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In What Way Does the Russian GAAR Comply With EU ATAD and BEPS Rules?

by

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Summary

The issues of tackling aggressive tax planning are actual throughout the whole history of global market economy. Earlier this struggle was held by the states individually through imposing rules into their national legislation authorizing tax supervisory bodies to use new methods of control, establishing liability for tax evasion, and developing the approaches by judgements of the courts on relevant cases.

The removal of administrative barriers, globalization processes in market economy and promotion of entrepreneurship, alongside with other measures that stimulate taxpayers to fulfill their tax obligations responsibly are affecting tax abuse. Today the intentions of the states to promote international tax cooperation and combat tax avoidance are reflected in General Anti-Avoidance Rules (GAAR) and special international agreements on tax issues Specific Anti-Avoidance Rules (SAAR), as well as coordination of efforts in the framework of international economic organizations (e.g. BEPS Action Plan developed in OECD).

The cornerstone of GAAR is the concept of tax abuse. Although the definitions of tax abuse may be different in some jurisdictions, the basis of all the approaches is the fact that the taxpayer obtains a tax advantage as a main purpose of an arrangement that is not genuine and has no economic content.

In the global efforts to tackle tax avoidance the states rely are reflected in the initiatives of the Organization for Economic Cooperation and Development (OECD). The most important step in counteracting tax base erosion and profit shifting was the BEPS plan published in 2015, containing relevant OECD activities. Though Russia is not a member of the Organization for Economic Cooperation and Development, it adheres to positions that are consistent with the recommendations reflected both in the BEPS action plan and other documents of OECD. This is reflected not only by changes in the Russian tax legislation, but also in the judgements of Russian courts.

Preface

I would like to thank my tutor, Sigrid Hemels for her time, consideration and the feedback I have received during the course and in writing thesis. Sigrid charged me with enthusiasm, inspired and shared her dedication to taxation.

Many thanks my professor Cecile Brokelind for the great master programme and for expanding the boundaries of tax world for me, sharing unique experience and ideas.

Special thanks I dedicate to my mother, Valentina, for her love, support and for being my personal lighthouse in the times of uncertainty.

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Abbreviation list

ATAD	Anti-Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
CFC	Controlled Foreign Company
CJEU	Court of Justice of the European Union
EU	European Union
FTS	Federal Tax Service of the Russian Federation
GAAR	General Anti-Avoidance Rules
IRD	Interest and Royalties Directive
MNE	Multinational Enterprise
MS	Member State
MTC	Model Tax Convention
OECD	Organisation for Economic Cooperation and Development
PE	Permanent Establishment
PSD	Parent-Subsidiary Directive
RTC	Russian Tax Code
SAAR	Specific Anti-Avoidance Rules

1. Introduction

1.1 Background

The issues of tackling aggressive tax planning are actual throughout the whole history of global market economy. Earlier this struggle was held by the states individually through imposing rules into their national legislation authorizing tax supervisory bodies to use new methods of control, establishing liability for tax evasion, and developing the approaches by judgements of the courts on relevant cases.

The removal of administrative barriers, globalization processes in market economy and promotion of entrepreneurship, alongside with other measures that stimulate taxpayers to fulfill their tax obligations responsibly are affecting tax abuse. Today the intentions of the states to promote international tax cooperation and combat tax avoidance are reflected in General Anti-Avoidance Rules (GAAR) and special international agreements on tax issues Specific Anti-Avoidance Rules (SAAR), as well as coordination of efforts in the framework of international economic organizations (e.g. BEPS Action Plan developed in OECD).

The Action Plan on Base Erosion and Profit Shifting (hereinafter - BEPS plan) was implemented to the Russian Tax Code in 2017 and greatly developed the existing level of anti-abusive approaches in the Russian tax law. The legal regime of taxation on profit and income in the Russian Federation is influenced by a number of factors including the internationalization of tax law. The implementation of OECD principles and regulation predetermined the recent development of national tax policy. These changes in Russian tax legislation were mostly due to the implementation of measures introduced by OECD and mainly by BEPS plan[1]. Russia is an integral part of the world community and general problems in the field of taxation affect the Russian tax regime. As prescribed in the Russian Constitution Russia has the supremacy of the international law as international treaties are the integral part of the Russian legal system. And in

