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GAAR implementation in the Netherlands: does fraus legis suffice?

by

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HARN60 Master Thesis

Master's Programme in European and International Tax Law

2018/2019

6 June 2019
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Abbreviation list

ATAD	Anti Tax Avoidance Directive
ATAP	Anti Tax Avoidance Package
BEPS	Base Erosion and Profit Shifting
CJEU	Court of Justice of the European Union
CFC	Controlled Foreign Company
DTT	Double Taxation Treaty
EU	European Union
GAAR	General Anti-Avoidance Rule
HR	Dutch Supreme Court (Hoge Raad)
IRD	Interest- and Royalty Directive
LOB	Limitation on Benefits
OECD	Organisation for Economic Co-operation and Development
PPT	Principal Purpose Test
PSD	Parent-Subsidiary Directive
SAAR	Specific Anti-Avoidance Rule
TAAR	Targeted Anti-Avoidance Rule
TFEU	Treaty on the Functioning of the European Union

Abstract

This thesis regards a research to the implementation of the GAAR in the Netherlands. It focuses on the PPT and the ATAD GAAR. According to the Dutch government, there is no need for implementing a GAAR, since it is covered by the *fraus legis* doctrine. According to this research, there are however some differences between the doctrine and the GAARs.

The PPT has a focus on the subjective test, while the objective test can be seen as an escape to still be granted benefits. Albeit *fraus legis* also has both tests, it is more stringent in its application than the PPT. The ATAD GAAR is a reflection of case law of the CJEU. The differences between *fraus legis* and the ATAD GAAR are that the ATAD GAAR has a broader subjective test; has an artificiality test; applies to cross-border situations; and ignores arrangements when they are deemed to be artificial instead of applying a substitution doctrine. The Netherlands therefore seems not to fulfil the obligation to implement the GAAR and should consider rewriting its statutory GAAR *richtige heffing*, which is not in effective use anymore, so that it complies with the ATAD GAAR.

1 Introduction

1.1 Background

In the society of today, corporations focus on processing their fiscal burdens in the most profitable method possible. The arrangement of such structures leads to tax planning which is mainly done by multinational enterprises. These enterprises use disparities between different tax jurisdictions to reduce their taxable income and thereby deprive tax revenues of countries. Famous examples are the Amazon, Apple and Starbucks cases.[1] Using tax planning structures does not necessarily imply that it is prohibited and it even does not have to entail that an aggressive fiscal structure is applied by the corporation. According to the European Commission, aggressive tax planning entails *'taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability'*.[2] Where tax evasion is illegal (falsifying one's income), tax avoidance is not, although there is no universal understanding of this concept. Where the Organisation for Economic Co-operation and Development (OECD) described tax avoidance as *'a term that is difficult to define but which is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could strictly be legal it is usually contrary to the intent of the law it purports to follow'*,[3] it is also described as the contriving of artificial arrangements to reduce the tax liability.[4] What is allowed regarding tax planning and what is not differs per country.

Countries have therefore agreed upon implementing anti-abuse rules in their Double Taxation Treaties (DTT) to counter tax evasion and avoidance. However, these rules do not apply to all situations and since tax planners are searching for loopholes in legislation, it is necessary to implement more general rules that aim to prevent the use of these loopholes. The need for such tax anti-avoidance schemes involving international aspects, led to the introduction of international instruments to foster a more universal principle of anti-abuse rules and better cooperation between countries. The OECD proposed in 2015 a base erosion and profit shifting (BEPS) Action plan package in order to meet this demand, that consists of 15 reports with recommendations on different tax aspects. Following that direction, in January 2016 the European Commission introduced, as part of the Anti Tax Avoidance Package (ATAP) (which is a package that contains measures to prevent aggressive tax planning, boost tax transparency and create a playing field for businesses in the EU), a proposal for a Council Directive on 'rules against tax avoidance practices that directly affect the functioning of the internal market' (ATAD), which was approved in July and should have been implemented by Member States on 1 January 2019.[5]

[1] Commission Decisions of Amazon Luxembourg, SA.38944, 4 October 2017; Apple Ireland, SA.38373, 30 August 2016; Starbucks Netherlands, SA. 38374, 21 October 2015.
[2] European Commission Recommendation of 6 December 2012 on Aggressive Tax Planning, (2012/772/EU).
[3] OECD Glossary of tax terms, http://www.oecd.org/ctp/glossaryoftaxterms.htm.
[4] Prebble and Prebble 2008, p. 151.
[5] European Commission Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, 28 January 2016, COM(2016) 26 final.

One of the purposes for introducing the ATAD was to respond on the BEPS Project since all Member States of the European Union (EU) are also part of the OECD and therefore devoted to their recommendations. The European Commission wanted to ensure unification of implementing anti-avoidance rules to avoid creating loopholes and mismatches within the EU which is naturally the main goal of such a rule. Since the purpose of EU legislation is to secure the internal market by protecting the fundamental freedoms, several adjustments to the OECD recommendations were required in order to comply with the fundamental freedoms. The adoption of the ATAD was necessary to respect these limitations.

This thesis has a focus on the General Anti-Avoidance Rules (GAAR), provided by the BEPS Project in the form of the Principal Purpose Test (PPT) and the ATAD in Article 6 together with its influence on the Netherlands. By doing so, the research takes into account the required adoption of the GAAR into national legislation of the Netherlands. A GAAR is a general anti-avoidance rule that aims *'to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions'*.[6] EU Member States should have their own GAARs by 1 January 2019. The Netherlands already adopted a GAAR in the 1920s which has since been developing.[7] Nowadays, this Dutch GAAR has taken the form of the *fraus legis* doctrine and therefore does not have a statutory basis. This doctrine is a remedy against evasion of law and is applicable if the law does not want a legal act to happen, but does not (explicitly) forbid it. Now that the Member States should have implemented the ATAD GAAR, including the Netherlands, it is of the opinion that the doctrine suffices and does not require to make any amendments to fulfil the compulsory implementation of the Directive even though the GAAR in the Parent-Subsidiary Directive (PSD), that contains an identical provision on anti-abuse, was implemented into national legislation and was therefore not regarded to fall under the doctrine of *fraus legis*.[8] This research establishes to what extent this opinion is valid.

1.2 Aim

This research regards the implementation of the GAAR in the Netherlands. According to the Netherlands, the GAAR has already been implemented in its national legislation by the *fraus legis* doctrine, which has been in force long before the adoption of the GAAR in EU legislation. The purpose of this thesis is to evaluate on the fact that the Netherlands is under the assumption that it is not obliged to amend its legislation so that it corresponds with the GAAR. By analysing what is expected of the GAAR in different sources[9] and how the Dutch GAAR functions, this research concludes whether or not the Netherlands fulfils its obligations with respect to the implementation of this rule.

The question that needs to be answered to achieve this aim and by that being the leading question for this research is: *Does the Netherlands fulfil its obligation to implement the GAAR in domestic legislation?*

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[6] Preamble (11) ATAD.
[7] Niessen 2018, ch. 18.5.
[8] Kamerstukken II, 2018–2019, 35 030, no. 3, p. 14-15.
[9] ATAD; PSD; Merger Directive; IRD; OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report*; and case law of the CJEU.

1.3 Method and material

The method used for this research is the legal-dogmatic research method.[10] This method aims at assessing the law as it stands today in direct taxation. Materials used consists of Dutch legislation together with how the *fraus legis* doctrine was formed by case law and how it is used nowadays. The parliamentary history of the implementation of the GAAR is elaborated on to evaluate on how and to what extent it is de facto implemented. Also, case law of the European Court of Justice is analysed together with EU tax legislation (consisting of primary and secondary law). Furthermore, to analyse the PPT, BEPS Action 6 is included. To complement everything, legal doctrine in the form of academic articles, papers, books and commentaries are consulted to give a wider perspective on answering the legal question.

1.4 Delimitation

This thesis is written with the expectation that the reader has a general knowledge of (EU) tax law so that the basic concepts do not need to be explained. It focuses on the implementation of the GAAR in the Netherlands and does not take any other States into consideration; at most for examples as comparison. The GAAR is adopted by the EU Council, mainly through the ATAD, which therefore forms the basis of this research.[11] Also, the GAAR in other EU legislation is taken into account to see its effect in the Netherlands. Furthermore, the PPT of the OECD's BEPS Action 6, is analysed since it contains a minimum standard of measures for participating countries against treaty abuse. Whether these general rules are effective is a question on itself, which is not part of this thesis. The collected materials are up to date until 5 June 2019, no later materials are taken into account for this research.

1.5 Outline

The concept of anti-abuse is the main topic of this thesis. Therefore, the next chapter starts with an analysis of the content of BEPS Action 6. It shortly looks into the different aspects and afterwards the PPT is analysed. Then, since the European Commission's reaction to BEPS Action 6 was to adopt a GAAR in the ATAD, this is also extensively elaborated on, although the other Directives are briefly mentioned as well.

In chapter three, a thorough analysis of the interpretation of the GAAR by the Court of Justice of the European Union (CJEU) is made. It discusses the concept of tax abuse by analysing this from old to new case law. Also, a distinction is made between direct and indirect tax cases since the CJEU also developed, in addition to the set of rules that national anti-abuse provisions must comply with, an anti-abuse doctrine in a number of Value Added Tax judgments. The very recent influential cases are dealt with somewhat broader and opinions of scholars have been taken into account for those cases as well.

