‘The Principal Purpose Test under BEPS Action 6: Does the OECD Proposal Fit the EU Legal Framework?’

by

Oleksandr Koriak

HARN60 Master Thesis
Master’s Programme in European and International Tax Law
2015/2016

Spring semester 2016
Tutor: Axel Hilling
Examiner: Cécile Brokelind

Author’s contact information:
oleksandr.koriak@gmail.com
+46 72 5791263
Dedication

This master thesis is dedicated to the memory of my father, who inspired me to become a lawyer through constant support and encouragement. Thank you, dad, for believing in me and all of my endeavors. I am forever proud to be your son and I hope that you would have been proud of me too.
# Table of Contents

Summary .......................................................................................................................... I

Abbreviation list .......................................................................................................... II

1. Introduction .............................................................................................................. 1
   1.1 Action 6: ‘minimum standard’ against treaty shopping ........................................ 1
   1.2 Subject and purpose ............................................................................................ 2
   1.3 Research method and materials ......................................................................... 4
   1.4 Delimitations ...................................................................................................... 4
   1.5 Outline ............................................................................................................... 5

2. The PPT rule according to BEPS ........................................................................... 5
   2.1 The OECD proposal .......................................................................................... 5
   2.2 Example of treaty shopping arrangement ......................................................... 7
   2.3 Scope of application .......................................................................................... 8
      2.3.1 In general ................................................................................................... 8
      2.3.2 Arrangement or transaction ......................................................................... 8
      2.3.3 Benefit under the DTT .............................................................................. 8
      2.3.4 Subjective test .......................................................................................... 9
      2.3.5 Objective test ........................................................................................... 10
      2.3.6 Legal consequences .................................................................................. 11
   2.4 Interaction with SAARs ..................................................................................... 13

3. The PPT rule as proposed by the European Commission ....................................... 14
   3.1 In general .......................................................................................................... 14
   3.2 EC Recommendation on the PPT ................................................................. 15
   3.3 Comments on the EC Recommendation ........................................................... 16

4. Compatibility with EU law analyses ....................................................................... 17
   4.1 In general .......................................................................................................... 17
   4.2 Applicable fundamental freedoms ..................................................................... 18
   4.3 Possible restriction ............................................................................................ 19
   4.4 Justification grounds ........................................................................................ 21
      4.4.1 In general .................................................................................................. 21
      4.4.2 Prevention of tax avoidance ....................................................................... 22
      4.4.3 The PPT and a wholly artificial arrangement ........................................... 23
      4.4.4 Safeguarding the balanced allocation of taxing rights .............................. 24
   4.5 Principle of proportionality ................................................................................. 26
   4.6 Another limitation: the subjective test in the EU context ................................. 30

5. Conclusions ............................................................................................................. 31

Bibliography ............................................................................................................... IV

Table of cases ............................................................................................................. VII
Summary

On October 5, 2015, the Organization for Economic Cooperation and Development published the final package of 15 actions under the BEPS initiative. This package, in particular, includes the Final Report on Action 6 – ‘Preventing the granting of treaty benefits in inappropriate circumstances’, which is intended to provide countries with the ‘minimum level of protection against treaty abuse’. To that end, the principal purpose test (so-called ‘PPT’ rule) is to be implemented into double tax treaties.

In general, although the BEPS proposal is soft law and cannot take precedence over EU law, it nonetheless has been committed to gradual implementation by the Member States and thus may cause a number of problems. In particular, BEPS actions and EU law, namely fundamental freedoms might be intrinsically difficult to reconcile. The EU freedoms are the cornerstone of the single market and aim at securing free movements to ensure neutrality between domestic and cross-border transactions, while BEPS rules seek to counteract aggressive tax planning schemes that naturally cannot be used in domestic situations. Therefore, should BEPS actions were implemented, they would impose a restrictive or discriminatory tax treatment on cross-border transactions merely because they involve more than one state. In this respect, the PPT provision proposed under BEPS Action 6 is not an exception.

In this master thesis the author continues the discussion on BEPS and its compatibility with EU law, focusing specifically on the PPT rule. The major research question is whether a Member State could implement the proposed rule into its double tax treaties in compliance with EU law. In addition, the PPT formula chosen by the European Commission in the recently released Anti-tax avoidance package is also analyzed.

The author deduces that the PPT rule frustrates the exercise of the freedom of establishment and/or free movement of capital. Further, considering the Court of Justice of the European Union’s case law, this restriction is unlikely to be justified by the overriding reason of public interest. What is more, it has been shown that even supposing that the PPT is justified, neither the BEPS proposal nor the European Commission’s recommendation fulfils the requirements of the principle of proportionality.

As a conclusion remark, the present research stresses that in order to be consistent with EU law, the Member States are to consider the PPT carefully before implementing either BEPS proposal or European Commission’s recommendation.
### Abbreviation list

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>Art</td>
<td>Article</td>
</tr>
<tr>
<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>DTT</td>
<td>Double Tax Treaty</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EC Recommendation</td>
<td>Commission Recommendation On the Implementation of Measures Against Tax Treaty Abuse</td>
</tr>
<tr>
<td>GAAR</td>
<td>General Anti-abuse Rule</td>
</tr>
<tr>
<td>LOB</td>
<td>Limitation of Benefits</td>
</tr>
<tr>
<td>MNE</td>
<td>Multi-National Enterprise</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization of Economic Cooperation and Development</td>
</tr>
<tr>
<td>OECD Model</td>
<td>Model Tax Convention on Income and on Capital (2014)</td>
</tr>
<tr>
<td>P</td>
<td>Page</td>
</tr>
<tr>
<td>PP</td>
<td>Pages</td>
</tr>
<tr>
<td>Para</td>
<td>Paragraph</td>
</tr>
<tr>
<td>PPT</td>
<td>Principle Purpose Test</td>
</tr>
<tr>
<td>PSD</td>
<td>EU Parent-Subsidiary Directive</td>
</tr>
<tr>
<td>Report</td>
<td>The Final Report on Action 6</td>
</tr>
<tr>
<td>SAAR</td>
<td>Special Anti-abuse Rule</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>VAT</td>
<td>Value Added Tax</td>
</tr>
<tr>
<td>WHT</td>
<td>Withholding Tax</td>
</tr>
</tbody>
</table>

II
1. Introduction

1.1 Action 6: ‘minimum standard’ against treaty shopping

The base erosion and profit shifting (‘BEPS’) initiative was launched on July 19, 2013, when the Organization for Economic Cooperation and Development (‘OECD’) presented Action Plan on BEPS\(^1\) endorsed by G20 Leaders with the concrete set of actions to be taken to address aggressive tax planning structures widely used by Multi-National Enterprises (‘MNEs’). This Action Plan considered treaty abuse (or treaty shopping) as ‘one of the most important source of BEPS concerns.’\(^2\) Following it, in September 2014, the OECD issued the ‘Action 6 Deliverable on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances’\(^3\), which then was followed up by two discussion drafts.\(^4\) On October 5, 2015, as a result of efforts of the OECD and G20 in cooperation with a number of developing countries, the final package of 15 actions under the BEPS project was released. Among others, this package includes the Final Report on Action 6 (‘Report’),\(^5\) which is intended to provide countries with the ‘minimum level of protection against treaty abuse’.\(^6\) In particular, the OECD recommends the inclusions of detailed model provisions in double tax treaties (‘DTTs’), which should be adapted to constitutional restrictions (if any) of countries and EU law requirements. However, these recommendations may be disregarded insofar as a country has anti-abuse rules in domestic law offering the minimum protection from treaty abuse, or there is a judicial concept (i.e. substance-over-form) that may also adequately address treaty abuse practices.\(^7\)

In section A of the Report, the OECD distinguishes two situations of granting treaty benefits in inappropriate circumstances: i) a situation when a taxpayer seeks to circumvent limitations provided under the applicable DTT ii) a situation when a taxpayer by using treaty benefits attempts to dodge domestic tax law.\(^8\) Since the second situation cannot be addressed through DTT provisions and needs domestic anti-abuse rules to be implemented,

---


\(^2\) Ibid 18; the term ‘treaty abuse’ and term ‘treaty shopping’ are hereinafter used as synonyms.


\(^5\) OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report (OECD Publishing 2105). References are made to paras of the Report, and paras of the proposed Commentary to the PPT.

\(^6\) The Report (n 5) 5.

\(^7\) Ibid 6.