[1] OECD Action Plan on Base Erosion and Profit Shifting, OECD Publishing, http://dx.doi.org/10.1787/9789264202719-en.

case when the national rule is incompatible with the international treaty, the treaty shall prevail. The norms of supranational law and the norms enshrined in OECD acts affect the possibility of improving the Russian tax regime trough the implementation of these acts or through incorporation. The recent consolidation brought many novelties into the Tax Code of the Russian Federation[2]: in particular the rules for taxation of controlled foreign companies, the rules of fine (insufficient) capitalization, the concept of beneficial ownership, criteria for tax residence of legal entities, ratification of the Convention on Mutual Administrative Assistance in Tax Matters. These novelties are milestones of the present Russian tax policy at the present stage. On June 2017, the Russian Federation joined the OECD Multilateral Convention on implementation of measures relating to tax agreements in order to counteract the erosion of the tax base and withdraw profits from taxation[3], which contains mandatory provisions reflected in the final report of the BEPS Action plan.

1.2 Aim

The aim of this thesis is: to introduce to the Russian anti-tax avoidance regulations by analysing GAAR and CFC rules and compare the relevant methods and principles in ATAD and BEPS, finding similarities and differences and focusing on in what way do the Russian anti-tax avoidance rules (in particular Russian GAAR – Article 54.1 of the Russian Tax Code) comply with the ATAD rules as a key anti-abusive instrument in the EU.

1.3 Method and material

In order to achieve the aim of the thesis formal legal method, comparative law method and the legal doctrine method will be applied, supplemented by specific examples for illustration. The main objects and research materials are international tax legislation and the EU tax legislation as well as the specific provisions of Russian Tax Code, including Article 54.1 of it, BEPS Action

[2] The Tax Code pf the Russian Federation, Part One No. 146-FZ of July 31, 1998. Part Two No. 117-FZ of August 5, 2000.
[3] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting // OECD, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

Plan, academic materials and CJEU case law will be exploited in this thesis paper.

1.4 Delimitation

The demarcation of this paper is limited within context regarding the tax legislation on GAAR and CFC regulations. Other BEPS actions and ATAD provisions will not be included in this paper.

1.5 Outline

This thesis has been divided into four sections to analyse the topic. Chapter 2 will focus on the international cooperation in setting OECD standards revealed in BEPS Action Plan. Chapter 3 will analyse the mechanisms of GAAR and CFC legislation by reference to the EU ATAD. Chapter 4 will firstly discuss the similarities and differences between Russian GAAR and CFC rules and the provisions of ATAD and OECD BEPS Plan. Finally, chapter 5 will provide the final conclusions of this paper

2. OECD BEPS Plan and International Cooperation

2.1 Organisation for Economic Co-operation and Development (OECD) and its role

The Organization for Economic Cooperation and Development is an international interstate organization of economically developed countries that recognize the principles of representative democracy and a free market economy and is represented by the developed countries. OECD is a platform for the discussion, development and coordination of the economic and social policies, for sharing experiences and solutions of common problems. OECD is represented by 37 countries with developed democratic institutions and a market economy. The OECD maintains active partnerships with more than 70 countries that are not members of the Organization, of which 24 countries regularly participate in the activities of various OECD Committees as observers. Overall, OECD countries account for 17.7% of the world's population and more than 60% of global GDP.[4]

The aims of OECD were defined in the first article of the Convention and consisted of a coherent policy aimed at:

(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

Most OECD decisions made in the form of conventions, declarations, agreements on various issues, recommendations, and joint principles are advisory in nature and are taken by consensus. The OECD regulatory framework includes about 200 legal instruments, including codes,

[4] Humanities portal https://gtmarket.ru/organizations/oecd/info

agreements, conventions, decisions, and declarations and recommendations. Some of the OECD's regulations are binding interstate agreements for participating countries others do not impose regulatory obligations on countries and are advisory in introducing the best practices of national regulation in certain areas.

2.2 Cooperation of the OECD and Russia

Cooperation between the OECD and the Russian Federation began in the first half of the 1990s. This was facilitated by both internal reforms in Russia related to the establishment of market relations and democratic norms, as well as internal reforms of the OECD itself, which, while remaining a "closed club", began to implement the expansion strategy, incorporating the former socialist countries of Europe. For this, in 1990, the Centre for Co-operation with European Economies in Transition was created in the OECD, which, among other things, began to coordinate the interaction of the OECD with Russia.