The fourth chapter handles the *fraus legis* doctrine of the Netherlands. It goes into detail on the foundation and its development over the years. The applicability of the doctrine in international situations is also taken into account for this research since that is one of the main aims to tackle for the ATAD. Furthermore, recent case law is discussed in this chapter to determine its validity

[10] Douma 2014, p. 17-20.
[11] Article 6 ATAD.

as of today. Lastly, the international influence on the doctrine is taken into account to see what has been done and should have been done by the Netherlands regarding the implementation of the GAAR.

In chapter five, the validity of the implementation of the GAAR according to the PPT and the ATAD of the Dutch doctrine is assessed. It extensively discusses on every aspect whether *fraus legis* covers the requirements set by the OECD and the European Commission by taking into account all the previous chapters supplemented by opinions of scholars.

Lastly, a conclusion is presented where a final conclusion is made on whether the obligation to implement the GAAR is fulfilled by the Netherlands. By doing so, the main question will be answered.

2 General Anti Avoidance Rules

2.1 General Report

While some tax concepts have a common meaning for different jurisdictions, there is no general understanding of what constitutes a GAAR, or even for that matter what constitutes tax avoidance. GAARs are adopted by countries as a statutory rule or as a doctrinal approach which is based on a judicial interpretation.[12] Since a GAAR is applied after the facts have taken place, it is difficult to predict tax expenses for taxpayers since they do not know the specific tax consequences of their actions beforehand.[13] The complication lies in the fact that a GAAR applies to each case separately, where its elements (the purpose for instance) are considered independently for each case. Overall, there are similarities in which GAARS have been invoked by tax authorities. It is commonly applied when taxpayers alter the form or structure of a transaction to shift to another tax rate which is more favourable. That shift is done by a multi-step and multi-party arrangement for transactions that attract higher tax burdens; by relabeling a transaction into a different form; or by exploiting literal interpreted rules that are inconsistent with the purpose of the rules.[14] However, simply because higher tax alternatives exist, does not mean that these arrangements should be used. A subjective test should for most GAARs be triggered for it to be applicable, which implies that the purpose of the transaction or arrangement was to avoid tax.

In this chapter, first of all, the OECD's interpretation of the GAAR is described together with what it suggests countries to implement in GAARs. Secondly, the EU's interpretation of the adoption of GAARs is assessed, which jurisprudence will be followed up to in the next chapter.

2.2 BEPS-Project OECD

Worldwide, numerous DTTs have been concluded between countries with the main purpose to prevent international double taxation and thereby promoting business on the global market. Another purpose of these treaties is the prevention of tax avoidance (and evasion). To tackle

[12] Krever 2016, p. 1-2.
[13] Ibid, p. 2.
[14] Ibid, p. 6-7.

tax avoidance, the OECD has released the BEPS Project Actions. Action 6 contains a minimum standard of measures that countries should take against treaty abuse.[15]

The report proposes to contain in the DTTs, among other things, a Limitation on Benefits (LOB) and PPT.[16] The LOB rule is a Specific Anti-Avoidance Rule (SAAR) and limits treaty entitlement towards entities that meet certain requirements. It generally accepts the legitimacy of transactions but negates the tax benefits that exceed the SAAR's boundaries. To capture other abuse of law that is not covered by the LOB rule, the report included the PPT as a GAAR that aims to dismantle arrangements and substitutes hypothetical arrangements to recompute the tax liability.

2.2.1 Principal Purpose Test

The PPT was included in the report to be able to cover all types of treaty abuse schemes. The rule is included in the OECD Model in Article X, 'Entitlement to Benefits', paragraph 7. It strives to ensure that DTTs are applied with respect to their purpose, that is to provide benefits to legitimate arrangements and transactions opposed to those whose purpose is mainly to gain favourable tax treatment.

The PPT applies where the following cumulative conditions are met: it concerns an arrangement or transaction; it results in a direct or indirect benefit; one of the main purposes was to obtain that benefit; it is not established that granting the benefit corresponds with the object and purpose of relevant DTT provisions.[17]

Before denying treaty benefits, an arrangement will be subject to the so called subjective and objective test that are part of the previously mentioned conditions. The subjective test requires that obtaining the treaty benefit is one of the principal purposes of the transaction. If it is the principal purpose, the objective test requires as an exception, that for granting the benefit, it is not in accordance with the object and purpose of the relevant provisions. All relevant facts should be taken into account in order to establish the application of the PPT.

The European Commission published a recommendation in 2016 where it recommends Member States to adopt anti-avoidance rules in DTTs based on the PPT.[18] Even though it seeks for a connection to the PPT, the recommendation that the Commission makes differs. It adds to the conditions of the PPT that, after the subjective test fails, it should be established whether *'it reflects a genuine economic activity'*.[19] This is necessary for the reason that the concept needs to be in line with case law of the CJEU.[20] Hereby, the European Commission basically

[15] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report.*
[16] Ibid, p. 18.
[17] Ibid, p. 55.
[18] Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271 final.
[19] Ibid, p. 3.
[20] Ibid, p.3.

adds a proportionality test. By adding this requirement, an examination of the different motives must be tested to determine which one is decisive.

2.3 The European Union

Some countries have implemented Action 6 recommendations in their domestic law and others in their tax treaties. The EU has an active role on the implementation of it and the European Commission's approach is to enshrine the BEPS measures into binding EU legislation with the purpose to create a solid framework for Member States in delivering on their commitments to the Project. Uncoordinated implementation of the BEPS Project could create opportunities for taxpayers to use differences in their advantage. The initial response was the proposal of the Common Consolidated Corporate Tax Base (CCCTB) that could be useful in the majority of aggressive tax planning cases within the EU. However, since there was a lack of agreement in the formulation and the uncertainty regarding its outcome, the European Commission proposed the more practical ATAP.[21]

With the ATAP, substance is given to combatting international tax avoidance. It consists of seven components of which the ATAD[22] is the most binding one. The ATAD contains an interest limitation rule, exit taxation, a GAAR, Controlled Foreign Company (CFC) rules and rules on hybrid mismatch arrangements. It provides for a minimum standard approach on cases that have been broadly dealt with in case law by the CJEU.[23] By that, it basically represents and summarises the case law and no additional sovereignty is taken from Member States. This is also the case for the PSD,[24] Merger Directive[25] and the Interest- and Royalty Directive (IRD).[26] The importance of adopting the ATAD is connected to the BEPS Project, since it is essential to keep the uncoordinated implementation of anti-avoidance measures to a minimum. Furthermore, it has been established that the lack of harmonisation in direct taxation does not justify derogations from the EU fundamental freedoms; Member States are obliged to comply with EU law.[27]

The ATAD is the most recent accepted Directive in this area by the EU Council and therefore gives a good impression of what abuse of law is at this moment. The GAAR in Article 6 is meant to tackle artificial arrangements that are not covered by a SAAR, like any other GAAR, and Member States are compelled to implement the GAAR according to the Directive. It is

[21] Commission Communication to The European Parliament and The Council on Anti-Tax Avoidance Package: Next Steps Towards Delivering Effective Taxation and Greater Tax Transparency in The EU, 28 January 2016, COM(2016) 23 final, p. 6.
[22] Council Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, L 193/1, 12 July 2016.
[23] Article 3 ATAD.
[24] Council Directive 2015/121 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, L 21/1, 27 January 2015.
[25] Council Directive 2009/133/EC 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, L 310/34, 19 October 2009.
[26] Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, L 157/49, 3 June 2003.
[27] Case C-270/83 *Commission of the European Communities v French Republic* [1986], para. 23-24.

important since it fixes the gaps for tackling planning schemes that often arise after the making of a SAAR while not affecting the application of SAARs.

2.3.1 ATAD elements

According to the ATAD, tax abuse comprises the following elements:[28]

- The main purpose or one of the main purposes of the arrangement is obtaining a tax advantage (subjective test);
- The arrangement defeats the object or purpose of the applicable tax law (objective test);
- The arrangement or series of arrangements is not genuine (artificiality test).

The arrangement is furthermore deemed to be non-genuine when it is not put into place for valid commercial reasons reflecting an economic reality.[29]
The provision of the Directive combines a subjective test that is objectified by the objective test, the PPT that is in compliance with the OECD recommendations, with the artificiality requirement that is to be tested in the light of the economic reality, required by the CJEU. The ATAD appears to contain elements of the Merger Directive[30] and the *Cadbury Schweppes* case,[31] and is identical to the anti-abuse rules of the PSD.[32] While the PSD provides for certain benefits, namely the exemption of withholding taxes on dividends, the ATAD does not. The ATAD confronts economic activities that are considered abusing. Furthermore, with the PSD having a narrower scope, the ATAD has a more general effect on the domestic tax law of Member States by giving permission to Member States in calculating the tax liability by disregarding a non-genuine arrangement.[33] The de minimis approach of the ATAD leaves Member States the freedom in deciding how to calculate the tax liability when the ATAD is applicable. The European Commission imposed this approach as a general obligation on Member States to confront abusive arrangements. The CJEU jurisprudence simply gave permission in taking action against those arrangements in accordance with EU legislation.[34]
The next chapter analyses the formation of the anti-abuse rule since the GAAR in the ATAD stems from jurisprudence of the CJEU. However, first of all, this chapter goes further into the different elements of the ATAD.

