was seemingly not distinct when came to application to different fields of taxation.[127] Moreover, assessment of scholarly writings has led to the following conclusion, that in terms of utilisation the prohibition of abuse is not concrete to the extent necessary for it to bear a constitutional acknowledgement of a general principle of EU law, and rather a legal maxim.[128]

To continue this tier, from points 68 to 69 in Halifax judgement[129] the court is reminding of the very similar thing stated also in the Kofoed case[130], which is that the utilisation of national legislation shall not be as broad to include abusive tax arrangements, for instance such arrangements which constitute a nature of wrongful enrichment by using national law in the shape of a usual economic transaction.[131] Later on it was with a 3 M Italia Spa[132], where in point 32 the Court made an emphasis on the state of art by saying that EU legislation does not contain a general principle that would imply a burden on MS to fight tax law abuse specifically in area of direct taxation.[133] The legal foundation for this burden is considered to be vague and unclear in its utilisation. By the end of the day in the point 123 of the 2019-year judgement on Skatterministeriet case the CJEU clearly wrapped up that anti-tax abuse rules shall not be cancelled by the existence of fundamental freedoms and by trying to interpret them for wining a more favourable decision in the court.[134] With years passing by and with the ATAD GAAR entering the legal landscape of EU, a particular legal clarity became visible. To be more precise the mentioned hereinabove clarity is referencing to the understanding that indeed MS do have a duty to withdraw fruits from such tax settlements that satisfy the conditions of abuse of law covering the area of direct corporate taxation. Also, it become a recent practice of CJEU to challenge a GAAR on the basis of proportionality principle[135], which in EU law is versed to

[123] *Supra*, note 83, p. 177.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*
[128] Arnull, A. What is a General Principle of EU Law?. In R. de la Feria & S. Vogenauer (Eds.).in book, *Prohibition of Abuse of Law: A New General Principle of EU Law?* pp. 7–24, 2011.
[129] Supra, note 22.
[130] Judgment of the Court of 5 July 2007, Hans Markus Kofoed v Skatteministeriet, Case C-321/05, ECLI:EU:C:2007:408.
[131] *Supra*, note 127.
[132] Judgment of 29 Mar. 2012, 3 M Italia Spa, C-714/10, EU: C:2012:184, point 32.
[133] *Ibid*.
[134] Judgment of 26 Feb. 2019, Skatterministeriet, C-116/16 et 116/17, EU:C:2019:135, point 123.
[135] *Supra*, note 131, p. 181.

authorities and their powers. To be more precise, its teleological purpose is whether authorities exercise their powers in such a way that measures proposed and their goal are proportionate.[136]

Confiding on the discussed hereinabove CJEU approach in tax avoidance context is demonstrating that established boundaries for combating tax abuse within the EU at its top legislative tier shall remain unchanged. By means of which the case law of the CJEU would be cherished with an intention to defend fundamental freedoms. Moreover, notwithstanding the abovementioned, the court demonstrates us that CJEU differentiates economical and even political decisions concerning anti-tax abuse rules, as well as the court did not acknowledge any to be e.g., a clear limitation of a freedom of movement principle.[137] In addition, the court underlined in point 55 of Cadbury Schweppes judgement that it is just artificial arrangements, which ought to be aimed by general anti-tax abuse provisions.[138] Owing to the ATAD GAAR the Commission is now legally enabled to access a EU MS particular models of behaviour. Especially those models, which can be distrustful to the ensuring that all taxpayers' rights are provided proportionally, and whether there is no place for unreasonable extra obligation to pay or vice versa unreasonable leniency. Via judicial review of the court, the Commission can access MS approach to tackle tax abuse and that would be the case before a probable tax policy harmonisation would be prosperous. Taking into account the abovementioned it becomes clear that the new GAAR proposed in the Article 6 of ATAD makes the Commission to derive from MS their pure sovereignty when it comes to direct taxation, since especially when it comes to cross border collaboration it is highly likely that unclear circumstances would appear and thus become a basis for a plethora of litigation which in its turn would demand CJEU involvement.[139]