At present, Russia is actively participating in the OECD as an observer in Committees and Working Groups, which gives it the right to express its state's position on the issues discussed, to participate in the development of decisions and recommendations. Throughout the entire period of cooperation, the circle of OECD Committees and Working Groups, in which Russia participates as an observer, has been constantly expanding. Through the OECD, Russian participation in global development programs is being implemented. Russia also participates in many of the OECD Global Forums dedicated to pressing issues of economic policy of the governments of the leading countries of the world[5].

The OECD-Russia program, in the framework of which cooperation is ongoing, is intended to help the government solve key institutional and political problems that determine the possibilities of economic and social progress, on the understanding that Russia's joining the Organization is a joint goal. The OECD provides Russia with advisory and technical assistance in the development and implementation of market reforms at the

[5] Humanities portal https://gtmarket.ru/organizations/oecd/info

macroeconomic and sectoral levels, the creation of institutions and market economy tools, including support in the development of legislation in various sectors of the economy, attracting foreign investment, enterprise reform, banking reform, and solving state problems management and regulation, corporate governance, modernization of educational policy, scientific and technical and innovation policy. OECD general economic reviews of Russia are regularly published, as well as specialized studies and reviews of the situation in individual sectors of the economy and social relations. To discuss the prepared materials, seminars and conferences are organized with the participation of leading OECD experts, representatives of the executive and legislative branches of the Russian Federation, national and international research centres. Based on their results, materials are prepared containing recommendations for the relevant government departments.

The issue of Russia's membership in the OECD has been repeatedly raised throughout the entire period of cooperation. Having declared its desire to join the OECD at the G8 Summit in Halifax in 1995, Russia submitted an official application for membership in the Organisation in 1996. In subsequent years, Russia and the OECD gradually expanded their cooperation, consistently adhering to the course of Russia's accession to the Organisation, which was initially recognized as a “mutually shared goal” and confirmed by relevant official statements[6].

On May 16, 2007, the OECD Council decided to start the negotiation process on the accession of the Russian Federation during the session of the OECD Council. On November 30, 2007, the Roadmap for Russia's Accession was adopted, aimed at implementing the decisions of the OECD Council and defining a procedure that allows member countries to assess Russia's willingness and ability to fulfill the obligations imposed by membership in the Organisation.

The submission to the OECD of the “Initial Memorandum on the Position of the Russian Federation Regarding OECD Legal Acts” in June 2009 was the official start of the process of discussion at the interagency level of practical

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[6]Russian governmental Committee on economic development and integration http://government.ru/department/130/about/

steps to join the OECD. To this end, the Russian government has developed a “Legislative Plan for the harmonization of Russian legislation with OECD standards.” From 2009 to 2013, issues of Russia's accession and Russia's implementation of the necessary measures for this were discussed in all key OECD Committees. At the end of 2013, most of the Committees gave a positive conclusion on Russia's readiness to join the OECD in terms of regulatory compliance with the principles of the Organization.

On March 12, 2014, the OECD suspended indefinitely activities related to the accession process of the Russian Federation[7]. The reasons for this decision by the OECD were political and connected with the international crisis around Ukraine, which made the relations between Russia and OECD countries sharply complicated.

However, Russia still follows the OECD regulations and recommendations in the legislation processes and implements the core ideas into the national legislation (and OECD’s Model Tax Convention on Income and Capital and BEPS Action Plan are not exceptions).

2.3 BEPS Project as an International Anti-avoidance Standard

The legal background for tax avoidance is represented by OECD Base Erosion and Profit Shifting (BEPS) initiative and the EU’s Anti-Tax Avoidance Directive (ATAD). BEPS focuses on international business relations in paying fair share of tax, which includes numerous actions and other tax avoidance methods.

The BEPS project focuses on international business relations in paying fair share of tax and includes numerous actions and tax avoidance methods. It is the initiative of Global largest economies aimed to plug loopholes of the corporate tax system that has allowed multinational enterprises to reduce their exposure to tax by shifting profits. The common business trend was to shift from high-tax jurisdictions to low-tax jurisdictions and find legal ways for such shifting. As a result, a number of world’s largest economies were suffering losses and made a step forward to tackle tax avoidance by initiating

[7]Web portal of the Russian Digital Ministry https://digital.gov.ru/ru/activity/directions/307/

a dialogue on the basis of OECD in 2013. As a result of numerous discussions came BEPS Action Plan. It became an international tax standard for a great number of countries to follow and many countries updated their national tax rules in accordance with it in order to reflect the increasing digitalization of the global economy, and how these rules should be aligned to prevent multinationals using transfer pricing and other arrangements to separate profits from value creation.