An important difference to take note of beforehand is that the ATAD is not limited to intra-EU situations but also applies to purely domestic situations or in relation to situations with third countries. In this aspect, the ATAD broadens the application of the existing anti-abuse doctrine.[35]

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[28] Article 6(1) ATAD.
[29] Article 6(2) ATAD.
[30] Article 15(1)(a) Merger Directive.
[31] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006], para. 61-62.
[32] Article 1(2) and (3) PSD.
[33] Rigaut 2016, p. 503.
[34] Navarro, Parada and Schwartz 2016, p. 12.
[35] Brandsma 2018, p. 1.

The first part in Article 6 ATAD, the 'arrangement', is not defined. According to a Commission Recommendation on aggressive tax planning, it has to be interpreted as *'any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event'*.[36] The arrangement may consist of more than one step.[37] Also, the arrangement is considered to be non-genuine 'to the extent' that they are not put into place for valid commercial reasons reflecting an economic reality.[38] The 'to the extent'-part states that also certain parts of an arrangement may constitute abuse. This is completely in accordance with CJEU case law.[39]

The requirement of artificiality is an interesting concept of the ATAD. It has been mentioned before when an arrangement is non-genuine; an example of this is a shell corporation. This clause is to be seen as an escape for the other elements. Arrangements that pursue tax advantages are not necessarily non-genuine and the anti-abuse rule is not applicable when the arrangement is put into place for valid commercial reasons and reflects an economic reality. In other words, it is allowed for taxpayers to make use of the most advantageous fiscal benefits. This is also in line with case law of the CJEU.[40] In deciding whether an arrangement is artificial, the following aspects should for instance be considered: the actual decision-making power of corporations; the availability of own financial resources; or the existence of a risk for the corporation.[41] All aspects of the arrangement should be taken into account in deciding whether it is genuine or not. Therefore, the EU Council chose to provide for some leeway in the text of the Directive to state 'genuine arrangements' and 'main purpose or one of the main purposes' instead of 'wholly genuine/artificial arrangements' and 'main purpose'.

Where the artificial element has the form of a more objective criterion being that the arrangement reflects an economic reality; the main purpose element looks more at the motive of the legal act. With that, it has a more subjective character for it looks at the intention of the taxpayer. However, also for this test, objective elements should be taken into account. Taxpayers themselves would mostly not admit that the main purpose of an arrangement was to obtain certain tax benefits or tax avoidance. The actual intention should be distracted from objective circumstances. The genuineness of an arrangement has been tried to be traced back by the CJEU into a subjective abuse intention when it can be established on the basis of e.g. statements and correspondence.[42] This line of thinking should be extended to the GAAR in the ATAD. When the main purpose does not have validity as a separate element, then the artificial element has to be applied in order to clarify the subjective test. The other way around, when an arrangement is deemed to be non-genuine, it does not necessarily signify abuse in which it can be established on the basis of statements or correspondence that the main purpose of a

[36] European Commission Recommendation of 6 December 2012 on Aggressive Tax Planning, (2012/772/EU), para. 4.3.
[37] Article 6(1) ATAD.
[38] Article 6(2) ATAD.
[39] Case C-255/02 *Halifax and others v Commissioners of Customs & Excise* [2006], para. 94; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007], para. 83.
[40] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006], para. 34-38.
[41] Opinion of AG Kokott in Case C-6/16 *Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics* [2017], para. 57.
[42] Case C-255/02 *Halifax and others v Commissioners of Customs & Excise* [2006], para. 70.

taxable person is not to obtain a tax advantage (even though this situation would in practice most likely not take place). Also, the arrangement has to defeat the object and purpose of the applicable tax law before abuse can be established. To ascertain whether this is the case, the applicable domestic tax law has to be evaluated on. This differs in every Member State and situation, so there is no absolute guideline. Abuse within the meaning of the ATAD is therefore always dependent on the context in which it must be assessed. So even though the elements are cumulative, they partly merge when an arrangement is being tested by the ATAD.

3 The concept of tax abuse of the CJEU

3.1 Introduction

This chapter discusses the concept of tax abuse from the perspective of the CJEU. In case law, it is of importance that domestic anti-abuse rules in cross-border situations are not in conflict with EU legislation. The CJEU requirements on anti-abuse rules together with the concept of abuse of law that has been formed are assessed, which stems from numerous cases and is still developing to this date.

3.2 Abuse of law according to the CJEU

Cases of the CJEU regarding tax abuse in intra-EU arrangements are dealt with through the following steps.[43] First of all, it has to be decided whether the taxpayer has access to EU legislation. If so, it must be established if there is any discrimination or a restriction within the meaning of the EU fundamental freedoms. Thirdly, there has to be a justified purpose. As fourth step, it should be established whether the measure is suitable for achieving the justified objective. Lastly, the measure should be proportional.

The first step is whether EU legislation is applicable in the situation that a taxpayer wants to avoid domestic taxation. When corporations are principally created to make use of EU legislation, the question arises whether it can be appealed to. In *Centros*,[44] a company was established in a foreign Member State for the purpose of benefiting of a more favourable tax scheme. The CJEU held that this does not constitute abuse of the EU freedom of establishment per se.[45] The fact that the CJEU handled this case, implies that the first step of applicability of EU legislation has been fulfilled. For the second step, an appeal to EU law in abusive situations is possible, but this appeal cannot yield positive results since a restriction is justified in such a case. There is also no primary EU legislation that denies access in case of abuse and therefore it is only relevant to determine whether there is a justification for a restrictive measure by a Member State. Practically, the first two steps are unnecessary to be answered for the abuse test and should therefore start at the third step; the justified purpose.

There has to be a balance in direct taxation between the sovereignty of Member States and the fundamental freedoms provided by the Treaty on the Functioning of the European Union

[43] Wisman 2017, Ch. 4.2.
[44] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999].
[45] Ibid, para. 27.

(TFEU). Different concepts of tax abuse in all Member States create conflicts with the freedoms. The relevant freedom in this research is the right to engage in cross-border situations which is enshrined under the freedom of establishment,[46] the free movement of capital[47] and the prohibition on discrimination[48] on the grounds of the nationality of taxpayers. Member States are allowed to take measures to prevent erosion of their fiscal sovereignty. This should however be in compliance with the provisions of the fundamental freedoms and are hence prohibited from different treatment of other nationals from their own.[49] Member States should also comply with EU law in direct taxation in terms of the fundamental freedoms even though there is a lack of harmonisation.

When Member States treat domestic and cross-border situations discriminatory, it is in principle contrary to EU legislation.[50] This can however be justified in case of prevention of abuse. It should nonetheless be clear that it is not allowed to have a GAAR that qualifies to tackle all cross-border situations as abuse.[51] General provisions in GAARs of domestic legislation are allowed only in so far that they are used in specific circumstances.[52] Abuse should be scrutinised in every case on itself on the basis of objective evidence.[53] There are numerous factors taken into account by the CJEU in deciding on the justification for tax abuse. The criterion of proportionality of relevant measures in relation to its proposed objective and the requirement of the restriction to not surpass what is necessary is the most important justification.[54]

Fortunately, this somewhat general defined approach was given substance to in later cases and gave a coherent material approach that created a basis for an EU tax abuse concept. It was held that national anti-abuse rules that restrict the freedom of establishment may be justified when they are specifically aimed at tackling 'wholly artificial arrangements', for the reason that they solely aim to avoid taxation in a Member State.[55] This term was in first instance not clearly defined in *Lankhorst*.[56] Years after it was first mentioned, *Cadbury Schweppes* defined a 'wholly artificial arrangement' as a foreign entity that does not pursuit a genuine economic activity in the host Member State for an indefinite period.[57] As an example could be thought of a letterbox or front subsidiary.[58] Whether it concerns a genuine economic activity has to be assessed on the basis of objective factors that are ascertainable by third parties in terms of the

[46] Article 49(1) TFEU.
[47] Article 63(1) TFEU.
[48] Article 18 TFEU.
[49] Case C-279/93 *Finanzamt Koln-Altstadt v. Roland Schumacker* [1995], para. 21-22.
[50] Case C-446/03 *Marks & Spencer plc v David Halsey* [2005], para. 31.
[51] Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004], para. 51.
[52] Case C-28/95 *A. Leur-Bloem v Inspecteur der Belastingdienst* [1997], para. 41.
[53] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999], para. 25.
[54] Ibid, para. 34.
[55] Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002], para. 37; Case C-446/03 *Marks & Spencer plc v David Halsey* [2005], para. 57; *Cadbury Schweppes*, para. 51.
[56] Case C-324/00 *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* [2002], para. 44.
[57] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006], para. 54.
[58] Ibid, para. 68.

presence of premises, staff and equipment.[59] A taxpayer may however have a fiscal motive to establish a corporation in another Member State as long as it carries on a genuine economic activity in the host Member State.[60]

The case in itself regarded a UK company which controlled subsidiaries in other countries. The tax authorities found the Irish subsidiary (that is a low tax jurisdiction) to be a CFC and applied its CFC rules because it was subject to less than three quarters of the amount of tax that would have been paid in the UK. The company was of the opinion that this was in breach of the freedom of establishment. The CJEU held that the arrangement must have fraudulent features and having a subsidiary in Ireland with the purpose to benefit from low taxation rates does not constitute abuse in itself.[61] Furthermore, it concluded that all EU nationals should get similar treatment, where the UK CFC rules did treat foreign subsidiaries differently in this case and needs a justification of public interest that does not go beyond what is necessary.[62] The reduction of tax revenue in the UK was not sufficient as a justification. For it to be justified it was necessary to regard a 'wholly artificial arrangement' not reflecting an economic reality. The case defined abuse of law by using the term 'main or one of the main purposes' of a transaction to obtain a tax advantage. Also, the CJEU concluded that the purpose of the freedom of establishment is to foster economic activities and therefore, the arrangement should go against that purpose to be regarded as abuse of law.