2.2. The role of PE and the Freedom of Establishment principle in accessing tax avoidance case law

This sub-chapter examines the role of PE when it comes to deciding upon tax avoidance case-law, it shall also be noted that the following matters are connected with the European fundamental freedom of establishment. For instance, regarding the relevant case-law to this part of the research it includes but is not limited to the following case-law. Including the Centros case[140], since there it was disputed whether the company had possessed a right to be acknowledged in Denmark given the fundamental EU right to the freedom of establishment provided by the TFEU Treaty (with the use of its Articles 52, 56, 58)[141]; the Cadbury Schweppes case[142] where the court has elaborated on the concept of "wholly artificial arrangements" and pinpointed that when holding company's affiliates are not established within the EU MS then such circumstances do not per se signify that the tax evasion is present there.[143] When it comes to discussions on the usage of freedom of establishment principle in tax-law abuse, VAT fraud, tax avoidance cases it might sometimes be misunderstood how domestic tax legislation which limits the horizon of usage of freedom of establishment can be justified if those purpose is to combat wholly artificial arrangements utilised by MNEs and bypass domestic laws. Moreover, the EU copying approaches to implement and ensure that the freedom of establishment principle

[136] *Ibid.*
[137] Paul Craig, *EU Administrative Law*, 2nd edn, Collected Courses of the Academy of European Law, Oxford, 2012; online edn, Oxford Academic, 24 May 2012. Available at: https://doi.org/10.1093/acprof:oso/9780199568628.001.0001. Accessed May 2, 2023.
[138] *Supra*, note 23.
[139] *Supra*, note 136, p. 182.
[140] Judgement of 9 March 1999. Centros Ltd v Erhvervs. Case no. C-212/97.
[141] *Supra*, note 1.
[142] *Supra*, note 138.
[143] *Supra*, note 26.

is approached correctly within the context of tax avoidance, all lead to the cases thoroughly envisaged in the next paragraphs.

Speaking facts, there was a precedent in 2014 where the matter in question regarded both tax avoidance and the freedom of establishment principle.[144] The case in question concerned a cross-border holding of enterprises which were put under the tax imposition by a MS, where consequentially that tax was questioned on the matter of its consistency with the freedom of establishment principle. It was when an advocate general Juliane Kokott in her opinion to the case of Nordea Bank Danmark A/S v Skatteministeriet has outlined that the aim to preclude tax avoidance was unable to defend and excuse the limitation the freedom of establishment in question, because Danish law went far away to what was considered proportional for achieving the purpose of combating tax avoidance.[145] The first-time assessment of the basis to substantiate the need to keep authorities their powers of imposing taxes across MS borders was visibly acknowledged in the Marks & Spencer case.[146] As to the Marks & Spenser judgement, it became a landmark case in international tax law, since it became one of the first game changing precedents where the justifications for restricting tax measures were acknowledged and established on the EU primary law. Hence, The Marks & Spenser case along with the followed-up case-law regarding cross-border establishments and losses have together improved the whole state of things to a better. Further, moving on with this matter in the mentioned hereinabove case of Skatteministeriet, the Danish tax legislation provided at that time that for enterprises possessing foreign affiliates and such with in-country affiliates were subjected to different tax approach. The matter regarded was Avoidance of double taxation via utilisation of a credit method also known as a situation when the tax is set-off.[147]

In addition, it is worth to discover the Centros case, which is a pearl in European company law precedent treasury. The whole situation was regarding an arrangement which raised concerns by Danish tax authorities, where solely relying on the freedom of establishment two Danish nationals established a Centros limited liability company pursuant to the United Kingdom company law which in fact had a lawfully registered head office in a different MS even though no actual economic activities were carried out there. Whereas a question posed to the EU court was if it complies with the freedom of establishment principle for a MS to deny in registration of an affiliate company for a legally established enterprise which possesses a registered head office in a different MS however, where no actual economic activity is carried out or economic value is created. In this particular case the ECJ performed more a liberal tactic to access the European company law. What it did was at first to state that when it comes to companies that are exercising their rights to freedom of establishment then MS shall not discriminate those with an argumentation that the company formation happened compliant to another MS law where the given company possesses an established office and is not actually active. As a second thesis, the ECJ stated that a MS is not empowered to such extent to limit the freedom of establishment principle by linking such action to the basis of creditors protectionism or fraudulent activity elimination at the beginning stage, if it is known that different methods for combating fraud and protecting creditors are existant.[148]

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[144] Opinion of Advocate General Kokott delivered on 13 March 2014. Regarding Nordea Bank Danmark A/S v Skatteministeriet. Case C-48/13. ECLI:EU:C:2014:153. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CC0048&qid=1683585286455. Accessed: May 2, 2023.

[145] *Ibid*.

[146] Judgment of the Court of 13 December 2005, Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes), Case C-446/03, ECLI:EU:C:2005:763.

[147] *Supra*, note 145.

[148] *Supra*, note 140.