\(^8\) Ibid 15.
Action 6 dealt explicitly with the first one, which involves treaty shopping.\(^9\) The OECD considers treaty shopping as ‘arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to a resident of that State.’\(^10\) It usually refers to a situation when a taxpayer, who is not entitled to enjoy benefits under DTT, tries to access them indirectly, for instance, by establishing a ‘letterbox’ company in a contracting state or by involving an independent intermediary.\(^11\)

In the Report, treaty shopping is approached on three fronts. First, there should be a clear statement included in tax treaties emphasizing that contracting states do not intend to provide opportunities for a taxpayer to reduce his tax liability or to enjoy non-taxation with the help of treaty shopping. Second, there should be the limitation-on-benefits (‘\text{LOB}’) rule included into the OECD Model Tax Convention (‘\text{OECD Model}’).\(^12\) This specific anti-abuse rule (‘\text{SAAR}’) would limit treaty entitlement to entities that meet certain requirements (e.g. legal nature, ownership, and general activities). Third, to catch other forms of treaty abuse that could not be covered by the LOB rule, it is further suggested to include in the OECD Model a more general anti-abuse rule (‘\text{GAAR}’) named a ‘principal purpose test’ (‘\text{PPT}’).\(^13\)

The OECD states that although some flexibility is allowed, countries would ensure a minimum level of protection against treaty shopping if they included in DTTs: i) a common intention regarding non-creating opportunities for no-taxation; ii) the combined approach of both the LOB and PPT rule; iii) the PPT rule solely, or iv) the LOB rule complemented by a mechanism designed to counteract ‘conduit financing arrangements’.\(^14\)

1.2 Subject and purpose

When one thinks about BEPS as a soft law instrument, which of course cannot override provisions of EU law, but has been committed to gradual implementation by the Member States, some problems may arise in the EU context. In general, BEPS actions and EU law, namely fundamental freedoms might be intrinsically difficult to reconcile. The EU freedoms are the core of the single market and aim at securing free movements to ensure neutrality between domestic and cross-border businesses, whereas the BEPS

\(^9\) Ibid 16.
\(^10\) Ibid 17.
\(^11\) Ibid.
\(^13\) Ibid 19.
\(^14\) Ibid 22.
rules seek to curb some types of tax planning that naturally cannot be used in domestic situations. Hence, BEPS actions may impose a restrictive or discriminatory tax treatment on cross-border transactions merely based on the fact that they involve more than one state. Given that, scholars rightfully expressed a grave concern as to the compatibility of some rules proposed by the OECD in the BEPS project with the EU fundamental freedoms.\(^\text{15}\)

In this master thesis, the author, using previous academic works in this direction as a starting point, continues the discussion specifically on the PPT rule and accompanying Commentary (‘Proposed Commentary’)\(^\text{16}\) as it is set forth in the Report. It is stemming from the academic literature that the PPT clause to be inserted into DTTs concluded by a Member State might infringe primary EU law, \textit{i.e.} fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (‘TFEU’)\(^\text{17}\) and the Court of Justice of the European Union (‘CJEU’) case law as well.\(^\text{18}\)

Therefore, the major aim of this thesis is to provide for the further analysis of the BEPS initiative in respect of the PPT provision and the Proposed Commentary thereto and examine whether a Member State could implement the proposed rule in its DTTs in compliance with EU law. Additionally, the wording of the PPT provision as suggested by the European Commission will also be discussed as a possible EU-compatible solution.

The findings in this master thesis should contribute to the further academic discussion and practical implementation of the PPT rule into the Member States’ DTTs. To that end, the author, firstly, analyses the PPT rule as proposed by the OECD, secondly, provides an overview of the Commission’s approach towards the PPT, and, thirdly, tests the PPT against the identified EU law and doctrines established by the CJEU to find an


\(^{16}\) The Report (n 5) 26.


\(^{18}\) Supra 15.
answer to the question: would the implementation of the PPT rule under BEPS project fit the EU legal framework?

1.3 Research method and materials

The Report does not explain what limits EU law might place on the implementation of proposed domestic and international tax rules. For this reason, legal scholars working on the BEPS project have ‘an important legal-dogmatic task [...] to fill this gap’.19

Since the central question of the thesis is whether and to what extent there is a conflict between the proposed PPT rule and EU law, the legal dogmatic method will be used as a leading method of the research. Legal dogmatic research method deals with analyzing current law as it is laid down in written and unwritten source such as EU law, international rules, principles, concepts, doctrines, case law and academic literature.20 According to the chosen method, the research should be performed in a two-stage process where the sources of law are defined and then interpreted, analyzed, systemized and confronted with each other.21

For the purpose of the present study EU primary law (TFEU), soft law (BEPS Action 6 and the European Commission Recommendation), CJEU case law, legal textbooks, journal articles, and literature are to be examined. Some relevant references concerning GAARs also will be made to the EU secondary law.

1.4 Delimitations

In this thesis only the PPT rule as proposed in the Report will be analyzed, compared with similar PPT as recommended by the European Commission and assessed in the light of EU law.

The author does not analyze whether it is necessary to implement the PPT provision or how efficient it would be to attain the OECD’s objective to establish a minimum level of protection against treaty abuse, as it constitutes a separate topic for research in its own.

This thesis is further limited to the EU fundamental freedoms, prevention of tax avoidance alone and in conjunction with safeguarding the balanced allocation of taxing rights as possible justification grounds for a restriction; and principle of proportionality. Also, this thesis will not cover the issue of

21 S. Douma (n 19) 20.
compatibility of the PPT rule with constitutional law of the Member States.

The LOB clause, EU compatibility of which is even more questionable, has been subject to extensive investigation\(^{22}\) in international tax literature\(^{23}\) and, therefore, deliberately left outside of the scope of this research. Moreover, LOB is not finalized in the Report and expected to be completed in the first part of 2016.\(^{24}\)

1.5 Outline

Following the introduction of the PPT presented in the Report, the author will examine the scope of its application, legal consequences and interaction the PPT with SAARs. Further, having observed relevant aspects of the PPT rule, the author analyses the European Commission’s approach towards this rule. Thereafter, the thesis proceeds with an investigation of whether the PPT rule is compatible with the EU fundamental freedoms. The analysis starts with a short introduction and continues with the determination of which fundamental freedom may be affected by the application of the PPT, whether the rule is discriminatory or restrictive. After that, the author assesses the provisions contained in the PPT clause in the light of the prevention of tax avoidance alone and in conjunction with safeguarding the balanced allocation of taxing rights as conceivable justification grounds and the proportionality principle. Further, another limitation, which could be imposed on the scope of the PPT by the CJEU case law, will be observed. Finally, the author's conclusions are presented.

2. The PPT rule according to BEPS

2.1 The OECD proposal

The OECD proposes the inclusion of the PPT rule as a GAAR that could catch any type of treaty abuse schemes, *inter alia*, through financial arrangements that passed other anti-abuse provisions. The rule to be included in the OECD Model as para 7 of Article X ‘Entitlement to Benefits’ and reads as follows:\(^{25}\)

> ‘Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income *if it is reasonable to conclude*, having regard to all relevant facts and circumstances, that obtaining that benefit was *one of the principal purposes* of the arrangements in question.’

\(^{22}\) L. De Broe and J. Luts (n 15) 128.

\(^{23}\) Most scholars have drawn the conclusion that the LOB clause eventually restricts the exercise of the fundamental freedoms enshrined in the TFEU.

\(^{24}\) The OECD will take into account the LOB rule in the US Model Treaty, the revised version of which was adopted after publishing the Report.

\(^{25}\) The Report (n 5) 26.
of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.'

Some similarities with the recommended provision may be found in the current Commentary on Article 1 of the OECD Model. As the OECD pointed out, the PPT reflects a guiding principle, according to which benefits under a DTT should not be conferred where a primary purpose of the transactions or arrangements was to secure a more favorable tax position and where obtaining that benefit would be contrary to the object and purpose of the DTT provisions.

The PPT rule strives to ensure the proper application of DTTs according to their purpose – ‘to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons as opposed to arrangements whose principal objective is to secure a more favourable tax treatment.’

The Report also provides states with an optional provision that could be included into DTTs as para 8 of Article X. This provision provides a taxpayer, who was denied a treaty benefit in the first place, with a possibility of filling a request to the tax authority to receive that benefit. In other words, the tax authority has discretion to allow a taxpayer to enjoy a DTT benefit related to the relevant item of income or capital as if the transaction passed the PPT. However, before reaching the decision the tax authority should take into account all relevant facts and circumstances. In a case of rejecting the request, the tax authority should consult the tax authority of the other contracting state to ensure that the latter treats the arrangement or transaction in the same way. But it does not mean that the tax authority to which request was made is required to receive the confirmation from the other side.

It could be argued that the OECD proposal of implementation of the PPT rule, at least, prima facie, exemplifies the general legal tendency of the
EU. Similar general anti-abuse provisions could be found in the EU Directives on tax matters and in some DTTs. However, the proposed PPT evokes an outpouring of criticism from legal scholars in view of its vague and ambiguous wording, which put in doubt the effectiveness of the rule against treaty shopping. In fact, there is a low degree of consensus on how PPT should be formulated or whether there is a need for such a GAAR at all.

2.2 Example of treaty shopping arrangement

The Proposed Commentary illustrates some examples of arrangements, which should be considered as having one of the principal purposes of obtaining the treaty benefit.