Soon after the previous case, *Thin Cap GLO* dealt with an infringement on the basis of a SAAR (UK thin cap rules). Companies with a non-resident parent lender were treated less advantageous than domestic lenders. It was held that it constituted a restriction on the freedom of establishment because it was less favourable for foreign companies to finance subsidiaries with loans. The thin cap rules did not only aim to 'wholly artificial arrangements', but applied the SAAR when the loan was not given at arm's length. Since the CJEU ascertained that it regarded purely abusive practices, it adjusted the requirements of *Cadbury Schweppes*. It held that deviation from the arm's length principle in itself was sufficient to be a justification under two conditions.[63] A domestic anti-abuse rule cannot contain a general presumption of tax evasion or avoidance and a taxpayer should be given the possibility without undue administrative constraints to provide evidence for justification of commercial reasons of a certain arrangement.[64] A rule that compels a taxpayer to systematically provide the tax authorities this information to prove its genuineness with its related tax benefits without the tax authorities having to provide any evidence of tax evasion or avoidance is not permitted.[65]

[59] Ibid, para. 67.
[60] Ibid, para. 75.
[61] Ibid, para. 36-37.
[62] Ibid, para. 42/46-47.
[63] C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007], para. 81.
[64] Ibid, para. 82.
[65] Opinion of AG Kokott in Case C-6/16 *Eqiom SAS, formerly Holcim France SAS and Enka SA v Ministre des Finances et des Comptes publics* [2017], para. 30.

The CJEU also developed the concept of tax abuse in VAT cases which also had an immediate impact in the field of the non-harmonised direct taxation. The first influential case was *Emsland.*[66] It involved a corporation that exports products to third countries and imports those products back to the EU resulting in a higher amount of export restitutions than custom duties upon importation and was therewith a tax advantage. The CJEU held that first must be established that abuse of EU law takes place when a taxpayer intends to acquire an advantage by artificially creating conditions where it can benefit from it, in such a way that the purpose of the concerning arrangement is not achieved.[67] Abuse in this sense therefore has an objective element; being in conflict with the purpose of the rule, and a subjective element; the intention to artificially gain an advantage. This subjective element that contradicts the objective of relevant EU provisions was provided first in *Centros*,[68] but was finalised in *Emsland* for establishing an abuse of EU legislation that permits Member States to restrict fundamental freedoms.[69]

The CJEU further evaluated on abuse and the objective and subjective tests in *Halifax*.[70] The case regarded a bank that engaged in several artificial properties developments in order to recover input VAT due to its otherwise unrecoverable input VAT for it regarded exempted transactions. A general anti-abuse concept was applied that was formulated as a general principle of abusive practices that are prohibited. A similar test as in *Emsland* was applied regarding the proportionality requirement necessary for the justification. It ruled that it concerns abuse of tax legislation when: the transactions concerned result in the accrual of a tax advantage contrary to the purpose of the provisions providing that advantage, which is the objective test; and it must be apparent from all objective factors that the essential aim of the transactions is to obtain a tax advantage, which is the subjective test.[71] When these conditions have been met and there is found to exist an abusive practice, the tax authorities may levy tax as if the transactions had never taken place.[72] In the assessment of the subjective test, only the artificial character of the transaction can be an indication of the essential aim of the transaction (which would be to acquire tax advantages).[73] Legal, economic and personal connections with other companies are important factors for this test.[74] By taking these circumstances into consideration, it can appear that obtaining the tax advantage is in fact the essential aim of the transaction even though other purposes have influence on that decision. It constitutes abuse of EU law when it is established that the transaction is contrary to that rule.

The objective and subjective test in *Halifax* limits Member States in the formation of anti-abuse rules for it basically is formulated as a GAAR in itself that contains the necessary elements for it, where the objective element requires a tax advantage to be achieved contrary to the purpose

[66] Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000].
[67] Ibid, para. 59.
[68] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999], para. 24-25.
[69] Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000], para. 39.
[70] Case C-255/02 *Halifax and others v Commissioners of Customs & Excise* [2006].
[71] Ibid, para. 74-75.
[72] Ibid, para. 98.
[73] Ibid, para. 81.
[74] Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008], para. 62.

of relevant EU legislation. In the case itself, the CJEU held that the deduction of input VAT needs a direct link to an output transaction to secure the fiscal neutrality principle. These transactions were made in order to achieve a tax advantage and therefore contradicted the purpose of EU law.

Finally, the *Kofoed* case should be taken note of for this research (which is non VAT related). In this case the question was raised whether the Merger Directive could be appealed to directly when not implemented into domestic legislation since the Directive reflects the general principle of abuse. The CJEU explained the principle in this case as a transaction not carried out in the ordinary course, but solely for the purpose to unlawfully obtain benefits conferred by EU law.[75] This is a stricter interpretation of the principle than the Merger Directive implies and the CJEU states that the Directive only reflects the general doctrine of abuse of law. It held that the implementation of anti-abuse rules into domestic legislation is not necessary, provided that a national basis to tackle abuse is available.[76] That legislation has to be interpreted conforming the Directive, however, it cannot in itself lay down obligations.[77] Without implementation of anti-abuse rules (of this or any other Directive) and without any national basis to tackle abuse, it is impossible to combat tax avoidance, because primary EU law is also unattainable in a purely domestic situation.

3.3 Recent developments

3.3.1 *Euro Park Service*

With the *Euro Park Service* case,[78] the CJEU finally clarifies how anti-abuse provisions of the Merger Directive relate to the general concept of abuse stemming from CJEU case law. In *Kofoed,* Advocate General Kokott concluded that a direct assessment to the anti-abuse prohibition concept of primary EU legislation is unlawful when secondary EU law has its own anti-abuse provisions (which is the case for the Merger Directive).[79] Also, in *Kofoed* it was held that the anti-abuse provisions of the Merger Directive reflect the concept of abuse stemming from case law.

The *Euro Park Service* case regarded the French merger provisions that subjects non-residents to a procedure of prior approval. France requested a ruling on this clause whether it can be assessed against primary EU legislation. It also questioned whether this clause was permissible taking into account primary EU law. The CJEU held that assessing to primary EU law is only possible if a clause is not exhaustively harmonised. Since Article 15 of the Merger Directive is not exhaustively harmonised, this rule may be assessed against primary EU legislation.[80] Furthermore, the CJEU stated that the concept of abuse in the Merger Directive is identical to the concept in primary EU law.[81] For the reason that both concepts are equal, which thus means

[75] Case C-312/05 *Hans Markus Kofoed v Skatteministeriet* [2007], para. 38.
[76] Ibid, para. 44.
[77] Ibid, para. 45.
[78] Case C-14/16 *Euro Park Service v Ministre des finances et des comptes* publics [2017].
[79] Opinion of AG Kokott in Case C-312/05 *Hans Markus Kofoed v Skatteministeriet* [2007].
[80] Case C-14/16 *Euro Park Service v Ministre des finances et des comptes* publics [2017], para. 19-26.
[81] Ibid, para. 69.

that there is one Union concept of abuse, any conflict between EU law can be ruled out. Thereby, the terminology used in the Merger Directive comes essentially down to the same as in all jurisprudence even though it might have been defined differently.

3.3.2 *N-Luxembourg* and *T-Danmark* cases

In the *N-Luxembourg* and *T-Danmark* cases,[82] Danish companies were owned by a parent company of another Member State who were all directly or indirectly owned by third countries or private equity funds from unknown residents. The Danish companies paid their dividend or interest and claimed exemption from withholding tax in accordance with the PSD or IRD. The Danish tax authorities appealed to this, since they found that the parent companies were not the beneficial owners. They were of the opinion that tax avoidance was the intention, because the use of the intermediary holdings had the purpose to gain access to the benefits of the Directive.