In his opinion, advocate general Athanasios Rantos in 2022 addressed the case of Gallaher Limited *v* The Commissioners for Her Majesty's Revenue & Customs[149] which also concerned the freedom of establishment principle together with direct taxation matters.[150] In this case the course was acknowledging the holding company rules correspondent to the EU law. In that case-law circumstances transfers of enterprise's assets were executed from Gallaher to other holding groups of Japan Tobacco incorporated enterprises which are established in Switzerland and Netherlands. Nota bene, overall transaction cost was calculated to be more than 2.4 billion UK pounds. Consequentially, it was decided by the court that holding transfer rules in national legislation are within the scope of freedom of establishment principle, also known as the Article 49 of the TFEU. Then it was said that national legislation in question did not bear a nature of limiting the freedom of establishment regarding the transfer of assets from a MS resident enterprise to its sister enterprise situated in a third country. Which was wrapped up altogether by stating that such holding transfer legislation provisions are appropriate to the urge for ensuring a harmonised and proportional distribution of tax authority powers for enforcing taxes amongst MS in such situation where the tax liable person was subjected for a compensation in such amount that would correspond to the complete market worth of assets.[151,152]

The assessment of the role of freedom of establishment principle was in principle done in the previous paragraphs, whereas for accessing the role of PE when it comes to tax avoidance case law, the best precedent to recall is the widely-known Cadbury Schweppes case[153]. In his opinion, advocate general Philippe Léger delivered a deliberate assessment of the situation around the Cadbury case which until today is considered as a very prominent and a most recommended writing for the purposes of academic researchers in international tax law field.[154] Advocate general stated that the respective UK law was unfavourable to mother enterprise, which from the one side is a resident enterprise having an affiliate in the UK and on the other side is an established enterprise with an affiliate in a MS that did not have an advantageous enough tax policy to be within the scope. In the end Mr. Léger underlines that combating tax avoidance per se is between the paramount grounds of public interest, which might fully excuse that a legislation can constitute a hindrance to the application and correspondence of law as to EU fundamental freedoms.[155] By the end of the day the ECJ concluded that the UK rules indeed restricted fundamental freedoms of company which established a CFC notedly that if regardless the fact that the company is taking a beneficial advantages of EU MS legislation it carries out a factual commercial activity and is somehow engaged in value creation in any MS.[156] Nevertheless, when the limitation relates to artificial arrangements which a business is using to bypass the law of a chosen MS, it can be acceptable to appear as a hindrance to freedom of establishment principle and execution of commercial activity.[157] The mentioned hereinabove cases lead to a conclusion that the CJEU is indeed operating for the common good, for the

[149] Judgment of the Court of 16 February 2023, Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs, Case C-707/20, ECLI:EU:C:2023:101.
[150] Opinion of Advocate General Rantos delivered on 8 September 2022. Regarding Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs, Case C-707/20. ECLI:EU:C:2022:654. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0707&qid=1683591330937. Accessed: May 3, 2023.
[151] *Ibid*.
[152] *Supra*, note 149.
[153] *Supra*, note 142.
[154] Opinion of Mr Advocate General Léger delivered on 2 May 2006. Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue, Case C-196/04. ECLI:EU:C:2006:278. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CC0196&qid=1683593602039#Footref55. Accessed: May 3, 2023.
[155] *Ibid*.
[156] *Supra*, note 143, p 137.
[157] *Ibid*.

people at first, since such decisions as Cadbury, where it was acknowledged that within the context of the freedom of establishment principle, the national tax law abused the fundamental principle, even though the case was on the matter of tax avoidance.