A typical treaty shopping structure is shown above. A parent company resident of State A established a subsidiary in State C, which does not have a DTT with State A and; therefore, State C levies withholding tax of 25% on any payment of dividends to the parent company, according to its domestic legislation. However, State B concluded a DTT with State C, under which there is no withholding tax on dividend distributions from State C. To

---

32 E. Pinetz (n 15) 4; P. Kavelaars, EU and OECD: Fighting against Tax Avoidance (2013), 41 Intertax 10, p. 507; C. Palao Taboada (n 15) 602-603; M. Lang (n 15) 656; L. De Broe and J. Luts (n 15) 122-146.
34 In DTTs concluded by the UK dividend, interest, royalties and sometime, the other income articles supplemented by the ‘main purpose’ provision.
35 E. Kemmeren (n 15) 192; M. Lang (n 15) 656.
36 Proposed Commentary, para 14.
37 Proposed Commentary, para 14 (examples A and B).
benefit from this DTT, the parent company assigns the shares (e.g. usufruct agreement) or other rights to a third person, which could be an independent financial company (intermediary), resident of State B. Furthermore, there is no withholding tax on payments made by the intermediary to the parent company.

This simple structure allows the parent company to reach the exemption from source taxation in State C, which according to the Proposed Commentary is to be treated as an arrangement with one of the principal purposes to obtain that exemption and, consequently, should be struck down by the PPT rule.

2.3 Scope of application

2.3.1 In general
According to the Report, in order to apply the PPT provision the following conditions must be met: i) there is an arrangement or transaction ii) directly or indirectly results in a benefit under a DTT; iii) have been set up for one of the principal purposes of obtaining that benefit, and iv) it is not established that granting the benefit corresponds to the object and purpose of the relevant provisions of the DTT. From the wording of the provision, it is clear that these conditions must be fulfilled cumulatively. That is to say, if at least one of these conditions is not met, the rule cannot apply. In this section, the author will discuss the scope and various elements of the PPT rule in detail.

2.3.2 Arrangement or transaction
According to the OECD, the term ‘arrangement or transaction’ should be understood broadly and encompasses ‘any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable.’\(^{38}\) Such an arrangement or transaction, in particular, is intended to create, assign, acquire or transfer the income, right on that income or property. It also should be noted that a transaction alone may create a benefit, or it may be conducted along with a group of transactions that together lead to a tax advantage.\(^{39}\)

2.3.3 Benefit under the DTT
Applying a broad definition, the OECD suggests that the notion of ‘benefit under this Convention’ should include not only the relief from double taxation provided by Article 23 or the protection granted to a taxpayer under Article 24 of the OECD Model but also all limitations on taxation imposed on the source state such as a reduction of taxes, exemption, deferral of taxes

\(^{38}\) Proposed Commentary, para 9.
\(^{39}\) Ibid.
or tax refund.\textsuperscript{40} It does not include the scope of a DTT itself (Articles 1 and 2) and the general definitions (Articles 3 to 5), which may grant the benefit only with conjunction to distributive rules.\textsuperscript{41} Thus, if the application of specific DTT provisions somehow improved a taxpayer’s position as compared to domestic legislation, it would constitute a tax benefit. However, not all tax benefits fall within the scope of the PPT, but only those that furnished under a DTT at issue. If a benefit stipulated in national legislation, EU legislation, or another DTT, the PPT cannot be used in order to deny such benefit.\textsuperscript{42} The rule, therefore, is designed to counteract the abuse of a particular DTT.\textsuperscript{43}

2.3.4 Subjective test

Before denying a benefit, the PPT looks at whether an arrangement was motivated by fiscal advantages. This may be referred to as a ‘subjective test’, which attempts to identify if the arrangement was inspired by obtaining the tax benefit under DTT.

Some scholars expressed the opinion that it is next to impossible to prove a taxpayer’s intention, even though all circumstances and relevant facts of the particular situation are taken into consideration.\textsuperscript{44} Pinetz argued that ‘objective facts may give only indications as to the motives behind certain behaviour, but proving a certain motivation or that a certain motivation did not exist is hardly possible.’\textsuperscript{45} Nevertheless, the real intention of a taxpayer has a crucial role and gives rise to the application of the PPT rule.\textsuperscript{46}

Interesting enough that the rule leaves open a possibility of existing not just one, but also two or more principal purposes of the transaction.\textsuperscript{47} Under the subjective test, it is not necessary that the sole purpose of transaction or series thereof is to gain a DTT benefit. What is more, it is not required that the purpose should be the ‘essential’ or ‘dominant’. It is sufficient that at least one of the principal purposes was to obtain a tax benefit\textsuperscript{48} implying that a transaction motivated mainly by legitimate commercial purposes may still not pass the PPT if gaining a tax advantage was also a principal purpose. To put it differently, assuming that a taxpayer successfully proved that an arrangement is also inspired by other legitimate non-fiscal reasons, the tax authority may still invoke the PPT rule and deny the benefit, arguing

\textsuperscript{40} Proposed Commentary, para 7.
\textsuperscript{41} C. Palao Taboada (n 15) 606.
\textsuperscript{42} L. De Broe and J. Luts (n 15) 131.
\textsuperscript{43} C. Palao Taboada (n 15) 606.
\textsuperscript{44} E. Pinetz (n 15) 5.
\textsuperscript{45} Ibid.
\textsuperscript{46} M. Lang (n 15) 658.
\textsuperscript{47} Ibid.
\textsuperscript{48} Proposed Commentary, para 12.
that the transaction aimed at a DTT benefit as well.\textsuperscript{49} Thus, the distinction between principal purposes and not principal ones is a fundamental element of the PPT rule and requires an analysis of a particular situation.\textsuperscript{50}

Taxes are one of the essential business expenses, and any reasonable business has to take into consideration tax implications in virtually any transaction that also would depend on benefits granted by DTT.\textsuperscript{51} But when does this consideration become one of the principal purposes? The Report does not offer any guidance on how one should distinguish between principal purposes and ancillary purposes, and between different principal purposes.\textsuperscript{52}

In the view of the above, one might argue that the PPT rule set forth a quite low subjective abuse threshold.\textsuperscript{53} Indeed, although it is up to the tax authority to move first in the matter and having regard to all relevant facts and circumstances come to the conclusion, the requirement ‘it is reasonable to conclude’ is not demanding as it could be.\textsuperscript{54} As a result, the tax authority is not required to establish beyond reasonable doubt that obtaining the DTT benefit was one of the principal intentions of a taxpayer. It does not even need to provide full evidence to justify the conclusion since it would suffice to ‘reasonable conclude’.\textsuperscript{55}

Analyzing the subjective element of the PPT, some authors share the view that the provisions are intended to set ‘a balance between the interests of the taxpayer and those of the tax authorities’.\textsuperscript{56} However, as it was heavily criticized in statements submitted to the OECD\textsuperscript{57} and academic literature,\textsuperscript{58} it is evident that the tax authority is in much more favorable situation insofar as a burden of proof is eventually placed on a taxpayer.

2.3.5 Objective test
The last part of Article X (7) constitutes the fourth requirement, which phrased as an exception to the main rule. The PPT would apply ‘unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this

\textsuperscript{49} M. Lang (n 15) 658.
\textsuperscript{50} Ibid 659.
\textsuperscript{51} L. De Broe and J. Luts (n 15) 132.
\textsuperscript{52} M. Lang (n 15) 659, L. De Broe and J. Luts (n 15) 132.
\textsuperscript{53} L. De Broe and J. Luts (n 15) 131.
\textsuperscript{54} M. Lang (n 15) 658 see also C. Palao Taboada (n 15) 602-604.
\textsuperscript{55} M. Lang (n 15) 658; see also L. De Broe and J. Luts (n 15) 132.
\textsuperscript{56} M. Lang (n 15) 658; see also E. Pinetz (n 15) 5.
\textsuperscript{57} See the numerous statements in the OECD, Comments Received on Public Discussion Draft ‘BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances’ (OECD publishing 2014).
\textsuperscript{58} M. Lang (n 15) 658; see also E. Pinetz (n 15) 5; L. De Broe and J. Luts (n 15) 132.
Convention.’ This is also might be considered as an ‘objective test’. In general, under the objective test, it should be determined whether the intention of the contracting states concerning relevant DTT provisions is frustrated when a taxpayer receives a tax benefit. According to the Proposed Commentary, the objective test would allow the taxpayer, whose claim to obtain a benefit was refused, to establish that granting that benefit in circumstances at hand would be following the object and purpose of the relevant provisions of the DTT.

The wording of the objective test as it is defined in Article X (7) also raises some questions. In particular, what use would PPT rule have if it could only apply when a provision of a DTT is invoked against its object and purpose? Article X (7) stipulates that if the benefit corresponds to the object and purpose of the relevant provision, the objective test will be satisfied, and the PPT will not apply. However, according to Article 31 of the Vienna Convention the interpreter of a legal norm always has to take into account an object and purpose of the provision. A legal meaning of the provision cannot be defined if it is interpreted in isolation, based only on the letter of law. The interpretation of a DTT, thus, always depends on the object and purpose of the provision.

Lang rightly concluded that the formulation of the objective test is a ‘mere hint for the interpretation’ and it should be understood in the way that it highlights the apparent need to consider the object and purpose while interpreting relevant provisions. This conclusion also supported by the examples illustrated in the Proposed Commentary to the PPT.

In addition, while for the subjective test to deny a benefit it is sufficient to ‘reasonable conclude’, the exception in form of objective test should be ‘established.’ This implies that a burden of proof remains with a taxpayer, who should prove that, in a specific case, granting the benefits would not be contrary to the object and purpose of relevant DTT provisions.