Since Danish tax law did not provide for anti-abuse legislation at the time, the CJEU stated that the general principle of EU law, where a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction is purely artificial and is designed to circumvent the application of the legislation of the Member State, is applicable. So, in case of a fraudulent or abusive practice, the tax exemption can be refused under the Directives.[83]

The CJEU also held that, according to the IRD, the term 'beneficial owner', required to be exempted from taxation under the IRD, should be interpreted as an entity that actually benefits economically from interest received that is paid to it.[84] It should freely be able to determine the use of that income.[85] It was further added that the concept of beneficial ownership appearing in tax treaties based on the OECD Model Tax Convention is relevant for the interpretation of the IRD.[86] The precise relationship, however, remains unclear.[87]

The definition of tax avoidance was also broadened for no protection from Directives can be invoked and the CJEU provided for indications of elements that may constitute abuse. The CJEU referred to artificial arrangements, where the principal objective or one of the principal objectives is to obtain a tax advantage.[88] Member States can also rely on general EU anti-abuse provisions to refuse benefits of Directives, even in the absence of such provisions in domestic law or DTTs.[89] This statement is somewhat peculiar, since Directives are required to be implemented by Member States.[90] Also in *Kofoed* it was stated that Directives may not be relied upon in case of failure to transpose.[91] According to *Haslehner and Kofler*, the impact of

[82] Case C-115/16 *N Luxembourg 1 and Others v Skatteministeriet* [2019]; Case C-116/16 *Skatteministeriet v T Danmark and Y Denmark Aps* [2019].
[83] Case C-115/16 *N Luxembourg 1 and Others v Skatteministeriet* [2019], para. 96-98.
[84] Ibid, para. 88.
[85] Ibid, para. 89/122.
[86] Ibid, para. 90.
[87] Haslehner and Kofler 2019, p. 4.
[88] Case C-115/16 *N Luxembourg 1 and Others v Skatteministeriet* [2019], para. 127.
[89] Ibid, para. 95-120; Case C-116/16 *Skatteministeriet v T Danmark and Y Denmark Aps* [2019], para. 68-92.
[90] Article 288(3) TFEU; Haslehner and Kofler 2019, p. 2.
[91] Case C-312/05 *Hans Markus Kofoed v Skatteministeriet* [2007], para. 42.

this shall however be minimal, since Member States should have implemented a GAAR as of 1 January 2019 provided by the ATAD.[92]

3.3.3 *X-GmbH*

The *X-GmbH* case[93] concerned a German parent company with 30% of the shares of a subsidiary in Switzerland. The subsidiary qualified as a CFC under German tax legislation and therefore the profit was increased of the parent company, that on its turn found the German provisions to be contrary to the free movement of capital and the standstill clause should not apply.[94] The standstill clause allows for derogations from prohibition on restrictions to the free movement of capital, not amended after 31 December 1993. However, German provisions were amended after that year.[95]

The CJEU went on to the more important aspect of this case that the objective of German CFC rules corresponds to the overriding reason of public interest to prevent unacceptable tax avoidance by the transfer of income to third countries with low taxation rates. In its analysis whether the restriction was proportional, the CJEU held that the CFC rules constitute a restriction to the free movement of capital which might fall under the need to prevent tax evasion.[96] The German legislation has, however, unproportional legislation that presumed abuse when no commercial justification was provided to the tax authorities. Germany found that this should be seen as to provide the possibility to verify the information but was rejected as an argument. [97]

The CJEU held that the free movement of capital is not intended to frame conditions between Member States and third countries under which companies can be established. The CJEU implies that for the purpose of examining the proportionality of national legislation, restricting the free movement of capital between Member States and third States, the understanding of the term 'wholly artificial arrangement' that reflects the EU standard of abuse, should be different from restricting the fundamental freedoms between Member States.[98] The CJEU lowered its standard of abuse resulting in a scheme that has *'its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate'*.[99]

3.3.4 Remarks on the recent developments

It appears that the CJEU, with the former three cases, brings effect to the PPT for the concept of abuse for primary EU legislation which has also been mentioned by *Kuźniacki*.[100] It puts aside the 'wholly artificial arrangement' standard for a lower one in situations with third

[92] Haslehner and Kofler 2019, p. 3.
[93] Case C-135/17 *X-GmbH v Finanzamt Stuttgart – Körperschaften* [2019].
[94] Article 64(1) TFEU.
[95] Case C-135/17 *X-GmbH v Finanzamt Stuttgart – Körperschaften* [2019], para. 44-45.
[96] Ibid, para. 59.
[97] Ibid, para. 88.
[98] Ibid, para. 83; Kuźniacki 2019, p. 3.
[99] Case C-135/17 *X-GmbH v Finanzamt Stuttgart – Körperschaften* [2019], para. 84.
[100] Kuźniacki 2019, p. 4.

countries as well as for situations between Member States. While the PPT phrases the concept of abuse as 'one of the principal purposes' to obtain a tax advantage, this could easily be interchanged by 'its primary or one of its primary objectives' as mentioned in *X-GmbH* or 'the principal objective or one of the principal objectives' as mentioned in *N-Luxembourg* and *T-Danmark*. This allows to prevent arrangements with a primary purpose to avoid taxation as well. With this, it has become important to determine the degree of economic substance since the substance matters used by the CJEU remain undefined, although *N-Luxembourg* and *T-Danmark* provide for some indications on what the substance matters should contain.[101]

Unfortunately, not more has been written on these cases by scholars as of today. It is obvious that the CJEU only provided for a minimum standard and not a maximum standard on anti-avoidance rules to which Member States should be compliant. Member States can consequently adopt stricter rules which makes it difficult to ascertain how GAARs are implemented exactly throughout the EU and hence, the legal certainty will be affected. It is important to know how the concept of abuse is applied for this research because the Dutch GAAR has to be in accordance with the rulings of the CJEU. Whether it is in accordance is evaluated in the fifth chapter.

4 The Dutch concept of tax abuse

4.1 Evolution of the national GAAR

The Netherlands has developed GAARs since the 1920s. The first GAAR was a statutory GAAR which was closely followed in 1926 by a doctrinal GAAR, developed by jurisprudence. These GAARs were implemented long before the BEPS discussion. In this chapter, the development of the Dutch GAARs are assessed. In the last part, the influence of the EU is taken into account to assess later whether the Dutch GAAR is compliant.

4.1.1 Statutory GAAR *richtige heffing*

The Netherlands introduced a statutory GAAR under the name *Richtige heffing*[102] in 1925 into the *Wet tot bevordering van de richtige heffing der directe belastingen*.[103] From 1959 and onwards, it is still included in Article 31 General Tax Act.[104] It states that legal acts are not taken into account when they did not intend to have substantial change in the factual situation; or it can be assumed that the acts would not have taken place if they would not have made the levying of taxes (partially) impossible.[105]

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[101] Case C-115/16 *N Luxembourg 1 and Others v Skatteministeriet* [2019], para. 139; Case C-116/16 *Skatteministeriet v T Danmark and Y Denmark Aps* [2019], para. 114, cited: *'Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans'*.
[102] Loosely translated to: *rightful levy*.
[103] Act of 29 April 1925, Staatsblad No. 171; Loosely translated to: *Act to promote the rightful levying of direct taxes*.
[104] Loosely translated from: *Algemene Wet inzake Rijksbelastingen*.
[105] Article 31 General Tax Act.

The reason for its introduction was the increasing amount of tax avoidance arrangements. It was ought to be necessary since the tax avoided would have to be collected elsewhere, resulting in a heavier tax burden for persons that do not avoid paying their share.[106] At that time, the Minister of Finance acknowledged the drawbacks of a GAAR, like the implementation and borderline cases, however, the preventive effect would be of great use until a better solution would be found.[107]

In practice, the statutory GAAR has seldomly been applied. On the one hand this is caused by the fact that tax authorities require approval from the Ministry of Finance to invoke the GAAR.[108] When the General Tax Act was introduced, it was noted that the Ministry of Finance would only grant this authorization in very expressive cases. This is apparent since it rarely, if ever, granted such approval. From 1987, it was decided to 'for the time being' suspend the provisions of the doctrine for which it has become obsolete.[109]

To date, the minister has not come back to this. The most important factor for the suspension was the introduction of *fraus legis*, which is the Dutch doctrinal GAAR, whose conditions were verified in the Supreme Court's judgement of 21 November 1984.[110] *Richtige heffing* had no added value next to *fraus legis* because the requirements were the same, the application of *fraus legis* is simpler and the scope is broader.[111] The Ministry of Finance denied approvals for the application of the statutory GAAR from 1 August 1987 to promote the use of *fraus legis* and that doctrine has been applied ever since.

4.1.2 Doctrinal GAAR *fraus legis*

Before *richtige heffing* was introduced to combat tax avoidance, *fraus legis* already existed to prevent avoidance of law in general. The doctrine stems from Roman law and was described as 'a remedy against evasion of law' and in addition it stated that 'fraus legis takes place if the law does not want it to happen, but does not (explicitly) forbid it'.[112] The first time it was accepted and applied at the Dutch court for tax purposes was on 26 May 1926 in the so called 'three-days-case'.[113] In order to keep a periodic benefit out of the inheritance tax, it was stipulated that it did not end in the event of death but three days before that moment. In vain, because the Supreme Court ruled that the benefit under the Inheritance Tax Act 1859 also applied to benefits ending in the event of three days before the death for it was found to be comparable to an 'until death' benefit, since the object and purpose of the law would not be achieved if this act was allowed to take place in order to remain untaxed.

[106] Handelingen der Staten-Generaal, Bijlagen 1923-1924, 396, no. 3, p.1 (Memorie van Toelichting) (See Hemels 2016, p. 435).
[107] Hemels 2016, p. 436.
[108] Article 32 General Tax Act.
[109] *Kamerstukken II*, 1986-1987, 17 050, no. 80.
[110] Dutch Supreme Court (HR) 21 November 1984, ECLI:NL:HR:1984:AC8603.
[111] Hemels 2016, p. 436.
[112] Glossarium van Latijnse en Romeinse rechtstermen – Constant de Koninck, p. 185.
[113] HR 26 mei 1926, NJ 1926, 723; Loosely translated from: *driedagenarrest*.