2.3. Identifying the conflict between tax evasion and tax planning. Where does one merge with another?

When it comes to the process of reflecting upon matters of different tax behaviours, there is a number of matters that raises corners. However, the most paramount one to this research is the question of a distance between tax evasion and tax planning. Between the strictly illegal matter and the one which is considered fully lawful with respect to taxpayer's right to fundamental EU freedoms – could it be freedom of capital movement across EU MS borders or freedom of establishment. It is a well-known phrase in language that freedom of individual ends where the freedom of other begins. During the time consuming process of work on this research the author has come to the border notion of this dilemma if we apply the mentioned hereinabove approach. Which implies that if the borderline of tax evasion is up to the point where begins the permitted list of action constituting tax planning – then here could potentially lie the answer. Notwithstanding this, the author had come across with another tax law notion. Which is Tax avoidance. Neither is it a full evasion from paying the imposed tax, nor is it a list of action corresponding to the permitted tax behaviour which is called tax planning, however could it be a bigger term of inclusive nature, that includes in it all negative shades of tax behaviours? Definitely not, since words mean and imply exactly what they mean, then tax avoidance is indeed a middle term when it comes to accessing tax evasion and tax planning. As it is known the IBFD book on revisited tax avoidance in BEPS concept proposes that shades of tax planning from more lawful to less permitted, the notion itself is said to be not a definite legal term. Nonetheless, outliers are also known, those constitute – Brazil, where legal initiative on transposing aggressive tax planning behaviour was declined; or Portugal and UK where the mentioned above is common thing in active status. It is said that, however in UK "the expression 'aggressive tax planning' is used, even although is not defined"[158]. What is closer to tax evasion but is actually quite far from it is aggressive tax planning. It constitutes a darker shade of lawful tax planning, and is considered to be a separate term from tax avoidance. Such absence of a uniform understanding of these particular terms opens a huge room for debating around its boundaries and limits, as well as creates causes for litigations, since the absence of a uniform understanding of a term is a root of future misunderstandings and debates around the respective matter.

In addition, as the CJEU with its practice is deliberately working on achieving a harmonised judicial structure with explanations of terms and interpretations of laws for the convenience of EU MS. It is following that with the utilisation of GAARs by all MS differently in their own and not similar to each other's tax jurisdictions, is demonstrating a clear answer to the question – why there is still not an unanimously common and uniform understanding of tax evasion, tax avoidance and tax planning? Where one of potential answers has arrived and it is - the freedom which such circumstances give to national tax authorities for exercising their powers within the limits provided by the EU primary law and CJEU judicial practice. There are texts which provide that the understanding of how far the tax avoidance is different from tax planning is not questionable, that is said to be a French tax practice. Contrary to which the Swedish and Austria's practices are not so confident about a single and crystal clear

[158] *Supra*, note 105, p. 12

understanding of a borderline between tax planning and tax avoidance. Moving forward, as to to aggressive tax planning which is the most relevant form of tax planning to this paper since owing to its contrasting nature it raises more concerns for tax authorities rather than usual lawful tax planning. Straight to the point, there is a jurisdiction which accessed aggressive tax planning and tax avoidance as interconnected terms, and that is a Czech practice.[159] Each upcoming example is more curious than the previous one. For instance, for Belgian tax authorities it is accepted that within the context of BEPS project an understanding of aggressive tax planning is interrelated and is not really separatable from tax avoidance.[160] To conclude this section, for Denmark it is acknowledged that abusive tax planning is considered to be amongst political disputes the matter whether tax authorities and national legislation shall provide interpretations and acknowledged understandings of the respective taxation notions.[161] All examples in this chapter are taken from the IBFD official book on Tax Avoidance.[162]

On contrast to the raised concerns and possible explanations there is an author who elaborated on this context from the negative connotation perspective. The author Jānis Zelmenis in his paper states that there is the number of problems which completely deny a possibility to achieve a common unanimous and uniform definition of tax planning.[163] To be concise, such problems would constitute the following situations. The approach to the following list of red flags for accessing examining tax behaviour "objective and subjective factors", "mailbox company", "abusive practice", "wholly artificial arrangements" is being questioned. It is questioned, since it is not always on the surface, when it comes to accessing whether a company indeed need three employees and a little property or it is an artificial establishment. Another consideration would be, whether a company indeed has created a huge value with their invention and consequentially patent and royalty or is it a vicious trick of their lawyers to arrange a less taxable path for their income. In addition, it could be the case where a company is truly a middle sized and their yearly turnover is not huge, so that they do not even possess sufficient finances to push them through Bermuda or previous Double Irish with a Dutch for instance if they would want to. Consequentially it was acknowledged that notwithstanding the problems which deny the possibility to issue a uniform definition for e.g., tax planning, the Cadbury precedent with its decision is now a solid foundation and a common method with little steps to examine whether the tax behaviour constitute a lawful tax planning and what is more important – how lawful tax planning could be separated from another term which is tax evasion.[164]

Those are: "the concept of use of wholly artificial arrangements, the concept of abusive practice, and the use of the substance"[165]. When in the case of Cadbury, the ECJ acknowledged the UK national tax law to be abusive of fundamental EU freedoms, notedly that at that time UK was a member state to the European Union, by this move the ECJ remined us of the supremacy of EU law over MS national laws doctrine firstly established in the case of Costa v. ENEL.[166] Which is immensely vital, since it was done to remind the authorities and the people of the initial purpose behind the European Union creation which was a single market, that is only possible with the uniform and harmonised legal framework for cooperation in the cross-