2.3.6 Legal consequences
The application of the PPT rule implies that ‘a benefit under this Convention shall not be granted’. The contracting state will, accordingly, be

59 It should not be confused with objective test in the sense that the fiscal intention of a taxpayer has to be derived from objective facts and circumstances.
60 Proposed Commentary, para 2.
61 E. Pinetz (n 15) 6.
63 M. Lang (n 15) 661.
64 E. Pinetz (n 15) 6.
65 M. Lang (n 15) 660.
66 Ibid; E. Pinetz (n 15) 6.
obliged to deny the benefit derived from the abused DTT provision once the requirements of the PPT rule are fulfilled. There is no discretion in this respect.

The term ‘benefit’ has the same meaning here as in the notion of ‘the purpose of obtaining the benefit’. Reiterating what has been discussed in subsection 2.3.3, this term comprises: 1) a reduction or exemption from withholding taxes in the source state and 2) elimination of double taxation in the resident state. Following the literal reading of the PPT provision, it implies that both of these groups of benefits should be disallowed if a transaction or series thereof falls within the scope of the PPT rule.⁶⁷

Application of the PPT rule leads to far-reaching and adverse consequences for a taxpayer and, eventually, may create the juridical double taxation that would have a penalizing effect.⁶⁸ Nevertheless, the issue of legal implications of the PPT rule is still unclear and causes not fewer questions than the scope of the rule in general.⁶⁹

The PPT itself or Proposed Commentary remains silent and does not explain how the rule affects the residence state’s obligations to give a relief for double taxation when the PPT is applied by the source state. For instance, should the resident state increase the credit amount if the source state, invoking the PPT rule, reclassifies a payment of interests to a payment of dividends and, accordingly, increases a withholding tax levied therein?⁷⁰ If the residence state agrees with the application of the PPT by the source state, it should do so. But if it is not a case and the residence state considers that the PPT rule was applied incorrectly, the dispute should be solved by the mutual agreement procedure.⁷¹ Evidently, the situation becomes even more complicated when three or more states are involved.⁷²

Another question, which also is not addressed in the Report, is that how the transaction conducted to obtain the refused benefit should be treated after all. Will a taxpayer still be allowed to enjoy DTT benefits after the reclassification of the transaction? Unfortunately, Article X(7) solely appeals to the rule that should not be applied, without indicating the ‘right’ rule to be applied.⁷³

Also, if a transaction does not pass the PPT and tax authorities deny tax

---

⁶⁷ See C. Palao Taboada (n 15) 606.
⁶⁸ M. Lang (n 15) 662.
⁶⁹ See C. Palao Taboada (n 15) 606; M. Lang (n 15) 662-663.
⁷⁰ L. De Broe and J. Luts (n 15) 134.
⁷¹ C. Palao Taboada (n 15) 606.
⁷² M. Lang (n 15) 662.
⁷³ Ibid, see also L. De Broe and J. Luts (n 15) 133-134.
benefits under the ‘shopped’ DTT, should a taxpayer still be protected by the DTT between the residence state and source state or should the source state impose a statutory withholding tax this situation? While applying the ‘original’ DTT would seem to be logical and fair, it is far from evident that a taxpayer may rely on the favorable outcome. It is most likely that the result of the PPT application would depend on the choice of each country.74

The point might be made that the issue of legal consequences is uncertain, which entails that the PPT rule offers less security to taxpayers and again appears to be more favorable to tax authorities.

2.4 Interaction with SAARs

The LOB clause as proposed by BEPS is regarded as a SAAR, which already could be found in some DTTs concluded by countries such as India, Japan and most notably the US. This SAAR unlike a GAAR such as the PPT is mechanical and principally focuses on the legal nature, ownership and a general activity of the resident of the contracting state. The question to be considered below is how the PPT rule interacts with SAARs, namely the LOB clause and ‘beneficial ownership’ test. Can the PPT apply autonomously from the other DTT provisions?

Article x (7) stipulates that the PPT rule may be enforced ‘notwithstanding the other provisions of this Convention’ that seemingly has an independent status. The Proposed Commentary brings some further clarifications on this matter. On the one hand it states that: ‘[p]aragraph 7 supplements and does not restrict in any way the scope or application of the provisions of paragraphs 1 to 6 (the limitation-on-benefits rule): a benefit that is denied in accordance with these paragraphs is not a “benefit under the Convention” that paragraph 7 would also deny. Moreover, the guidance provided in the Commentary on paragraph 7 should not be used to interpret paragraphs 1 to 6 and vice-versa.’75 On the other hand, if an arrangement or transaction passes the LOB, it still may constitute an improper use of DTT, which ultimately would be prevented by the application of the PPT rule.76

The PPT is aimed at counteracting conduit transactions that fall outside the scope of the LOB clause. The LOB, thus, should be regarded as a *lex specialis* to the PPT rule.77 In this respect, some authors expressed the opinion that according to the *lex specialis derogat legi generali* principle, the priority should be given to the *lex specialis* (SAARs) due to the *lex specialis* is applicable in specific circumstances regardless of a more general

---

74 See ibid.
75 Proposed Commentary, para 3.
76 Proposed Commentary, para 4.
77 L. De Broe and J. Luts (n 15) 133, C. Palao Taboada (n 15) 605.
rule (PPT). In other words, if an allegedly abusive transaction or series thereof adhered to the requirements of SAARs, it would exclude the application of the PPT rule. However, the scholars then reasonably countered this statement and claimed that the PPT is a ‘self-standing’ rule, and so that can be applied even when a transaction or arrangement satisfies SAARs requirement.78 In Carlos’ words: ‘[i]t is] doubtful that the relationship between a GAAR and a SAAR is the same as the relationship between a general norm and a special norm contemplated in the *lex specialis derogat legi generali* maxim’.79

The PPT is an independent rule and has a ‘general’ status in that it is designed to capture all forms of treaty shopping, where SAARs are intended to address only specific situations.80 This argument also confirmed by the Report, which states that LOB clause: ‘only focuses on treaty shopping and does not address other forms of treaty abuses; it also does not address certain forms of treaty shopping, such as conduit financing arrangements, through which a resident of Contracting State that would otherwise qualify for treaty benefits is used as an intermediary by persons who are not entitled to these benefits.’81

As for the concept of ‘beneficial owner’, the Commentary on Article 10 of the OECD Model specifies that it ‘does not deal with other cases of treaty shopping and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.’82

In conclusion, there should be no doubts regarding the independence of the PPT rule, which can be applied autonomously from SAARs.

3. The PPT rule as proposed by the European Commission

3.1 In general

After the Report was published, many Member States undertook the commitment to implement BEPS actions. However, there is a high risk that they may do so in an EU non-compliant way.83 On the one hand, the EU

78 Ibid.
79 Ibid.
80 C. Palao Taboada (n 15) 605.
81 The Report (n 5) 20.
anti-avoidance actions need a unified approach and cooperation to reinforce the Member States’ defense against BEPS structures and provides more legal certainty for taxpayers. On the other hand, these actions should conform to EU law. Understanding that, the EU sought to develop a common standard comprised of comprehensive set of rules to be implemented by all Member States. As a result, on January 28, 2016, the European Commission released the Anti tax avoidance package, which is a part of its agenda for the fair corporate taxation in the EU.

This Package includes legally binding instruments to prevent commonly used tax avoidance structures. The Commission suggests the adoption of these instruments, in particular, through the Anti Tax Avoidance Directive, which would be more suitable for the Member State when it comes to their national legislation. As for the treaty shopping, however, the Commission presented the Recommendation (‘EC Recommendation’), which is seen to be more appropriate tool to provide a guidance for the Member States to align the wording of the PPT as proposed by the OECD with the TFEU freedoms.

3.2 EC Recommendation on the PPT

The EC Recommendation addresses the implementation of the anti-treaty abuse measures taking into consideration the OECD’s proposal in the Report. First, it should be noted that the Commission did not include LOB clause into the EC Recommendation, apparently considering it to be contrary to EU law. Second, in respect of a GAAR based on the PPT, the European Commission recommends the Member States to insert this rule into DTTs with the following formulation:

‘Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and

84 Ibid.
88 Supra 83.
89 Supra 87.
circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that it reflects a genuine economic activity or that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.  

It is evident that the Commission endorsed the approach chosen by the OECD in BEPS. The latter, however, has been slightly modified in order to fit the EU legal framework. This minor but crucial modification from EU law perspectives is discussed below.

3.3 Comments on the EC Recommendation

From the wording of the Commission’s PPT rule, it could be deduced that to obtain a DTT benefit, an arrangement or transaction should pass the subjective test, i.e. should have no principal tax purpose. However, the rule still may not apply if a transaction or series of transactions is genuine, hence put into place for valid business reasons and reflects economic reality or granting the benefit corresponds to the purpose of the DTT.

Unlike OECD’s version, the PPT in the EC Recommendation also considers the question of ‘genuine economic activities’ when assessing whether a transaction passes the test. The PPT rule recommended by the European Commission, eventually, embodies a three-pronged approach including the subjective test (‘one of the principal purposes’), objective test (‘in accordance with the object and purpose’) and genuine nature test (‘genuine economic activity’). According to the Commission, the inclusion of latter into the OECD proposal would make the PPT rule compatible with the primary EU law and CJEU case law. But would that be enough for the PPT to survive the CJEU’s scrutiny? Are there any other flaws that the Member States should be cautious about while implementing the rule? The answer is to be found in the further sections.