The doctrine was not used anymore until 1984, the year in which the Supreme Court formulated two requirements for *fraus legis* to be applicable, namely: the objective criterion, which states that the arrangement is contrary to the object and purpose of the legislation; and the subjective criterion, which states that the motive for the taxpayer is to frustrate taxation.[114] This consequently implies that, even if the only purpose of the arrangement is for tax reasons; if it is not contrary to the object and purpose of legislation, *fraus legis* is not applicable. For this reason, e.g. international mismatches can still occur, since a structure does not necessarily contravene the object and purpose of the law. Indications to whether *fraus legis* is applicable can be: the foreseeable negative result of an arrangement when the tax benefit is not taken into account or the negligibility of the commercial result;[115] or a scheme that can be repeated over and over in order to reduce the tax base whenever necessary.[116] Opposed to *richtige heffing,* no approval is necessary for the tax authorities to invoke *fraus legis*, but the initial burden of proof lies with them.[117] For instance in both the *Hunkemöller*[118] and *Pelican Rouge* case,[119] the tax authorities had to prove that shareholders loans had in practice been granted solely for tax purposes or in reality had the function of equity.

Taxpayers are in principle thought to act from economic reasons when establishing the profit for corporate tax purposes. When more options are left to the taxpayer, they have the freedom to choose the most tax favourable approach; even if it results in taking advantage of mismatches between jurisdictions. However, foreign taxation might be important to determine the object and purpose of the arrangement. In case the result of a transaction is, in other aspects than tax, foreseeably negative, it can be concluded that only tax benefits mattered. This is called the 'more ways doctrine' (which is part of *fraus legis*) and is relevant when taxpayers have the choice between arrangements, but decide upon a certain option for the avoidance of taxation.[120] Two elements are important for this doctrine: the necessity of the transaction and the continuing avoidance of taxation.[121] When the taxpayer only has a fiscal motive, it undermines the basic principle.

Taxpayers do not need to disclose structures that could be covered by *fraus legis*. There are cases in which it was decided that the arrangement was held to be valid when the consequences of legislation provided for the possibility to make improper use of a provision, which were or could have been foreseen by the legislator.[122] On the other hand, it was ruled that *fraus legis* can be applied in case of awareness of the avoidance possibility, but no legislation was introduced to counter it.[123]

[114] HR 21 november 1984, ECLI:NL:HR:1984:AC8603.
[115] HR 22 July 1982, ECLI:NL:HR:1982:AW9473.
[116] Hemels 2016, p. 439.
[117] HR 13 December 1995, ECLI:NL:HR:1995:AA3124.
[118] Court of appeal 18 April 2019, ECLI:NL:GHAMS:2019:1504.
[119] Court of first instance 16 November 2018, ECLI:NL:RBNHO:2018:9865.
[120] Hemels 2016, p. 440.
[121] R. Kok and I. Mosquera Valderrama 2018, p. 13; HR 6 September 1995, ECLI:NL:HR:1995:AA1683.
[122] HR 11 December 1991, ECLI:NL:HR:1991:ZX4811.
[123] HR 15 March 2013, ECLI:NL:HR:2013:BY0548.

Fraus legis is seen as *ultimum remedium* and comes into play after all normal interpretation methods have been exhausted. A penalty will not be imposed when the taxpayer is in a defensible position,[124] meaning that the taxpayer was under the presumption of being in a correct position. As apparently a structure could not have been challenged under other interpretation methods, the fact that the wording of the law is in favour of the taxpayer is a strong argument for him to be in a defensible position. If *fraus legis* can successfully be applied, the arrangement will either be ignored or recharacterised in such a manner that taxation is in compliance with the intention of the legislation.[125] *Richtige heffing* could only disregard the arrangement, not recharacterise it.

4.1.3 *Fraus tractatus*

The Supreme Court is reluctant in applying the *fraus legis* doctrine in DTT situations. When it concerns an infringement of the object and purpose of a DTT, it is called *fraus tractatus*. This means abuse of treaty law; when treaty facilities are used for another purpose than what they are meant for or a situation that has purposely been made cross-border to claim the application of a DTT. The application of *fraus tractatus* can be limited in such international circumstances. An example is capital gain that is recharacterised as dividend based on Dutch domestic case law. Would that consequently mean that the other Contracting State should accept the treatment of capital gain as a dividend for treaty purposes? The Supreme Court held it is not the case when the tax authorities are unable to indicate that the intention of the Contracting States was to tackle abuse.[126]

The tax authorities have however tried to apply *fraus legis* in cases where a DTT was applicable. In a decision regarding a cash box structure, the Supreme Court held that the DTT, nor the explanatory notes of the Contracting States involved, supported the opinion of the tax authorities that the purpose and intent of the treaty would be infringed if the income was not taxed in the Netherlands and thus *fraus tractatus* was not applicable.[127] Another case regarding an international holding structure also failed.[128] The Supreme Court held in a later case that *fraus legis* in treaty situations can only be applied if both Contracting States have specifically agreed upon such a provision.[129] There are some DTTs in which it is explicitly mentioned that it allows the applicability of *fraus legis*, for instance in the DTT with Germany.[130] Only in such specific cases, *fraus legis* can be applicable. Therefore, qualification of domestic provisions on the basis of *fraus legis* generally does not have an effect on DTTs. This is to prevent one Contracting State from interpreting or otherwise imposing its will on the method of application

[124] HR 21 April 2017, ECLI:NL:HR:2017:638.
[125] Hemels 2016, p. 446.
[126] HR 15 March 1995, ECLI:NL:HR:1995:AA3094.
[127] HR 15 December 1993, ECLI:NL:HR:1993:ZC5542.
[128] HR 29 June 1994, ECLI:NL:HR:1994:ZC5700.
[129] Wisman 2017, ch. 5.1.2
[130] Art. 23 DTT with Germany of 1 December 2015: *'1. This convention shall not be interpreted to mean that each Contracting State is prevented from applying its domestic legal provisions on the prevention of tax evasion or tax avoidance. 2. Upon the request of the taxpayer, the competent authorities shall consult each other, pursuant to paragraph 3 of article 25, if the domestic legal provisions referred to in paragraph 1 result in double-taxation or if the taxpayer considers the taxation to be not in accordance with the provisions of this Convention.'*

of the DTT. Since Article 94 of the Dutch Constitution states that all treaties prevail over domestic law in case of conflict between them, *fraus legis* cannot apply easily.

4.2 Recent case law on *fraus legis*

The most recent case on *fraus tractatus* was decided on 7 February 2014 in which a Dutch corporation held a receivable against an Australian corporation of which the interest income was taxable in the Netherlands.[131] It was converted by the taxpayer into redeemable preference shares. For Dutch tax purposes, these proceeds paid on the shares qualified as equity that would be exempt under the Dutch participation exemption. However, this resulted in a double dip situation for the reason that these proceeds paid on the shares were also deductible in Australia. It was argued by the Dutch tax authorities that the one and only reason for the conversion of the receivable into redeemable preferred shares was to avoid taxation. This would contravene the object and purpose of the DTT since part of the profit would remain untaxed. The Supreme Court decided differently however. Since the Dutch exemption is not dependent on the deductibility of the redeemable preferred shares, the argument of the tax authorities was deemed to be irrelevant. It ruled that taxpayers are free in choosing how to finance its subsidiary. The freedom to make use of the different financing options is fundamental to corporate income tax legislation. It does not contravene the object and purpose of the DTT when it chooses to make use of that freedom.

While the structure in the previous case was set up to circumvent taxation, abuse could not be established due to the qualification difference. An important reason for this is the object and purpose of the DTT, which is to prevent or lower double taxation. The treaty allocates a levy and cannot create the right to levy on itself. Contracting States made a DTT on the basis of domestic legislation of both countries. Good faith is an important factor for the interpretation of these treaties in the application of it and so there should not be deviated from. No appeal has been made on *fraus tractatus* after this case. There are however still numerous national cases in which the doctrine of *fraus legis* is used and where the conditions to apply it are fulfilled.[132] In the latest *fraus legis* case,[133] the company *Hunkemöller* made the tax burden artificially low by creating shareholder loans, through a complex hybrid corporate structure with convertible bonds, that in practice were only provided to deduct the interest of these loans on the profits. The purpose of this structure was exclusively for tax reasons and was therefore deemed to be abuse of law under *fraus legis*.

4.3 International influence on domestic GAAR

The EU GAARs are adopted in Directives which are required to be implemented into domestic legislation by Member States. Article 288 TFEU states the following: *'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'*. The Directives themselves have set time limits for the implementation in domestic law. If this is not done in

[131] HR 7 February 2014, ECLI:NL:HR:2014:224.
[132] E.g. HR 12 October 2018, ECLI:NL:HR:2018:1931; Court of first instance 16 November 2018, ECLI:NL:RBNHO:2018:9865; Court of appeal 18 April 2019, ECLI:NL:GHAMS:2019:1504.
[133] Court of appeal 18 April 2019, ECLI:NL:GHAMS:2019:1504.

time or incomplete or if it does not comply with the requirements, it breaches its obligation under the EU treaty. The European Commission can then start a so-called infraction or infringement procedure against the respective Member State, which can ultimately lead to bringing the case before the Court of Justice that will result in a penalty or lump sum to be paid by the Member State.[134]

The ATAD should have been implemented by Member States on 1 January 2019. According to Dutch Parliamentary Papers, the GAAR of the ATAD is already implemented into domestic legislation, although not statutory, but through the doctrine of *fraus legis*, and therefore is not required to make any amendments to transpose the Directive.[135] The State Secretary of Finance mentions in these papers that the doctrine is similar to the ATAD GAAR. The only difference is that it lacks the test of artificiality (see chapter 2.3.1). To quickly come back to this test; it involves an arrangement or series of arrangements that is not genuine. Even though this test is not included, it is thought that the reasons relevant to the determination of artificiality in the GAAR included in the ATAD are also relevant in the subjective test in applying *fraus legis*.