[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *Supra*, note 143.
[164] *Ibid.*
[165] *Ibid.*
[166] *Supra*, note 43.

border transaction in a single market. Another assessment step to approach and constitute a lawful tax planning or unlawful tax evasion is by the ECJ for domestic courts to examine a real motivation for conducted transfers and overall tax behaviour. It all is justified by the EU fundamental freedom of establishment, as long as it gives companies across EU MS a right to establish freely their affiliates with the goal of conducting actual economic activities as well as by means of which to facilitate cross-border economic bonds within the union. To summarise the ECJ standpoint transposed in the Cadbury case, few more things that the court held were: whether an enterprise's affiliate in another country influence the economy of that MS and whether a registered there enterprise is carrying out a genuine business activity? And if the CFC actually is present at the PE location, along with the assessment of whether there is a full package of PPE, which is property plant and equipment. Currently, the following is used as a principal signal for examining if there was an unlawful tax planning, which is substance. Substance test is what it takes to understand if an enterprise is carrying out a genuine economic activity.[167]

[167] *Supra*, note 165.

3. Recent initiatives for structuring and systematizing corporate taxes lawfully. Is there a place for forum shopping?

Recent initiatives for structuring and systematizing corporate taxes lawfully count Pillar 1 and Pillar 2 with their proposed global minimum tax and e.g., BEFIT and DEBRA (i.e., debt-equity bias reduction allowance). DEBRA actually is one of the most recent EU initiatives, because the European Commission issued a directive initiative which reveals the DEBRA. Its purpose is to tackle asymmetric tax approach among debt and equity funding. Which is presenting an allowance on equity along with a following constraint on interest deduction.[168] There is a following opinion on the effect of DEBRA on businesses. It reads,

> "While the deductible allowance on equity incentivizes taxpayers to finance investments with equity, the limitation on interest deduction further restricts the taxpayer in its debt financing abilities. As such companies may have to reassess their financing structure taking into account the allowance on equity and the further restriction on interest deduction".[169]

Hence, there are initiative which would be mentioned in the following sub-chapters also. As to the forum shopping in the contemporary international tax law arena, it could be regarded as a form of tax planning – either lawful or the abusive one which disputably bears a shade of unlawful behaviour. Similar in wording but different in meaning is the "zone of acceptable tax avoidance opportunities"[170], that is a notion introduced by the prominent academic researcher James Nebus. That zone's area of influence consists of few methods to taxation revision, moreover, the Nebus research accessed the prospects of how such new policies as BEPS project and CCCTB (newly BEFIT) would change the situation around tax avoidance as such.[171] Other authors state that contemporary taxation problems solution is to tax passive income principally according to the source and active earnings by the place of domicile.[172] Regards passive income, there are fewer source jurisdictions if compared to another income type.[173] The reason lies in the human behavioural type that is keener to take less risks when it comes to portfolio investments, it is said that most chosen are USA, EU and Japan.[174] Proposed solution for mentioned jurisdictions is to introduce a withholding tax to tax passive income. Thus, revenues from trusts would be imposed to taxation at the place it was invested, e.g., tax haven.[175]

3.1. Opportunities for future evolution of legal framework regarding aggressive tax planning and tax morale

Speaking about future evolution of legal framework in tax law field, it is a fact that it is existing in a rapidly changing environment and not by any sense in vacuum. Therefore, tax authorities and all related organisational structures are facing an additional problem, i.e., digital future which is gradually becoming a digital reality. Since tech innovations are altering the way enterprises are conducting their activities, they are altogether switching to digital format which

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[168] *Supra*, note 100.
[169] Monique Pisters, "The debt-equity bias reduction allowance ('DEBRA'): the removal of the tax driven debt-equity bias?", Netherlands: Grant Thornton, 30 May 2022. Available at: https://www.grantthornton.nl/en/insights-en/articles/the-debt-equity-bias-reduction-allowance-debra-the-removal-of-the-tax-driven-debt-equity-bias/. Accessed: May 7, 2023.
[170] Supra, note 115.
[171] *Ibid*.
[172] Supra, note 63, p 234.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.