The Action Plan was made of 15 specific actions designed to provide the governments certain mechanisms to prevent corporations from avoiding their obligations to pay taxes.

The BEPS final recommendations were published by the OECD in October 2015 and are now being implemented by jurisdictions across the world, although some national BEPS measures have deviated to varying degrees from the measures included in the BEPS final reports.

3. The Anti-Tax Avoidance Directive (ATAD) as a European Response to BEPS

3.1 ATAD as a new instrument for Anti-Avoidance in the EU.

Adopting BEPS project gave a lot of food for thought to the European legislators in their intentions to find a uniform standard for the EU member states to tackle tax avoidance. Finally, the Anti-Tax Avoidance Directive (ATAD) was introduced as a core document initiating extensive changes to the corporate tax regimes in EU. First presented by the European Commission in January 2016, shortly after the publication of the BEPS final recommendations, Directive ((EU) 2016/1164) lays down rules against tax avoidance practices that directly affect the functioning of the internal market. It was adopted by the Council on June 20, 2016. Later in October 2016, the Commission presented additional rules targeting hybrid mismatch arrangements between EU and non-EU countries. These additional measures are known as ATAD II.

3.2 The Scope of ATAD

ATAD introduced legally-binding anti-abuse measures, which all member states are required to apply against common forms of abusive tax practices. This directive drew a vector that EU member states should follow as a minimum requirement in their attempts to tackle aggressive tax planning throughout the EU in order to ensure fair and stable environment for businesses.

The Directive applies at a broad range of taxpayers that are subject to corporate tax having PE in the EU and to their subsidiaries incorporated in the third countries. The rules introduced by ATAD are the reflection of OECD recommendations namely interest limitation rules, the CFC rules, the rules on hybrid mismatches. Also, an important measure to be introduced was a general anti-abuse rule (GAAR). This paper will cover ATAD's GAAR and CFC rules providing the analysis of their nature as a product of evolution of

BEPS principles and comparing them to the similar measures in Russian Tax Code.

3.3 General Anti-abuse Rule (GAAR)

National tax laws and EU acts often enforce the General Anti-Abuse rules (GAARs), which are designed to withstand any tax evasion scenario that lawmakers cannot predict. Since GAARs are aimed at combating unexpected tax avoidance schemes, these rules should be quite abstract and flexible.

The OECD has invited states to introduce GAARs into tax treaties to combat companies that evade taxes by abusing treaties between member states or with third countries (treaty shopping), creating artificial arrangements for access to the most favorable tax regime. The European Commission has included a similar proposal in the recommendations regarding tax treaties concluded by member states, given that this rule should be applied in line with EU law without violating the provisions of the Lisbon Treaty[8].

Although GAARs are abstract enough to respond to all unforeseen cases of tax avoidance, they are often criticized as violating the principle of legal certainty for taxpayers. As Michael Lang notes, GAARs are inherently rules that need flexibility and abstractness, while taxpayers rely on a particular tax system and management. Moreover, there is no general principle in EU law requiring member states to combat abusive practices in direct taxation[9].

As ATAD established, an arrangement (series of arrangements) put into place for the main purpose or one of the main purposes of obtaining a tax advantage shall be ignored by a member state. Such arrangements shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality. Where such arrangements are ignored by a member state, the tax liability shall be calculated in accordance with national law.

[8] Marjaana Helminen. EU Tax Law – Direct Taxation, 2019

[9] Lang M. Cadburry Schweppes' Line of Case Law from the Member States' Perspective // Prohibition of Abuse of Law: a New General Principle of EU Law? / R. de la Feria, S. Vogenauer (eds.). Hart Publishing, 2011. P. 451; Advanced Issues in International and European Tax Law. Hart Publishing, 2016. P. 166.

All EU directives affecting direct taxation contain measures to prevent certain forms of abuse of law. The turning point on the way to GAAR codification was the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (FTT). It provided that Member States take measures to prevent tax evasion and tax abuse. This provision was prescriptive, and not permissible.