The GAAR from ATAD focuses on the entire corporate tax legislation and fulfils an abuse safety net function, according to the State Secretary of Finance. As has been mentioned in chapter 2.3.1, the PSD contains identical provisions to the ATAD. This Directive was not seen to be covered by *fraus legis* and has been transposed into Dutch legislation.[136] The reason given was that the PSD aims to tackle abuse of the PSD and is only limited to advantages regarding the PSD, which has the form of a Targeted Anti-Avoidance Rule (TAAR) rather than a GAAR and therefore it does not hinder *fraus legis* to be applicable in other situations, contrary to the ATAD.[137] Because of the different character of the Directives, the choice that is made with the TAAR of the PSD is irrelevant to the application of *fraus legis* according to the Dutch government.

According to the author, this does not mean that the anti-abuse provisions from the ATAD do not have any consequences for the Netherlands. By linking the anti-abuse provisions of the ATAD to *fraus legis*, the doctrine must hereafter be interpreted in accordance with the provision of the Directive, insofar as the case falls within the scope of the Directive. Legal questions regarding the application of *fraus legis* in the sphere of corporate taxation therefore fall under the jurisdiction of the CJEU. This also applies to purely domestic situations and situations involving third States.

[134] Article 258 TFEU; Article 260 TFEU.
[135] Kamerstukken II, 2018–2019, 35 030, no. 3, p. 14-15.
[136] Transposed into Article 17(3)(b) Wet op de vennootschapsbelasting 1969 (Corporate Income Tax Act) and Article 4(3)(c) Wet op de dividendbelasting 1965.
[137] Kamerstukken II, 2018–2019, 35 030, no. 3, p. 14-15.

5 The compatibility of the GAAR and *fraus legis*

5.1 The implementation of the GAAR in the Netherlands

As shown in the previous chapter, the EU GAAR has been 'implemented' into Dutch national legislation. It has however been questioned by many whether *fraus legis* actually is sufficient to meet the requirements of proper implementation of it. This chapter goes into detail whether or not and to what extent the Netherlands has fulfilled the requirements of the European Commission to implement the EU GAAR by comparing the case law of the CJEU and the ATAD to *fraus legis* together with several opinions on this matter. First of all, this chapter looks at the similarities and differences between the OECD's PPT and *fraus legis* to establish whether the doctrine is in accordance with this even though it has already been explained that *fraus tractatus* does not have effect in DTT situations. However, *fraus tractatus* can still be applicable when such a provision is adopted in the DTT (similar to the PPT).[138]

5.2 Comparison between the GAAR and *fraus legis*

5.2.1 Principal Purpose Test in DTTs

The PPT has its focus on the subjective test, to look at the principal purpose of the arrangement. According to *Bender and Engelen*, to satisfy the objective test is only an escape to still be granted the treaty benefits.[139] For this reason, it is harder to satisfy to *fraus legis* than it is to satisfy the PPT, since *fraus legis* requires explicitly both criteria to be met. This results in the fact that in a case where the object and purpose of a legal provision are unclear, *fraus legis* cannot be applied, but the PPT can. Although the PPT does not specifically require an arrangement to be artificial, it can be relevant for the determination of the object and purpose and it can be an indication of tax avoidance. This implies that the PPT can be used in more situations than the doctrine.

Fraus legis requires that a tax advantage was the decisive motive of an arrangement or transaction, while the PPT only requires it to be one of the principal purposes. Furthermore, the PPT does not contain an artificiality test. With that being said, the PPT also requires less than the Union concept of abuse of law, which have been dealt with in chapter 2.3 and 3. This can result from the fact that not only artificial arrangements are covered under the subjective test. Such a broad test affects the possibility for taxpayers in choosing the most beneficial fiscal tax burden. *Bosman* stated that the PPT must therefore be broadly interpreted, which is also evident from the fact that conclusive proof of the objective test has a lower threshold than the one in the context of *fraus legis*.[140] It is sufficient when the subjective test is 'reasonable to conclude'.[141] Even the terms have to be interpreted broadly.[142] With that, the OECD wants to prevent abuse of DTTs in every possible way. This could however lead to the PPT having an overly wide range and thereby also denying tax benefits for legitimate structures. Such an anti-

[138] See ch. 4.1.3.
[139] Bender and Engelen 2016, ch. 4.
[140] Bosman 2018, ch. 5.3.2.
[141] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report*, p. 57-58.
[142] Ibid, p. 57.

abuse rule leads to an unjustified and undesirable strengthening of the means available for tax authorities to combat certain structures. A fiscal motive seems therefore not to be necessarily a legitimate reason to contest an arrangement or transaction. Concludingly, the doctrine of *fraus legis* is more stringent in its application than the PPT, that could be favourable when taking into account that *fraus legis* undoubtedly focuses more on the acquired tax advantage by an arrangement instead of having a broader focus like the PPT.

5.2.2 European Union

As can be seen in chapters 2 to 4, *fraus legis* and the EU GAAR do have similarities. According to the State Secretary of Finance, the doctrine does not need any adjustments. As mentioned in the Parliamentary Papers, the implementation of the GAAR can be done in the form of the *fraus legis* doctrine that functions as a legal framework and is in accordance with guidelines of the Directive; this has been verified in jurisprudence of the CJEU.[143]

As rightfully mentioned by *Kavelaars*, the ATAD GAAR will not be implemented but Article 1(2) and (3) PSD is already implemented into domestic legislation even though the provisions are equal to each other.[144] The legislator established that the concept of anti-abuse from the ATAD is incorporated into *fraus legis*, but the same legislator believes that the PSD should be incorporated into the Corporate Income Tax Act. According to *Kavelaars*, it would therefore have been sufficient to also use *fraus legis* in that view and concludes that the PSD is superfluously included and that it therefore should be abolished.[145] The reason given by the State Secretary of Finance that it has the form of a TAAR rather than a GAAR is not a strong argument in the opinion of the author, since first of all, it is made with the intention of being a GAAR and second of all, *fraus legis* would still be able to tackle the situations regarding situations where the PSD applies since it is also able to tackle these for ATAD situations.

A serious amount of questions have been put forward to whether *fraus legis* is compatible with the EU GAAR of the ATAD. The similarities between the ATAD and *fraus legis* are that they both have a subjective and objective test. There are however a few differences that can be questioned, being firstly the subjective test that is defined broader in the ATAD for it regards 'the main purpose or one of the main purposes' whereas in *fraus legis* it regards 'the decisive motive' for entering into an arrangement is to obtain a tax advantage. Whilst this is a recent development in jurisprudence from the CJEU that was formerly more in context of *fraus legis* (by stating it as 'the essential aim'),[146] the ATAD already implemented it into the Directive and therefore meets the requirements of case law as of today.[147] By this, it is also more in line with the PPT as mentioned in chapter 3.3.3.

[143] Case C-312/05 *Hans Markus Kofoed v Skatteministeriet* [2007], para. 41-45; Kamerstukken II, 2018–2019, 35 030, no. 3, p. 14-15.
[144] Kavelaars 2019, ch. 3.4.
[145] Ibid, ch. 3.4.
[146] Case C-255/02 *Halifax and others v Commissioners of Customs & Excise* [2006], para. 74-75.
[147] Case C-115/16 *N Luxembourg 1 and Others v Skatteministeriet* [2019]; Case C-116/16 *Skatteministeriet v T Danmark and Y Denmark Aps* [2019]; Case C-135/17 *X-GmbH v Finanzamt Stuttgart – Körperschaften* [2019].

Where the subjective test is defined broader in the ATAD, the Parliamentary Papers do not go into detail on this matter unfortunately, but it is clear that these tests cannot be interchanged for one another. The *Dutch association of tax advisors*, in commentary on the implementation of the ATAD, was of the opinion that this broad definition of the ATAD is so general and not framed that it is likely to lead to different interpretations of Member States, which leads to possible double taxation as can be seen from the results of the PSD and that therefore the doctrine of *fraus legis* should not be amended accordingly.[148] It is clear from this commentary that *fraus legis* and the ATAD GAAR are not similar in this aspect. It remains to be seen how the CJEU will interpret the doctrine in case law. Besides that, the CJEU recently indicated that transactions should in principle be assessed per case to establish whether the main purpose of the transaction is to obtain a tax advantage, whereas the Supreme Court chooses to assess relevant transactions as a whole.[149] It can be questioned whether both GAARs have the same applicability in this. In the opinion of the author, the difference between the subjective tests is substantial; the CJEU has adapted the criterion for a reason in its case law. By excluding the option 'one of the main purposes' in the criterion, some arrangements are not taken into account for this test. The explicit impact remains to be seen, but it is a fact that this difference can be influential on deciding a case.