becomes more complex to trace or locate to a specific geographical area for the purposes of taxes. It goes without saying that investments in AI can potentially be made by both governmental organisations including tax authorities and private individuals. After that, probably with the involvement of artificial intelligence, the situation around assessing taxpayer's tax information would alter current concerns of abusing freedom of establishment to the new ones including – whether the AI in hands of authorities would have mercy to taxpayers' privacy rights? Nevertheless, the future is ought to come and thus, we will see very soon.[176] Changes for tax law landscape are already stepping in, in particular those will affect MNEs and focus mostly on challenges of digital economy era, given the changes we are faced with owing to globalisation and digitalisation.[177] As to the introduced approaches for tackling tax avoidance, those shall be accessed from researching the predecessors that created opportunities for tax avoidance. Which are namely, incoherence in domestic tax legislation and "aggressiveness of other MNE's tax practices"[178] along with,

> "ability of state tax laws alone to legislate tax avoidance out of existence is inherently limited because of: (1) the fundamental tension between sovereignty and increased harmony of tax laws as governments are reluctant to surrender control of their tax revenues, and (2) outlier states will continue to operate as tax havens."[179]

It was stated by Nebus that recent tax reforms try to narrow companies' possibilities for tax avoidance via limiting the spectrum of national tax legislation. It was added that attempts for legalisation tax havens and unlawful tax behaviour without MNE's explicit involvement in such reforms shall not be successful. Vital was the saying that, "[n]ext 10 years will be the acid test of whether tax reforms can reverse the worldwide trend of an increasing degree of tax avoidance, and increasing popularity of tax havens"[180]. With which the author completely agrees. Altogether the Nebus principal thesis was that MNE's tax divisions cooperation with national tax law legislators is the key to solving common issues on the table.

3.2. Recent challenges in taxation and tackling tax avoidance

When the notion of tax jurisdiction itself might shift towards the modern way of conducting entrepreneurial activities it opens new ways of prescribing and acknowledging a tax jurisdiction or taxing nexus. As it appeared in the Google Ireland vs Hungary case but did not happened by the end of the day. Hungarian tax authorities argued that there are eligible on a nexus for taxing Google on a basis of questionable interpretation of tax jurisdiction. It was disputed whether Hungary can impose their extra big advertisement tax on Google as for foreign company if its advertisements are appearing in Hungary in Hungarian language and whether that is an equivalent to prescribing those advertisements Hungarian identity and thus, acknowledging it as a subject to Hungarian Tax authority powers. After being numerously and disproportionately fined for not paying the imposed tax for days, the Hungarian Tax authorities charged Google 3.3 million USD, and in response Google filed a lawsuit to CJEU where by the end of the day

[176] Deloitte, "Preparing for the future of tax", 8 Aug 2019. Available at: https://www.deloitte.com/global/en/services/tax/perspectives/future-of-tax.html. Accessed: May 6, 2023.
[177] PwC, "OECD Policy Note scopes work on the future of the international taxation system", 1 February 2019. Available at: https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-policy-note-on-future-of-the-international-taxation-system.pdf. Accessed: May 6, 2023.
[178] Supra, note 171.
[179] *Ibid.*
[180] *Ibid.*

the court acknowledged Hungarian tax legislation to be incompatible with the EU law.[181,182,183] In the IBFD book on revisited tax avoidance within BEPS context it is said that updated nexus standards draw borders among allowed and prohibited tax behaviours.[184] Also, BEPS Actions 8-10 are recognised as the heart of recent standards of tax avoidance.[185] It deals with such transfer pricing which provided that earnings would have arrived to tax havens. Actions 8 to 10 imply that transfer pricing consequences shall be directly connected to the value creation. Regarding additional challenges, as it was stated by the Director of global Tax policy at Netflix, Giammarco Cottani during the special lecture within the context of RGSL bachelor study programme and deliberately noted by the author, "[w]henever transparency is not guaranteed, that is where the tax is a problem". Which can be understood better through examples of not traceable transactions, as the crypto ones. Thus, all the innovations from fintech industry, such as cryptocurrencies and blockchain is something that has already broke into the usual state of things.

In addition, auctions become a place for tax avoidance and even money laundering. An alternative option to view auctions is as a place where taxpayers can avoid paying millions by acquiring art pieces with prior agreement together with the artist and an auction responsible. As regards to the ECJ upcoming practice, the European Parliament provided an examination of latest tax avoidance and evasion measures, in which it held that it is very possibly that owing to newest tax reforms the Court is not planning on pushing on with strict interpretations of differing word choice in provisions, but instead stick to a common idea in those with an aim to provide a fair equilibrium among rigid ATAD and taxpersons' freedoms.[186] To conclude the abovementioned, the European Parliamentary Research Service has issued a document where it is stating that while examining the "removal of taxation-based obstacles and distortions in the single market" it was concluded that a plethora of EU anti avoidance measures have become a base for difficulty outbreak for enterprises, while after complying with the OECD pillars it was acknowledged that the Commission shall check upon its intersections with the current anti avoidance laws, to ensure that the new ones do not induce even more complexity and to implement corrective measure to extent feasible.[187] To conclude this chapter, the author is inclined to reflect that there is a need to distinguish differences as well as political side of taxation matters between the fostering tax transparency from one side and from another governing cross-border tax competition which creates opportunities for avoidance to be probable.[188]