The incorporation of GAAR into EU tax directives has always been a common practice. These rules can be found in the following directives:

- Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in case of Parent Companies and Subsidiaries of Different Member States[10];

- Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, 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[11];

- Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States[12].

In this paper I decided to focus mainly on the provisions of Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD)[13].

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[10] See the full text of Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in case of Parent Companies and Subsidiaries of Different Member States: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32011L0096

[11] See the full text of 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: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0133

[12] See the full text of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0049

[13] See the full text of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market:

The directive covers all corporate tax payers in the EU Member States, including subsidiaries located in third countries (Article 1). It contains some clauses from the BEPS Action Plan, for example, CFC rules, provisions on hybrid schemes, as well as provisions on capital gains and on the implementation of GAAR.

GAAR is revealed in the Article 6 of ATAD: "General anti-abuse rule":

"1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law"[14].

According to this article, the general anti-abuse rule will suppress the creation and functioning of artificial arrangements, if there are no special rules for it. This wording practically reproduces the GAAR as set forth in the Parent Subsidiary Directive. However, the Article 6 (3) of ATAD leaves the issue of calculating tax and determining the economic nature of transactions for Member States.

Member states should conduct subjective and objective tests to identify abuses. This will allow the tax authorities to reject fully artificial

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.193.01.0001.01.ENG&toc=OJ:L:2016:193:TOC

[14] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market *OJ L 193, 19.7.2016, p. 1–14*

arrangements and carry out taxation based on the economic nature of the activity or operation.

For the first time the Court of Justice of the European Union set up abuse test in 2000 in Paragraphs 52-53 of the Judgement on *Emsland-Stärke case (C-110/99)*: “A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country.”[15]

Thus, an objective test requires factual circumstances, from which it follows that the objective of the EU rule of law was not achieved despite the letter of the law. A subjective test is designed to identify the ultimate goal of an event or a set of measures undertaken by a business entity that can be defined as artificial in the light of specific circumstances[16].

The Court of Justice of the European Union also conducted these two tests in *Halifax case (C-255/02)*, identifying abusive tax practices in relation to indirect taxation. At the same time, he applied the VAT ‘abuse of rights’ principle saying in the Paragraph 69 of its Judgement that: “The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law”[17].

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[15] Case C-110/99 Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas [2000] ECLI:EU:C:2000:695.

[16] De Broe L., Beckers D. The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice’s Case Law on Abuse of EU Law // 26 EC Tax Review. 2017. Iss. 3. P. 142.

[17] Case C-255/02 Halifax Plc., Leeds Permanent Development Services Ltd. and County Wide Property Investments Ltd. v. Commissioners of Customs & Excise, judgement of 21 February 2006 ECLI:EU:C:2006:121.

In the Judgement on *Cadbury Schweppes case (C-196/04)*[18], the CJEU revised this abuse double-test for direct taxation. Although this famous case initially dealt with CFC legislation, it generated widespread debate on tax evasion. From the perspective of the Court of Justice, the fact that subsidiaries are taxed at a low rate in another EU member state does not allow the country in which the head office is registered to compensate for this with a tax regime aimed at leveling such an advantage. There should be also no general presumption of tax evasion due to the fact that the resident company establishes its subsidiary in a low tax jusrisdiction as the court stated in the Paragraph 50 of its Judgement on *Cadbury Schweppes*: "It is also apparent from case-law that the mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty"[19].

In the judgements on *Emsland-Stärke*[20] and *Halifax*[21] cases, the Court of Justice of the European Union indicated that, in addition to the subjective intention to receive tax benefits also there should be objective circumstances demonstrating that the goal of freedom of establishment (when the company is not an artificial arrangement and really intends to conduct economic activity) has not been achieved. Thus, the Court of Justice of the European Union, according to a number of researchers, at least created the impression that it has the intention to form a uniform structure of tax abuse applicable in different areas of tax law[22].