Secondly, *fraus legis* lacks an artificiality test. This is one of the most crucial differences, which was said to be implicitly adopted in the subjective test of the doctrine. As seen in the provisions in the ATAD regarding the GAAR, the European Commission puts the emphasis on the artificial character of the arrangement. It is therefore somewhat remarkable that this condition is explicitly waived by the Dutch legislator. In older case law of the Supreme Court, the artificiality requirement has been formulated as a separate element in addition to the other conditions of *fraus legis*. However, the criterion no longer appears in the current application.[150] Many commentators are of the opinion that it is a somewhat optimistic view to leave this element out and it has to be seen during the coming years how the doctrine develops under the ATAD GAAR as an EU doctrine, which will be decided by the CJEU.[151] *Kavelaars* presented an alternative approach to actually transpose the ATAD into the statutory GAAR by replacing it with *richtige heffing* in Article 31 General Tax Act, which is currently not effective anymore. For the following reasons this would have been a better approach: it improves the legal certainty; it abolishes the superfluous provision of *richtige heffing*; and it would then contain a general concept of anti-abuse that is not limited to the application of corporation tax.[152] Unfortunately, this was not even mentioned as an option in the Parliamentary Papers.

There are also commentators that are of the opinion that *fraus legis* does suffice with the subjective element for the artificiality test. *Niessen*, who is also an Advocate General of the Dutch Supreme Court, stated that the national court may pay attention to the artificial nature of the arrangement, as well as to the legal, economic and personal connections with other

[148] De Nederlandse Orde van Belastingadviseurs, Commissie Wetsvoorstellen 2016, p. 7.
[149] Case C-251/16 Edward Cussens and Others v T. G. Brosman [2017]; Redactie Vakstudie Nieuws 2018, p. 15.
[150] Niessen 2018, ch. 18.5.
[151] E.g. Reijnen 2018, ch. 4; Kavelaars 2019 ch. 3.2.
[152] Kavelaars 2019, ch. 3.2.

companies, in the subjective test.[153] From such factors it can be acquired that tax frustration was the main purpose. Herein, some difference can be seen with case law of the Supreme Court, but in the opinion of *Niessen*, this is not considerable. Interestingly, with the introduction of the PSD came the artificiality test. *Debelva and Luts* opined whether that new requirement had an added value against the other tests. They mentioned that *'the concept of "valid commercial reason" could be regarded merely as making the subjective test more concrete'* and the requirement that an arrangement should 'reflect economic reality' stems from 'wholly artificial arrangement' which in the legal doctrine is submitted to relate both to the subjective and objective tests of the CJEU.[154] Therewith, this test was seen as an unnecessary addition to the other tests since it was included already and therewith supports the statement of the Dutch legislator.

Fraus legis does indeed seem to cover the artificiality aspect in the subjective test in the opinion of the author. Although the CJEU will decide on this matter, tax frustration should be decided from factors such as the legal, economic and personal connections and with that, the genuineness of an arrangement. If that is established for the doctrine, it naturally fulfils the artificiality test as well as the subjective test.

Thirdly, where *fraus legis* or *fraus tractatus* has never been successfully applied in situations where DTTs apply, the ATAD focuses on abuse of national systems in an international cross-border situation, by for instance responding to mismatches. This has also not been discussed in the Parliamentary Papers which is peculiar. It is unclear what the effect will be of this, but since the ATAD focuses on abuse of national systems in an international cross-border situation, cases coming before the CJEU will most likely need to apply the doctrine in some way. Although, it should be mentioned that from the wording of Article 6 ATAD, it remains unclear whether that provision applies to DTTs.

Lastly, the fact that *fraus legis* applies its substitution doctrine for recharacterising an arrangement can be different from disregarding an arrangement in the GAAR. This also has not been mentioned in the Parliamentary Papers. The wording of the ATAD GAAR implies that the arrangements shall be ignored when an arrangement is artificial. The question whether leaving out the arrangement is not similar to the aforementioned substitution remains. Article 6(3) ATAD states that the tax liability is calculated on the basis of national law, which may allow doing so according to the outcome on the basis of the application of *fraus legis*.

All things considered, it is difficult to confirm whether *fraus legis* suffices as covering the GAAR in the ATAD. It is unfortunate that the State Secretary of Finance in the Parliamentary Papers does not go into detail on actually all aspects, but mentions only briefly why the doctrine suffices. It will be interesting to see how the development of the doctrine of *fraus legis* is going to take place. The interpretation of the GAAR will be determined by the CJEU as a Community

[153] Niessen 2018, ch. 18.7.
[154] Debelva and Luts 2015, ch. 2.5.

doctrine. The effect of that doctrine in the Dutch implementation will, through interpretation in line with guidelines entail interesting case law.

6 Conclusion and final remarks

With the proposal of the ATAD by the European Commission in 2016, Member States should have implemented this Directive into national legislation by 1 January 2019. This research evaluates whether the Netherlands complies with the required implementation of the GAAR in the ATAD or if there are shortcomings. The analysis above gives the substance to answer the research question. For this study, the following research question was formulated: *'Does the Netherlands fulfil its obligation to implement the GAAR in domestic legislation?'*

To answer this question, it started with an analysis of the content of the PPT and the ATAD. The PPT includes a subjective test, which requires that a treaty benefit is one of the principal purposes of the transaction; and an objective test, which requires as an exception, that for granting the benefit, it is not in accordance with the object and purpose of the relevant provisions. The ATAD GAAR is in accordance with CJEU case law and comprises of a subjective test, which requires that the main purpose or one of the main purposes of the arrangement is obtaining a tax advantage; an objective test, which requires that the arrangement defeats the object or purpose of the applicable tax law; and an artificiality test, which requires that the arrangement or series of arrangements is not genuine. Furthermore, it shall be deemed to be non-genuine when it is not put into place for valid commercial reasons reflecting an economic reality. It is a de minimis approach which leaves Member States the freedom in deciding how to calculate the tax liability which affects the legal certainty.

Fraus legis is the doctrinal GAAR of the Netherlands which is in effective use from 1984 and has not been changed for the implementation of the ATAD GAAR since it is deemed to be sufficient without making any amendments. The doctrine consists of an objective criterion, which requires that the arrangement is contrary to the object and purpose of the legislation; and a subjective criterion, which requires that the motive for the taxpayer is to frustrate taxation. This also implies that, even if the only purpose of the arrangement is for tax reasons; if it is not contrary to the object and purpose of legislation, *fraus legis* is not applicable. The only difference between the Directive and the doctrine, according to the State Secretary of Finance, is the artificiality test which can also be derived from the subjective test. Furthermore, *fraus legis* only applies in DTT situations when it is explicitly mentioned in the treaty that it can be applied.

When comparing the PPT and *fraus legis*, it is obvious that the PPT has a focus on the subjective test, while the objective test can be seen as an escape to still be granted treaty benefits. Also, *fraus legis* requires the tax advantage to be the decisive motive of an arrangement or transaction whereas the PPT only requires it to be one of the principal purposes. For these reasons, *fraus legis* is more stringent in its application than the PPT.

The ATAD GAAR and *fraus legis* have some differences, being first of all the subjective test that is broader in the ATAD, similar to the PPT. This difference is substantial since some arrangements are not taken into account in the *fraus legis* subjective test which are taken into account in the ATAD GAAR. Furthermore, the doctrine lacks the artificiality test, but it appears to be covered by the subjective test in *fraus legis* since tax frustration should be decided from the genuineness of an arrangement and thereby it naturally fulfils the artificiality test and subjective test in one test. What the effect will be of *fraus tractatus* remains unclear since it was never applied successfully. Since the ATAD focuses on cross-border situations, it will likely result in cases before the CJEU who will decide about the application of the doctrine. Lastly, *fraus legis* applies its substitution doctrine for recharacterising an arrangement whereas the ATAD GAAR ignores an arrangement.

Concludingly, it can be said that the GAAR of the Netherlands has some similarities with the PPT and the ATAD GAAR, but it lacks in the applicability on some aspects. Even though the State Secretary of Finance reasons that *fraus legis* is sufficient, he does not go into detail why it is sufficient to cover all the aspects of the Directive. In the opinion of the author, supported by the opinion of scholars,[155] more attention should have been paid to the implementation of the ATAD GAAR than only stating that *fraus legis* suffices and there is no need for any amendments. The fact that the provisions of the GAAR in the PSD, which are equal to the provisions of the ATAD GAAR, are implemented into Dutch domestic legislation is an indication that there are discrepancies in the adoption of the EU GAARs. In the opinion of the author, one method should be chosen for the implementation with an argumentation that answers to all aspects of the GAARs which need to be implemented as to why and how the method suffices. Until now, that has not been done.

Following the approach of the PSD implementation, the ATAD GAAR would be fully incorporated into Dutch legislation. It could be better to transpose it into domestic legislation in some way; even when it is not in the exact wording of the Directive. For the reason that *richtige heffing* in Article 31 of the General Tax Act is not in effective use anymore, it could be rewritten so that it abolishes the current statutory GAAR and adheres to the ATAD GAAR.

[155] See ch. 5.2.2.

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