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[181] Stephanie Bodoni, "EU Courts Chides Hungary Over Google Ad Tax Penalties", 3 March 2020. Available at: https://www.bnnbloomberg.ca/eu-courts-chides-hungary-over-google-ad-tax-penalties-1.1399263. Accessed: May 7, 2023.

[182] Judgment of the Court of 3 March 2020, Google Ireland Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága, Case C-482/18.

[183] Opinion of Advocate General Kokott delivered on 15 October 2020. Regarding Cases C-562/19 P Commission v Poland Press and Information and C-596/19 P Commission v Hungary. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200132en.pdf. Accessed: May 7, 2023.

[184] Supra, note 162, p. 33.

[185] *Ibid.*

[186] European Parliament, "Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6)", Werner Haslehner and Katerina Pantazatou for PE 703.353 - March 2022, p. 25. Available at: https://www.europarl.europa.eu/regdata/etudes/STUD/2022/703353/IPOL_STU(2022)703353_EN.pdf. Accessed: May 7, 2023.

[187] *Supra*, note 168.

[188] Eccleston, R and Smith, H, "The G20, BEPS and the Future of International Tax Governance, Global Tax Governance: What is wrong with it and how to fix it", ECPR Press, P Diestsch and T Rixen (ed), United Kingdom, pp. 175-198, (2016). ISBN 978-1-785521263.

Conclusion

It is undeniable that respective tax legislators, institutions of a national level and supra-national are following and monitoring each and every possible tax law issue appearing on the international tax law arena. The substantiality and extendedness of this research binds to draw a number of conclusions. To begin with the legal problem indicated in the introductory part, the author reminds of it, "*when it comes to deciding upon where to tax income generated by MNEs – shall freedom of establishment principle allow for free choice of tax jurisdictions that could be more favourable for the beneficiary than the initial inhabitation country jurisdiction or shall the General Anti-Avoidance Rule (hereinafter referred to as "GAAR") literally rule over tax avoidance practices as it shall according to lex specialis principle*?".

The first conclusion proposes that taking into consideration the lex specialis principle applicable to GAAR, we shall not forget the legal doctrine from ECJ case-law of Costa vs. ENEL which indeed does not leave any other choice than to accept the supremacy of the EU primary law over national laws. In such case the freedom of establishment provided by the TFEU override GAARs of any country, even though some space would always be left open for special and unique circumstances which would bear a full potential to be heard in the Court of EU for reaching the most just judgement possible. The Centros case has shown that even without sufficient economic activities, when it comes to individuals and companies with their rights to establish companies or subsidiaries freely across EU, none of MS are eligible to discriminate such taxpayers on the basis of creditors protectionism or fraud eradication at its formation stage. Whereas, second thesis from the Centros case was that none of MS shall discriminate company formation on the basis that it was established with another MS company laws, noted that such establishment is not carrying out actual economic activity. Thus, it can be concluded that ECJ considers that it shall not be possible for MS to compromise fundamental freedoms of EU, on the grounds of tax avoidance general suspicion.

The second conclusion is centered around another legal problem, namely *"[d]oes freedom of establishment under article 49 of TFEU presume only the need to keep MNEs their right to freely choose markets and jurisdictions they enter, or does it allow even protection of MNEs beneficiaries' incomes when they are freely allowed to choose the jurisdiction where the income would be generated and afterwards taxed?"* Answer to which is, whereas classical literal interpretation of fundamental freedom presents nothing else than the actual wording, here comes teleological interpretation as a part of legal interpretation. Teleological interpretation, if applied to the question hereinabove, suggests that since the purpose behind establishing the EU was an economic union with a single market, then it follows that the consequential idea behind the freedom of establishment principle could be the taxpayer's right to choose whichever tax jurisdiction out of MS to establish there a taxing nexus, which in other words would sound like freedom to choose a tax jurisdiction to be subjected to. As to the second part of the question, by taking into account the adequate level of privacy and on the other side transparency, then if all tax arrangements were conducted without contradictions to the rule of law, then it follows that beneficiaries' finances would be subjected to the base protection of individuals' property by, e.g., civil law, which would not be the same in all MS.