[18] Case C-196/04 Cadbury Schweppes Plc., Cadbury Schweppes Ltd. v. Commissioners of Inland Revenue, ECR, judgement of 12 September 2006 ECLI:EU:C:2006:544.
[19] Case C-196/04 Cadbury Schweppes Plc., Cadbury Schweppes Ltd. v. Commissioners of Inland Revenue, ECR, judgement of 12 September 2006 ECLI:EU:C:2006:544.
[20] Case C-110/99 Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas [2000] ECLI:EU:C:2000:695.
[21] Case C-255/02 Halifax Plc., Leeds Permanent Development Services Ltd. and County Wide Property Investments Ltd. v. Commissioners of Customs & Excise, judgement of 21 February 2006 ECLI:EU:C:2006:121.
[22] See Lang M. Eine Wende in der Rechtsprechung des EuGH zu den direkten Steuern? // M. Hebig, K. Kaiser, K.-D. Koschmieder and M. Oblau (eds.). Aktuelle Entwicklungsaspekte der Unternehmensbesteuerung: Festschrift für Wilhelm H. Wacker. Berlin, 2006. P. 365; Idem. Die Rechtsprechung des EuGH zu den direkten Steuern. Frankfurt, 2007; de Broe L. International Tax Planning and Prevention of Abuse under Domestic Law — Tax Treaties

One of the recent important developments brought by CJEU on the concept of tax abuse may be found in the judgments on the “Danish Beneficial Ownership Cases”: *Skatteministeriet v T Danmark and Y Denmark Aps* (*Joined Cases C-116/16 and C-117/16* – “the dividend cases”)[23] and in *N Luxembourg 1, X Denmark A/S, C Danmark I and Z Denmark ApS vs. Skatteministeriet* (*Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16* – “the interest cases”)[24]. Danish High Court asked about the necessity of implementation of an anti-abuse provision in the tax legislation of EU MS in order to deny benefits from the IRD or PSD[25]. The CJEU stated that the general EU anti-abuse principle implied that an EU Member State has to deny such benefit if an arrangement constitutes abuse of rights irrespective of whether any specific anti-avoidance legislation has been implemented in domestic law.

3.4 Controlled Foreign Company (CFC) Rules

Under ATAD, the member state of a taxpayer shall treat an entity, or a PE of which the profits are not subject to tax or are exempt from tax in that member state, as a controlled foreign company where the following conditions are met:

- in the case of an entity, the taxpayer by itself, or together with its associated enterprises holds a direct or indirect participation of more than 50 percent of the voting rights, or owns directly or indirectly more than 50 percent of capital or is entitled to receive more than 50 percent of the profits of that entity; and
- the actual corporate tax paid on its profits by the entity or PE is lower than the difference between the corporate tax that would have been charged on the entity or PE under the applicable corporate tax system

and EC Law: a Study of the Use of Conduit and Base Companies': doctoral thesis. Katholieke Universiteit Leuven, 2007. P. 567.

[23] Joined Cases C-116/16 and C-117/16 Skatteministeriet v T Danmark and Y Denmark Aps, judgment of 26 February 2019 ECLI:EU:C:2019:135

[24] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 N Luxembourg 1 and Others v Skatteministeriet, judgment of 26 February 2019 ECLI:EU:C:2019:134

[25] Jonathan Schwarz Beneficial ownership: CJEU Landmark ruling. - February 27, 2019. - Kluwer International Tax Blog http://kluwertaxblog.com/2019/02/27/beneficial-ownership-cjeu-landmark-ruling/?doing_wp_cron=1590969356.4309849739074707031250

in the member state of the taxpayer and the actual corporate tax paid on its profits by the entity or PE.

Where an entity or PE is treated as a controlled foreign company, the member state of the taxpayer shall include in the tax base:

- the non-distributed income of the entity or the income of the PE which is derived from the following categories:
- interest or any other income generated by financial assets;
- royalties or any other income generated from intellectual property;
- dividends and income from the disposal of shares;
- income from financial leasing;
- income from insurance, banking and other financial activities;
- income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value; or
- the non-distributed income of the entity or PE arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.

Member states may opt not to treat an entity or PE as a controlled foreign company under certain circumstances, including when one third or less of its income is derived from the categories of income in the first point above.

Additionally, member states may exclude an entity or PE from the scope of the second point if its accounting profits do not exceed EUR 750,000 and its non-trading income does not exceed EUR 75,000; or when its accounting profits amount to no more than 10 percent of its operating costs for the tax period.

Many member states already have extensive anti-avoidance legislation in place including such measures as controlled foreign company or general anti-avoidance rules. Therefore, in some EU countries, the ATAD has only required relatively minor tweaks to existing tax law.