It also should be mentioned that the EC Recommendation generally follows the EU approach for a GAAR, recently implemented in the EU secondary law. For instance, the amended anti-abuse clause in the EU Parent-Subsidiary Directive (‘PSD’) reads as follows: ‘Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts

90 Author’s italics.
91 Supra 83.
92 See C. Panayi (n 15) 18.
and circumstances.”\(^93\) Although this GAAR, adopted by the Council of the EU, is not protected from being challenged under the primary EU law, it is assumed that this rule would be considered as being in conformity with EU law.\(^94\) Therefore, some scholars have referred to it as a good example of how the PPT rule might be drafted by the Member States in order to be inline with EU law.\(^95\)

4. Compatibility with EU law analyses

4.1 In general

To eliminate double taxation, the Member States are free to conclude international tax agreements with each other or third countries. This right is derived from Article 351 of the TFEU. However, this cannot be seen as a ‘cart blanche’ with regard to the content of the agreements.\(^96\) The Article also states that if a Member State concludes an agreement, which is not compatible with EU law, the Member State ‘shall take all appropriate steps to eliminate the incompatibilities established.’ This is also confirmed by the consistent CJEU case law: ‘as far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules. According to the settled case-law of the Court, although direct taxation is a matter for the Member States, they must nevertheless exercise their taxing powers consistently with Community law.’\(^97\)

As for double tax treaties, the CJEU ruled in Bouanich case that they constitute a ‘part of the legal background’ and, accordingly, should be considered when interpreting the fundamental freedoms.\(^98\) The CJEU has no jurisdiction to interpret a double tax treaty itself; nonetheless, it is competent to assess its legal effect on the exercise of the fundamental freedoms based on the presented facts.\(^99\) Thus, the Member States are obliged to exercise their retained competence in the field of direct taxation,

---

94 P. Baker (n 15) 4.
95 A. Dourado (n 15) 43; see also C. Palao Taboada (n 15) 607.
including the right to conclude DTT with other countries, in conformity with EU law and respect the fundamentals freedoms.

The PPT rule, which is to be inserted into DTTs cannot avoid the CJEU’s assessment and, therefore, could be tested on compatibility grounds. For that reason, the PPT rule must be compatible with the EU fundamental freedoms and the anti-abuse doctrine within EU law framework. The analysis provided further shows to what extent the EU Member States can implement the PPT rule according to the Report in order to stay on the safe side.

4.2 Applicable fundamental freedoms

To assess whether the PPT rule contradicts fundamental freedoms guaranteed by the TFEU, it is first necessary to ascertain which EU freedoms might be affected by the rule. Within the EU internal market, there are five directly applicable fundamental freedoms, which include the free movement of persons, free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and the free movement of capital. In respect of the current analyze only the free movement of capital and freedom of establishment is of particular relevance since the PPT rule is likely to fall under the ambit of these two freedoms.

Generally, there are two possible scenarios that could trigger the application of the PPT rule. In the first scenario, a treaty shopper is engaged in the cross-border establishment of a related entity through which investment to be made into a company located in another Member State or a third country. The treaty shopper benefits from the DTT concluded by the state where the related intermediary entity is set up with the fiscal purpose. Since the treaty shopper invests directly, this situation prima facie would be covered by the freedom of establishment enshrined in Article 49 of the TFEU. Even though the intermediary may have little economic substance, but is not a completely conduit company, it should nevertheless be regarded as an exercise of the freedom of establishment.

Based on the case law concerning corporate forum shopping, Panayi emphasized the CJEU’s position, according to which a mere fact of setting up a company with limited economic substance does not a priori call into question the right to exercise the freedom of establishment. This line of reasoning in the same vain applies in tax forum shopping cases. For instance, in already mentioned Cadbury Schweppes case, the CJEU ruled that if a taxpayer ‘sought to profit

---

100 See A. Dourado (n 15) 55.
101 See C. Panayi (n 15) 14-15.
102 Ibid.
103 Ibid.
105 C. Panayi (n 15) 15.
from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty [i.e. the fundamental freedoms]. An establishment of the company in a Member State with more favorable legislation or tax regime, which that establishment enjoys, corresponds to the object of the EU internal market and is not per se abusive. Otherwise, a taxpayer would not rely on the right granted under the freedom of establishment. Therefore, the fact that a taxpayer engaged in tax forum shopping by setting up an intermediate company in another Member State does not deprive him of the right of protection based on the freedom of establishment.

At this point, it also should be noted that only EU nationals are entitled to the freedom of establishment. It implies that, if the intermediary entity is established outside the EU, an anti-tax abuse rule such as the PPT, affecting a transaction, does not conflict with EU law if the freedom of establishment is an applicable freedom.

In the second scenario, a treaty shopper exercises the free movement of capital by investing into a company indirectly, through the independent entity, which might be located within or outside the EU. The return from such investment eventually would be channeled through an intermediary entity to the treaty shopper. The intermediary company, for instance, might be an independent financial institution assigned the right to receive dividends from another company. In view of this, the treaty shopper de facto would access to the tax benefits provided by the treaty network of the jurisdiction of the independent intermediary through which investment is conducted. Since this is a case of indirect investment, the free movement of capital should apply.

In the light thereof, two fundamental freedoms potentially might be frustrated by the PPT, i.e. the free movement of capital and freedom of establishment. The choice of which freedom should be invoked depends on whether a treaty shopper controls an intermediate entity or not.

### 4.3 Possible restriction

According to Article 63 of the TFEU, all restrictions on the movement of capital and payments between the Member States and between a Member

---

108 See C. Panayi (n 15) 15.
109 Ibid 16.
110 See the example in section 2.2.
111 See C. Panayi (n 15) 15.
State and third country are prohibited. With regard to the freedom of establishment, Article 49 of the TFEU provides that Member State shall not apply restrictive measures in respect of ‘the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.’

Continuing the compatibility analyzes, the next question to be addressed is whether the PPT rule might be viewed as having a restrictive or discriminatory effect on the free movement of capital or freedom of establishment. For a rule, measure or requirement to be regarded as contrary to the EU freedoms, it should be discriminative implying a different treatment of two nationals of different Member States in comparable situations or same treatment of two nationals of different Member State in different situations. That being said, according to the CJEU case law the TFEU free movement provisions preclude not only discriminatory treatment on grounds of nationality but also forbids any kind of so-called ‘not-discriminatory restrictions’, which could ‘prohibit, impede or render less favorable the exercise of that freedom.’ It is not necessary, therefore, to determine whether a particular measure is discriminative against cross-border investments. Even in the situation, when there is no discriminatory treatment on the basis of nationality, domestic legislation or a DTT could nevertheless result in a breach of the freedoms provided it has a restrictive effect prohibiting or in any other way impeding economic activities.

The prohibition of restrictive measures should be understood as a prohibition of measures that treat cross-border economic activities less advantageously than such activities in comparable internal situations. Applying such rule, national courts have to make a hypothetical evaluation as to whether the rule could be applicable in a comparable domestic situation. Thus, if the provision refers only to a cross-border transaction and imposes less favorable treatment as compared to the domestic situation, it is likely to constitute an obstacle or restriction to the freedoms.

Since tax treaties naturally apply only in cross-border situations the PPT rule targets specifically cross-border transactions and might be considered

---

117 See ibid.
as a hindrance to the freedoms, even though in regard to internal situations domestic legislation may contain a similar GAAR. Typically, the result of the application of the anti-treaty abuse tests such as the PPT should be that tax authorities disregard an intermediate entity for the tax purpose and treat payments as being directly made to another company. As a consequence, in the case of indirect investment when a treaty shopper involves an independent intermediary company, the PPT rule makes capital investments through an intermediary in another Member State more costly. The same restrictive result also would be in the case of direct investment with establishment a subsidiary in a Member State.

The application of the PPT rule, in addition, forces a taxpayer to provide evidence that a tax benefit was not one of the principal purposes of entering into the cross-border transaction. An extensive burden of proof further may hinder the free movement.

Ultimately, it is appropriate to conclude that the PPT as proposed by the OECD in BEPS constitutes a restriction of the exercise of the freedom of establishment and/or free movement of capital. The analysis in this thesis proceeds with an investigation whether the PPT rule restricting access to DTT benefits can be justified by the ‘rule-of-reason’ doctrine established and elaborated by the CJEU.

4.4 Justification grounds

4.4.1 In general

As it stated previously, the PPT rule hinders cross-border activities and may be in breach with the fundamentals freedoms. Yet, according to the CJEU ruling in Cassis de Dijon case, a restriction does not infringe the fundamental freedoms when it can be justified by an overriding reason of public interest. After the decision in this case had been delivered, the Member States appealed to various grounds of public interest as justifications of discriminatory or restrictive tax measures. In subsequent case law, the CJEU has accepted several justification grounds, such as: safeguarding effectiveness of fiscal supervision; need to ensure recovery of a tax debt; safeguarding balanced allocation of taxing rights; need to prevent a double use of losses; safeguarding fiscal cohesion of the national tax system; territoriality principle; and need to prevent tax avoidance or evasion.