The third conclusion relates to the next proposed legal question. It reads, "*does freedom of establishment cover only the place of establishment of MNE when it comes to taxing rights or it includes also the place where value is created, a place where income is being generated and the beneficiary's inhabitation country?"* To answer this question, the author recalls such notions as PE, PPE and SDP discussed mainly in sub-sections 1.3.4. and 2.3. At

one point in history the ECJ practice was to acknowledge the PE, when it comes to examining disputes which begun with freedom of establishment and taxation conflicts (as in Cadbury Schweppes case). The notion of PE itself bears a possibility to be interpreted in the context of PPE package, which is property, plant and equipment. If we add personnel to this list, then it would be a full set for debating around company's source jurisdiction – necessary for acknowledging the taxing nexus. Along with the progress rapidly approaching MNEs and tax authorities, the digitalised era forced European Commission to come up with Significant Digital Presence Directive, which is a decent continuation of establishing practical and fair grounds for acknowledging taxing nexus. When a huge part of enterprises on market are either fully operating exclusively online or just in part, then such innovative legislative tools are deemed exceptionally useful. In its turn, the question on freedom of establishment principal application to the current e-commerce era is seem to be prospering at its finest (in case Google Ireland v. Hungary the later failed with finding nexus), since with e-commerce it gradually appears that value creation and income generation is at the same time a particular country and a cloud space per se. However, the author still comes up with leads to finding nexus, it could be the jurisdiction of a country of a bank where money for digital services is landing or a country where goods are shipped from. Overall, it is economic substance, which serves as prominent indicator for accessing taxing nexus.

The fourth conclusion answers the proposed legal research question, which was, *"[w]hat is the borderline between tax avoidance and tax planning in corporate taxation under the freedom of establishment principle (Art. 49 of TFEU), noting that one is strictly illegal and another is lawful?"* As it was found in during researching process, the later – tax planning is deemed to be shaped within a context of permitted borders of taxpayers to obey the law and still save earned finances. As quoted in sub-section 1.1.3., in Zelmenis paper the author found out that checks for revenue service that were paid on time, accounting organisation and proper reports are indicating that tax behaviour constitute a lawful tax planning. Simultaneously tax planning is also corresponding to one's arrangement of commercial activity or individual business with the purpose of lowering tax burden inasmuch possible. Thus, it is concluded by the author that it is only a matter of taxpayer's honesty – whether his/her tax behaviour arrangements would or would not gradually turn from lawful tax planning, to aggressive tax planning when company reports would attain a sprinkle of bad faith or misleading information and later on meet the last stage which is tax evasion. Thesis section 2.2. has demonstrated different EU case law outcomes, which shows how in each case the Court has accessed different tax practices to be permissible or forbidden and different MS GAARs to be either cherishing freedom of establishment principle or contravening.

The fifth conclusion continues the issue raised in the previous one and in the title of this paper and is focused on the belief of absence of a uniformly accepted definition for tax avoidance and tax evasion. While preparing this thesis, the Author has reflected upon causes and reasons behind it. Taking into account all deliberate practice of OECD IF, the unanimous uniform approach to BEPS is coming, however currently with so differing GAARs, approaches to tax behaviours and understanding of its shades from lawful to illegal is still not reached. The Authors considers that it is so, because then tax authorities are enabled to settle on taxation matter cases up to their own vision. It is a kind of executing countries' state sovereignty on administrative level and national judicial level. However, as long as current world is highly globalised, it would indeed be more efficient for states to cooperate more, via transparent borders and TT for unified coherent approach to dealing with taxation matters internationally.

The sixth conclusion is following the discussed idea in the sub-section 3.1., which elaborates on a proper cooperation of MNEs in question and tax authorities, both national and supra-national for the common good purpose. Since issuing new tax reforms could be an actual solution, there is always a room for the dialogue between parties. Such dialogue between both interested parties, where ones are enthusiastic about keeping and multiplying money and others in providing governments with tax revenues and ensuring that tax legislation is not abusing fundamental freedoms and rights given by EU primary law, could become a most fruitful approach to finding a balance between those who wish to keep inasmuch finances possible and those who are urged to provide governments with tax revenues and ensure that GAARs are not abusive. Altogether the last presented solution would serve as a method to eliminate unnecessary obstacles to establishing the most efficient and transparent multinational tax policy.

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