However, this is certainly not the case across the whole of the EU, and several member states have had to legislate extensively to ensure alignment with the requirements of the directive. As such, the corporate tax landscape has

changed considerably in many parts of the EU. Therefore, it will be crucial for multinational companies with operations in the EU, including those based in third countries, to factor these extensive changes into their forward tax planning.

Given the widespread changes to national tax laws and regulations taking place at a global level as a consequence of the BEPS project and increasing public and governmental focus on tax avoidance, this is likely to add to an already challenging tax compliance environment for multinational firms.

4. Anti-Tax Avoidance in Russia: a new approach to GAAR and CFC Rules

4.1 Implementation of BEPS Actions in the Russian Federation

The Russian Federation made progress in amending its tax legislation and particularly RTC with new rules that tackle tax avoidance, which not only meet OECD standards, but also evaluating the accumulated Russian experience[26].

In 2016 Action 1 (addressing the tax challenges of the digital economy) was introduced (Article 174.2 of RTC), covering the services rendered electronically.

Followed by numerous discussions and debates adoption Action 3 followed (controlled foreign company (CFC) rules) and it does not simply taking into account the recommendations of OECD but bringing a new concept of “deoffshorization” into the tax legislation[27].

A set of amendments to RTC covered base erosion limitation involving interest deductions and other financial payments (Action 4). A thin-capitalization mechanism is now in operation.

According to Action 6 - preventing the granting of treaty benefits in inappropriate circumstances, double tax treaties should be amended. Currently in April 2020 new amendments to treaties with Cyprus, Malta and Luxembourg have been introduced and are supposed to enter into force from January 2021.

[26] Arakelov S. A. Development of the concept of the actual right to income: approaches of the Federal Tax Service of Russia taking into account the established judicial practice // Law. 2017. No. 5. P. 45-56.
[27] Karpenko, A. The main trends of deoffshorization. Legal framework for business // Tax Bulletin. - 2015. - No. 1.

Actions 8, 9, 10 (aligning transfer pricing outcomes with value creation) – clarified transfer pricing rules in accordance with the OECD recommendations.

Action 13 deals with country-by-country reporting. On January 26, 2017, the Federal Tax Service of Russia signed a multilateral Agreement of the competent authorities on the automatic exchange of country reports. Additionally, Law 340-FZ of November, 27 2017 introduced the amendments to the RTC on the automatic exchange of financial information and country reports with foreign countries. The Tax Code is supplemented by chapters 20.1 "Automatic exchange of financial information with foreign states (territories)" and chapter 20.2 "International automatic exchange of country reports in accordance with international treaties of the Russian Federation".

The most recent amendments into RTC are the provisions of Action 15 on multilateral convention to implement tax treaty related measures to prevent BEPS. the Russian Federation ratified MLI on 18 June 2019 and it entered into force from 1 October 2019.

4.2 The Role of OECD Acts in Russian Tax Law

Although Russia is not a member of OECD it follows the standards and regulations of this organization. The role of OECD Model Convention in the Russian tax legislation is being reconsidered. Russian courts recognize acts of OECD as standards and sources interpretation of tax law. When considering cases, courts sometimes referred to comments on the interpretation of international treaties, including the DTT. At the same time, the courts do not have a common approach in interpreting comments. After a period of non-recognition of comments as a source, nowadays many courts, when interpreting tax legislation, refer to it. In 2018, the Supreme Court of the Russian Federation has repeatedly indicated that the Comments are a framework document establishing general principles and approaches to the elimination of double taxation, and in accordance with Article 32 of the

Vienna Convention are one of the means of interpretation of agreements on avoidance of double taxation and to which they can refer Russian courts.[28].

Though Russia is not a member of the Organization for Economic Cooperation and Development, it adheres to positions that are consistent with the recommendations reflected in the BEPS action plan, Model Tax Convention on Income and on Capital and other documents of OECD.

Bruk B. gave a sufficiently comprehensive assessment of the Comments based on a study of the procedure for their adoption and the text, calling them "a guidebook that makes it possible to clarify the meaning of the Model Convention standards and, accordingly, similar norms[29].

Given the credibility of the OECD and the widespread use of the Commentary in practice, as stated in the introduction to the OECD MK, an analysis of this document outside of its relationship with a specific tax agreement allows us to conclude that this document can be evaluated as a source of soft law. However, this legal assessment does not turn the Comments into a recognized source of international law[30].