118 C. Panayi (n 15) 15.
119 Ibid.
120 P. Essers, G.de Bont & E. Kemmeren (n 96) 119.
121 C. Panayi (n 15) 15.
123 M. Helminen, ‘Chapter 2: Non-Discrimination and Basic Freedoms’ in ‘EU Tax Law –
4.4.2 Prevention of tax avoidance

Provided that the PPT clause evidently contains anti-avoidance rule, the most relevant justification that should be discussed here is the need to prevent tax avoidance and/or evasion, which often is put forward by the Member States as a legitimate basis for restrictive tax treatments. However, not all restrictive national rules intending to prevent abusive tax structures may be justified by this reason. It has been noted in section 4.2 that simple tax forum shopping does not necessarily result in abusive practices. EU nationals can freely choose a Member State for conducting their activities that is the most attractive from the tax point of view since the tax systems have not been harmonized within the EU. Choosing the most favorable fiscal route by means of tax forum shopping is allowed and cannot be restricted by national legislation.\(^{124}\)

From the EU law perspective, the anti-abuse provisions, such as the PPT rule, should look not only at a taxpayer’s intention to obtain a tax benefit but also whether the arrangement substantively constitutes an abusive practice.\(^{125}\) In this respect, the Court established and shaped the anti-abuse concept. Within this concept, the CJEU has been willing to accept the need to prevent tax avoidance as a justification ground alone if national provisions are specifically designed to target ‘wholly artificial arrangements’ aimed at avoiding tax normally due. Conversely, an arrangement that is genuine and does not lack economic substance cannot be treated as being abusive, even when a taxpayer has taken into account the tax outcome of that arrangement.\(^{126}\)

Although the CJEU had been referred to the term of ‘artificial arrangement’ in several cases,\(^{127}\) only in well-known Cadbury Schweppes, the Court presented detailed explanations to when a taxpayer’s activity becomes an artificial arrangement.\(^{128}\) In this case the Court has been asked whether British CFC rules constitute a restriction of the freedom of establishment and whether this restriction could be justified on the basis of prevention of tax avoidance practices. In short, the CFC regime eventually has been found to be restrictive. At the same time, following the opinion of AG Leger,\(^{129}\) the CJEU took the position that the restriction was justified since its purpose

\(^{124}\) See e.g. M. Helminen (n 123).

\(^{125}\) See C. Panayi (n 15) 15.


\(^{127}\) See e.g. C-264/96 ICI [1998] ECR I-4695 para 26, C-324/00 Lankhorst-Hohorst [2002] ECR I-11779, para 37; C- 446/03 Marks & Spencer [2005] ECR I-10837, para 57; see also M. Hilling (n 116) 296.

\(^{128}\) See M. Hilling (n 116) 296.

was ‘to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory.’¹³⁰ This implies that the rule concerned should apply specifically towards wholly artificial arrangements intending to circumvent the application of domestic legislation and conducted only or mainly to avoid taxes in a Member State concerned.¹³¹

Based on the ruling in Cadbury Schweppes and in the following cases,¹³² the Member States are allowed to introduce anti-treaty abuse rules designed in the way that they capture solely purely artificial arrangements.¹³³ Should the rules are formulated too broadly and also target bona fide transactions, they hardly could be justified and, as such, should be set aside.¹³⁴ As Panayi observes: ‘the more artificial the treaty shopping arrangement, the more that it is likely to have tax avoidance connotations, against which an anti-treaty-shopping provision can more readily be justified.’¹³⁵ Given that, in the following subsection, the PPT rule is tested in the light of the CJEU doctrine briefly described above.

4.4.3 The PPT and a wholly artificial arrangement

One may reasonably ask whether the PPT rule deals exclusively with purely (or wholly) artificial arrangements, and, thus, can be justified by the need to prevent tax avoidance. To answer this question, it is necessary to determine what should be understood under such arrangements.

In its case law, the CJEU developed an explicit set of requirements, which should be met in order to consider an arrangement as a wholly or purely artificial one. On the one hand, an arrangement must contain a subjective element showing a taxpayer’s intention of obtaining a tax benefit. In other words, there must be clear indicators pointing towards fiscal motives behind a particular arrangement.¹³⁶ On the other hand, despite the existence of fiscal motives, there must be objective factors indicating that the arrangement does not reflect economic reality. The artificial arrangement cannot be regarded as such as long as a genuine establishment exists and

¹³³ A. Cordewener, G. Kofler & S. Van Thiel (n 126) 1970.
¹³⁴ C. Panayi (n 15) 15.
¹³⁵ Ibid 16.
real business is carried out. For the establishment, such objective factors verify company’s physical presence and should include substance elements (e.g. premises, staff, and equipment necessary to carry out economic activities).\textsuperscript{137} If examining these objective factors tax authorities draw the conclusion that the company is a fictitious establishment, which does not provide actual economic activity (\textit{i.e.} ‘letter-box’ company or ‘front’ subsidiary\textsuperscript{138}), the arrangement has to be treated as a wholly artificial one.\textsuperscript{139}

Therefore, to counteract a purely artificial arrangement, anti-abuse rule should identify as to i) whether the purpose of obtaining a tax advantage has inspired the arrangement (subjective test) and ii) whether the arrangement reflects economic reality (genuine nature test).\textsuperscript{140}

It is can be seen from the wording of the PPT clause as discussed in subsection 2.3.4, that ‘having regard to all relevant facts and circumstances’ the rule places emphasis on the ‘one of the principal purposes’ of an arrangement, which satisfies the first requirement of the CJEU’s approach. Yet, as for the second requirement concerning genuine nature of an arrangement, scholars rightly noticed that the PPT rule does not contain such a test. Neither the rule itself nor the Proposed Commentary refers to the notion of ‘genuine economic activity’ or ‘economic reality’. This omission, in fact, poses a risk that less than wholly artificial arrangements would be covered by the PPT rule.\textsuperscript{141} As a result, the PPT proposed by OECD in the Report is unlikely to be justified solely by the need to prevent tax avoidance. This is also supported by the fact that the European Commission in its Recommendation complemented the PPT clause as formulated in the Report by the reference to the ‘genuine economic activities’.\textsuperscript{142} However, there might be a different outcome if the prevention of tax avoidance is reinforced by the other justification reasons, namely the aim to safeguard the balanced allocation of taxing rights.

4.4.4 Safeguarding the balanced allocation of taxing rights

As we well know from \textit{Marks & Spencer} case, the CJEU has accepted the safeguarding the allocation of the rights to impose taxes between the Member States as an imperative reason of overriding public interest, which could justify a restriction of the EU freedoms.\textsuperscript{143} According to the CJEU,

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{137} C-196/04 \textit{Cadbury Schweppes} [2006] ECR I-7995, para 67.
\item\textsuperscript{138} Ibid 68.
\item\textsuperscript{140} See to that extent D. Weber (n 107) 327.
\item\textsuperscript{141} C. Panayi (n 15) 18; see also E. Kokolia and E. Chatziioakeimidou (n 15) 154.
\item\textsuperscript{142} See section 3.
\item\textsuperscript{143} C- 446/03 \textit{Marks & Spencer} [2005] ECR I-10837, paras 45 and 51; see also C-231/05 \textit{Oy AA} [2007] ECR I-06373, para 51; C-414/06 \textit{Lidl Belgium} [2008] ECR I-03601, para 33;
\end{enumerate}
\end{footnotesize}
this justification reason may be recognized as legitimate provided that the legislation in question prevents arrangements that may jeopardize the Member State’s right to impose taxes on activities conducted in its territory.\textsuperscript{144}

The risk of cross-border tax avoidance also may undermine the balanced allocation of taxing rights between the Member States.\textsuperscript{145} Logically, therefore, the prevention of tax avoidance has often been put forward by the Member States as a reason justifying a restriction in conjunction with the need to ensure the balanced allocation of taxing rights. In \textit{Cadbury Schweppes} and \textit{Thin Cap Group Litigation} the Court univocally admitted the close link between these two justification grounds.\textsuperscript{146}

With this in mind, some authors expressed the view that the CJEU might accept a mere risk of tax avoidance as a legitimate reason justifying a restrictive measure even if there is no wholly artificial arrangement at issue. In doing so, the Court should not assess the prevention of tax avoidance as a justification ground alone, but in combination with safeguarding the balanced allocation of the power to impose taxes between the Member States.\textsuperscript{147} Hilling concluded that although the CJEU in its case law always refers to ‘artificiality’ of arrangements when interpreting the prevention of tax avoidance, it usually looks at the combination of the justification grounds and may ignore the criterion of artificiality. In other words, in order to be justified, it is not necessary for a provision to focus exclusively on wholly artificial arrangements insofar as the combination of the justifications used.

This conclusion is supported by the \textit{SGI} case, where the Court took the view that it was permissible for Belgium to maintain transfer-pricing rules, despite the fact that they constituted a restriction of the freedom of establishment. The CJEU found the national rules to be justified in a view of preventing tax avoidance coupled with the need to preserve the balanced allocation of the taxing power. Having regard to the reasoning in \textit{Oy AA} case,\textsuperscript{148} it has been deduced that ‘national legislation which is not specifically designed to exclude from the tax advantage […] purely artificial

\begin{footnotesize}
\begin{itemize}
\item C-182/08 \textit{Glaxo Wellcome} [2008] ECR I-03601, para 87; C-311/08 \textit{SGI} [2010] ECR I-487, para 60; and C-337/08 \textit{X Holding} [2010] ECR I-1215, para 33.
\item See \textit{e.g.} C-347/04 \textit{Rewe Zentralfinanz} [2007] ECR I-02647, para 42; C-231/05 \textit{Oy AA} [2007] ECR I-06373, para 54; C-311/08 \textit{SGI} [2010] ECR I-0487, para 60; and C-318/10 \textit{SIAT} (electronic Report of Cases), para 45.
\item M. Helminen (n 123), 50, see also D. Weber (n 107) 258.
\item C-196/04 \textit{Cadbury Schweppes} [2006] ECR I-7995, para 56; C-524/04 \textit{Test Claimants in the Thin Cap Group Litigation} [2007] ECR I-2875, para 75; C-318/10 \textit{SIAT} (electronic Report of Cases), see also M. Hilling (n 116) 301 and D. Weber (n 107) 258.
\item M. Hilling (n 116) 300-301, M. Helminen (n 123) 50.
\item C-231/05 \textit{Oy AA} [2007] ECR I-6373, para 63.
\end{itemize}
\end{footnotesize}
arrangements [...] may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States’. Following it, one may argue that when the CJEU made an overall assessment and took into consideration mentioned above justifications jointly it would suffice to justify a rule, which pursues the wider objective and targets less than wholly artificial transactions.

But can the safeguarding of the balanced allocation of taxing rights be recognized as an acceptable justification in case of the PPT rule? In general, anti-treaty abuse rules pursue the goal of restoring the allocation choice of the DTT, which was ‘shopped’. The original choice of the ‘right’ treaty has to be respected. Hence, a Member State must have the right to maintain measures aimed at safeguarding and restoring that allocation choice. What is important here is the outcome of the application of the anti-treaty abuse provision. If it results in imposing a withholding tax at the rate according to the applicable ‘original’ DTT (if any), one may claim that the provision restores the taxing balance. In contrast, if a withholding tax were imposed at the statutory rate by the source state (which would have a penalizing effect), it barely could be viewed as protecting and restoring the treaty balance since that balance itself would be disregarded in such situation. As previously observed in subsection 2.3.6 of the thesis, the legal outcome of the application of the PPT rule is far from certain and would rather be subject to different domestic interpretations, but one thing is clear: at this point, we cannot assert that the rule or the Proposed Commentary seeks to restore the balanced allocation of taxing powers.

Eventually, the PPT suggested in the Report, which lacks a genuine nature test and, accordingly, poses the risk of affecting bona fide transactions may still be justified provided that a Member State also refers to the need to safeguard the balanced allocation of taxing rights. However, it is difficult to predict whether the CJEU could recognize this justification ground as a viable one in case of the PPT rule. It would depend on how the PPT has been interpreted and applied.

4.5 Principle of proportionality

According to well-established case law, a restriction is permissible as long as it is appropriate to ensuring the attainment of the objective pursued and it

---

149 C-311/08 SGI [2010] ECR I-487, para 66; see also M. Hilling (n 116) 300-301.
150 M. Hilling (n 116) 301.
151 Which would have been applied if a taxpayer had not been involved in the abusive arrangement.
152 See to that extent C-376/03 D [2005] ECR I-5821.
153 C. Panayi (n 15) 16.
154 Ibid.
does not go beyond what is necessary to attain it. That is to say, even if the overriding public interest justifies a restrictive measure, it also should comply with the general EU law principle of proportionality. A measure must be suitable for achieving its aim and there is no other less restrictive alternative available, which would be equally suitable to preserve the public interest. If the rule is considered as disproportional, it constitutes a breach of the freedom in question. Therefore, in this section, the PPT rule is to be tested in the light of the principle of proportionality, yet, the author acknowledges that the CJEU’s approach towards this principle is under constant development.

First of all, for an anti-avoidance rule to meet requirements of proportionality, a taxpayer should be given ‘an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification [for the arrangement]’. The Court allows the anti-avoidance rule to make an assumption that certain transactions are abusive. Nonetheless, the rule should offer a taxpayer the opportunity to prove a negative. The PPT provision does not provide such an opportunity. The subjective test in the PPT rule cannot be rebutted by valid commercial reasons. A taxpayer is not entitled to explain his motives for setting up a subsidiary in another country or involving an independence intermediary to show that a transaction or series thereof is driven by sound business reasons and, therefore, should not be affected by the PPT. Apparently, this flaw makes the OECD’s PPT rule disproportionate.

Yet, it was presumed that the opportunity to provide a commercial justification could be found in the alternative provision to be inserted into PPT clause, according to which after denying a DTT benefit, a taxpayer may file a request to the tax authorities in respect of that benefit. This presumption, however, has little evidence since it is not clear from the wording of the alternative provision that a taxpayer always has an

---


157 See to that extent M. Hilling (n 116) 302.


159 D. Weber (n 107) 319.

160 P. Baker (n 15) 4.

161 See section 2.1.

162 C. Panayi (n 15) 19.
opportunity to provide proof of valid commercial reasons for a transaction.

Here it should be noted that the PPT wording in the EC Recommendation rectifies the OECD’s flaw with regard to the possibility to prove commercial reasons for a transaction (by adding the phrase ‘unless it is established that it reflects a genuine economic activity’\(^\text{163}\)).

Furthermore, the issue of the possibility to justify a DTT entitlement leads to the question of the burden of proof. As it has observed in subsections 2.3.4 and 2.3.5 of the current study, the PPT places an onus of proving on a taxpayer. The reason to this is that the rule contains an assumption that granting a benefit does not correspond to the object and purpose of the DTT provision. According to Dourado, this assumption would make the rule disproportional.\(^\text{164}\) In this respect, Baker stated that ‘[i]deally, to be compatible with EU case law in this area, the initial burden of establishing a prima facie case that a taxpayer is not entitled to the benefits should rest upon the revenue authorities’\(^\text{165}\) then a taxpayer should have the opportunity to furnish proofs that obtaining the fiscal benefit is justified by commercial reasons. However, the assumption of the abuse as well as shifting the burden of proof from the tax authority to a taxpayer does not, per se, make a rule disproportional as long as the latter has a possibility to provide evidence of commercial justification.

Another point to be considered in the proportionality context is the legal consequences of the application of the rule. The CJEU has underlined that ‘a finding of abusive practice must not lead to a penalty’.\(^\text{166}\) Further, it may be deduced from *Thin Cap Group Litigation* that the national rule could only tackle the abuse to the extent, which is necessary to prevent tax avoidance, and should not impose sanctions.\(^\text{167}\) Other good examples here would be *SGI* and *SIAT* cases, where CJEU held that ‘the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must, in order not to be considered disproportionate, be confined to the part which exceeds what would have been agreed under such conditions.’\(^\text{168}\) Following this line of reasoning, in the event of treaty abuse, a DTT benefit only should be disallowed in a part that is necessary to prevent the abuse effect.\(^\text{169}\) If otherwise, the PPT would be deemed disproportional to achieve its

\(^{\text{163}}\) See section 3.3.

\(^{\text{164}}\) A. Dourado (n 15) 56.

\(^{\text{165}}\) P. Baker (n 15) 4.


\(^{\text{168}}\) C-311/08 *SGI* [2010] ECR I-487, para 72; C-318/10 *SIAT* [2012] (electronic Report of Cases), para 52; see also D. Weber (n 107) 325.

\(^{\text{169}}\) P. Baker (n 15) 4.
objective. In the subsection 2.3.6 of the thesis, the author observed that a literal reading of the PPT provision implies that a benefit under DTT to be denied if an arrangement fails the test. Neither the provision nor the Commentary addresses the question of the re-characterization of a transaction or the application of the ‘original’ DTT. This may trigger the undesirable result in the form of juridical double taxation. Thus, one could reasonably put in doubt the proportionality of the legal outcome of the application of the PPT rule. This observation is equally relevant for the PPT provision in the EC Recommendation.

The last point of the proportionality test to be analyzed in this research relates to the issue of legal certainty. In general, scholars share the view that in terms of proportionality this is the weakest part of the PPT, which, ultimately, may trigger the breach of the fundamental freedoms. But of course, it would also depend on how a Member State interprets and applies the rule.

According to the CJEU, a national rule must have a sufficient degree of legal certainty. Observing Belgian national legislation on deduction of business expenses in SIAT case and Portuguese limitation of interest deduction provisions in Itelcar case the Court concluded that the national rule should make it possible, from the outset, to define its scope with sufficient precision. A rule is uncertain if it is not clear, precise, and predictable regarding its effect, in particular, when it may have adverse consequences for taxpayers. As such, a rule, which does not meet the requirements of the principle of legal certainty, may not be regarded as being proportional to its objectives.

The PPT has several aspects that need to be considered when determining whether it fulfills the conditions of legal certainty. First, comparing the PPT with GAAR in the PSD, it has been emphasized that despite similarities, the wording of the former is less precise in the sense that it could also apply towards commercial and genuine transactions. The problem is that the PPT rule relies on the ‘bona fide’ test, which cannot properly recognize treaty abuse and, accordingly, promotes much vagueness to its scope. Apparently, the same cannot be held in respect of the PPT as recommended

---

170 E. Kemmeren (n 15) 192; C. Panayi (n 15) 19; A. Dourado (n 15) 56; E. Pinetz (n 15) 6-7; P. Baker (n 15) 4.
171 C. Panayi (n 15) 19.
173 See section 3.3.
174 C. Panayi (n 15) 19.
175 See section 2.1.
176 A. Dourado (n 15) 56.
by the European Commission insofar as it contains the genuine nature test. This aspect of the legal certainty clearly resonates with the requirement of wholly artificial transactions in the light of the justification grounds that discussed in subsection 4.4.3. Second, even though it might be argued that in other aspects there is no reason to believe that the PPT is less precise or clear than the GAAR introduced in the PSD, the phrase ‘it is reasonable to conclude’ may create a greater level of uncertainty for taxpayers than the CJEU could accept.

Overall, both the PPT as proposed by the OECD in the Report and its amended version suggested for the Members States by the European Commission run the risk of being considered disproportional, and, thus, most likely will infringe the EU freedoms.

4.6 Another limitation: the subjective test in the EU context

Even if the PPT were justified by the overriding reason of public interest and satisfied the requirements of proportionality, the CJEU still would impose another limitation on the scope of the rule. As it mentioned before in subsection 2.3.4 of this thesis, the rule proposed in the Report lays an emphasis on the subjective or ‘purpose’ test. The PPT would apply if ‘one of the principal purposes of any arrangement or transaction’ were to achieve tax advantage under the ‘shopped’ DTT. Admittedly, this formulation might be too broad to fit the EU legal framework, although it reconciles with ‘the main purpose or one of the main purposes’ in Cadbury Schweppes. Moreover, an identical wording could be found in EU secondary law. For instance, Article 15 of the Merger Directive, which embodies the general principle of EU law that abuse of rights is prohibited, also operates the ‘principal objective’ of transaction and ‘one of its principal objectives’. At the same time, however, it is stemming from the CJEU case law that the subjective test should be interpreted narrowly than it is drafted in Article 15. In fact, the Court looks whether a transaction pursues an essential purpose of obtaining a tax benefit: ‘where the merger operation has the sole aim of obtaining a tax advantage and is not carried out for valid commercial reasons, such a finding may constitute a presumption that the operation has tax evasion or avoidance as one of its principal purposes.’ Such strict

---

177 P. Baker (n 15) 4.
178 M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer (n 15) 294; E. Kemmeren (n 15) 192; and E. Pinetz (n 15) 6-7.
179 C-196/04 Cadbury Schweppes [2006] ECR I-7995, para 56; see also A. Dourado (n 15) 56.
180 Supra 33.
interpretation of the ‘purpose’ within the context of the abuse of rights doctrine is also supported by the judgments in some VAT cases.\footnote{C-653/11 Ocean Finance [2013] (electronic Report of Cases), para 46, C-255/02 Halifax and others [2006] ECR I-1609, para 75.}

Following it, it has been reasonably deduced that the PPT rule most likely will be in conflict with the EU law requirements since the notion of ‘one of the principal purposes’ is much wider than a ‘sole’ or ‘essential’ purpose.\footnote{M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer (n 15) 295-296.} Thus, should the CJEU transposed the ‘purpose’ qualification on the PPT rule, its scope of application would be substantially reduced. Given that, the PPT rule has to be applied only when the principal purpose (not ‘one of the principal purposes’) of an arrangement or transaction was to obtain a tax advantage.\footnote{Ibid; E. Pinetz (n 15) 8; see also A. Dourado (n 15) 56.} When implementing or applying anti-avoidance rules such as the PPT, Member States should not ignore this limitation on the subjective test.

5. Conclusions

The main purpose of the master thesis was to determine whether a Member State could implement the proposed PPT under BEPS Action 6 into its DTTs in the context of the EU fundamental freedoms. Also, the PPT formula chosen by the European Commission for the Member States was a part of the analysis. In this respect, the author makes several conclusions.

First, the present research has shown that the PPT rule imposes a restrictive tax treatment on cross-border transactions and, therefore, affects the exercise of two fundamental freedoms, namely the freedom of establishment and free movement of capital.

Second, having observed the CJEU’s approach towards possible justification reasons for applying a restrictive rule, it is concluded that the PPT is unlikely to be justified solely by the need to prevent tax avoidance. The reason for this is that the rule focuses on the subjective intention of the taxpayer and disregards a genuine nature test. Neither the rule itself nor the Proposed Commentary refers to ‘genuine activities’ or ‘economic reality’ of the arrangement. Ultimately, it leads to the situation when less than wholly artificial arrangements would fall under the scope of the PPT rule. It has been observed, however, that unlike the BEPS version, the PPT as recommended by the European Commission could be justified by the prevention of tax avoidance since it also makes references to the ‘genuine economic activities’. At the same time, the author believes that even the OECD’s PPT rule could still be justified when a Member State puts forward the need to safeguard the balanced allocation of taxing rights along with the
prevention of tax avoidance as a combination of justification grounds. However, it is difficult to predict whether the CJEU would accept this justification since we cannot argue that the PPT seeks to restore the balanced allocation of taxing powers. It would depend on how the rule has been interpreted and applied by a Member State concerned in each particular case.

Third, it has been demonstrated that even assuming that the PPT is justified, neither the BEPS proposal nor the EC Recommendation fully satisfies the requirements of the principle of proportionality. According to the CJEU, a restriction is permissible as long as it is suitable for achieving the objective pursued and it does not go beyond what is necessary to attain it. From this perspective, the PPT has several flaws. The rule contains the assumption of the abuse, and it does not offer a taxpayer the opportunity to provide evidence of valid commercial reasons to demonstrate a legitimate business purpose. Evidently, the Commission in the EC Recommendation fixed this flaw. Another drawback of the PPT is the legal consequences of its application. The rule does not address the question of the re-characterization of a transaction or application of the ‘original’ DTT. This inevitably leads to the adverse result in the form of juridical double taxation, which hardly can be viewed as a proportional outcome. This conclusion is equally applicable for the PPT included in the EC Recommendation. What is more, having regard to the CJEU’s jurisprudence, the author advocates that the wording of PPT brings more uncertainty that could be accepted by the Court. Consequently, based on the present analysis, the PPT as proposed by the OECD in the Report or its modified version recommended for the Members States by the European Commission would be incompatible with the EU freedoms and CJEU case law.

Lastly, it has been deduced that even if the PPT rule were drafted and implemented in the EU compliant manner, the CJEU would impose another limitation on the subjective test. It implies that the rule can only apply when the principal purpose, but not ‘one of the principal purposes’ of the arrangement was to obtain a tax benefit.

Overall, these conclusions point to the need of Member States to reconsider and modify the wording of the PPT rule while implementing either BEPS or Commission’s proposal in order to be consistent with EU law.
**Bibliography**

**EU and international law**


Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different member states and to the transfer of the registered office of an SE or SCE between Member States (codified version) [2009] OJ L 310/34.


Vienna Convention on the Law of Treaties (with annex) [1969], Vienna, No. 18232.

**Official publications**


OECD, Model Tax Convention on Income and on Capital: Commentary on Article (OECD publishing 2014).


OECD, Preventing the Granting of Treaty Benefits in Inappropriate


Books

Douma S, Legal Research in International and EU Tax Law (Kluwer 2014).


Lang M, Pistone P, Rust A, Schuch J, Staringer C, Base Erosion and Profit Shifting (BEPS) - Schriftenreihe IStR Band 96 (eBook Linde 2015)


Academic articles


**Other sources**

OECD, Comments Received on Public Discussion Draft ‘BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances’ (OECD publishing 2014).

**Table of cases**


CJEU, Case C-212/97 *Centros* [1999] ECR I-1459.


CJEU, Case C-436/00 X and Y [2002] ECR I-10829.


CJEU, Case C-376/03 D [2005] ECR I-5821.

CJEU, Case C-446/03 Marks & Spencer [2005] ECR I-10837.

CJEU, Case C-265/04 Bouanich [2006] ECR I-923.


CJEU, Case C-255/02 Halifax and others [2006] ECR I-1609.


CJEU, Case C-513/04 Kerckhaert and Morres [2006] ECR I-967.


CJEU, Case C-321/05 Koføed [2007] ECR I-5795.

CJEU, Case C-231/05 Oy AA [2007] ECR I-6373.

CJEU, Case C-298/05 Columbus Container Services [2007] ECR I-10451.

CJEU, Case C-414/06 Lidl Belgium [2008] ECR I-3601.


CJEU, Case C-311/08 SGI [2010] ECR I-487.

CJEU, Case C-337/08 X Holding [2010] ECR I-1215.