Not excluding the use of the Comments based on the rules of interpretation of the 1969 Vienna Convention, the legal assessment of this document as a source of soft law is supported by the Russian scientist in the field of international taxation I. Khavanova, noting that "the essence of soft law allows both to completely ignore model approaches, and voluntarily follow them (in whole or in part)[31], including when concluding international treaties, regardless of the state's membership in the relevant international organization"[32].

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[28] V. Matchekhin, Using of the OECD Commentaries in tax disputes by the Russian courts: the modern practice, "Tax expert" 2016, no 3, p. 68.

[29] Bruk B. Prospects for codification of the concept of beneficial owner in the Russian tax legislation // Law. 2014. No. 8.

[30] Arakelov, S.A., Machekhin, V.A. Actual right to income in international tax treaties of the Russian Federation // Legislation. -2001. - No. 9. - 10.

[31] Khavanova I.A. The concept of the beneficial owner (owner) in tax law // Journal of Russian Law. - 2014. - No. 12.

[32] Khavanova I.A. On the discussion of the legal nature of the Official Commentary on the OECD Model Tax Convention // Financial law. 2016. No. 5. P. 43 - 46.

4.3 Russian National Anti-Abuse Rules ("Russian GAAR")

Initially in the Russian Federation, the approaches to identify tax avoidance and the evidence of taxpayer's dishonesty were based on the criteria reflected in the Russian case law. Russian courts have developed their own approaches to situations where a taxpayer formally complies with the rules but gains an illegitimate tax advantage. New concepts were introduced: "*bona fide taxpayer*" and an "*unjustified tax benefit*" based on a substance-over-form approach and use of the business purpose test to combat tax avoidance, shifting a burden of proof to a taxpayer[33]. The concept of "due diligence" in particular, which shifts the risks associated with the underpayment of tax on a transaction to a buyer or seller that, according to the tax authorities, failed to establish that its counter-party validly existed and was in a position to actually supply, has become a major problem for Russian taxpayers. The most important court position would be the Ruling No. 53 of the Plenum of the Supreme Arbitration Court of 12 October 2006 "Concerning the Evaluation by Arbitration Courts of the Legitimacy of the Receipt of a Tax Benefit by a Taxpayer"[34]. In fact, the most important elements of GAAR were enshrined by the higher court at judicial level.

At the same time, the terms and criteria formulated in the Resolution ("failure to exercise due diligence and caution", "business purposes", "real economic content of the arrangement", "arrangements with counterparties avoiding their tax obligations", etc.), were interpreted differently by the courts in subsequent years. The tax authorities at federal and local levels also had different interpretation of these terms, often inconsistent with the judgements and resolutions of courts. Due to this existing uncertainty, there was a need to introduce legislative norms that are unambiguously clear. This would minimize the risks for the businesses and improve the quality level of tax administration.

[33] Kopina A., Tax control in connection with deals between independent persons vs groundless tax benefit // Taxes. - 2015. - No. 9.

[34]Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_63894/

It took a long time to develop the amendments to the Russian Tax Code to fill the gaps and solve the problem of taxpayers, the main purpose of which was to avoid tax obligations or require compensations, such as refunds or offsets. For bona fide taxpayers, this meant creating normal business conditions and a favourable economic environment by eliminating unfair competition, banning so called "one-day firms" and stopping the unreasonable use of tax preferences.

The amendments were introduced on July 18, 2017 by the Federal Law No. 163-FZ "On Amending Part One of the Tax Code of the Russian Federation" (Law 163-FZ), which supplemented the Tax Code with Article 54.1 "Limits on the exercise of rights to calculate the tax base and (or) the amount of tax, fee, and insurance premiums" (Russian GAAR article). Later, on August, 16 2017 the Russian tax authorities represented by the Federal Tax Service (FTS) issued a guidance letter on the application of the rules of the Russian GAAR article in practice[35].

The provisions of paragraph 1 of Article 54.1 of the Russian Tax Code (RTC) cover prohibition of misrepresentation of information: "It is not allowed a reduction of tax base or amount of tax payable as a result of misrepresentation of information regarding business activity facts and taxable items in statutory and tax accounting". In this regard, tax audit materials should contain evidence of the distortion of information in the accounting documents, the link between the actions of the taxpayer and the distortions made, the intentions of the taxpayer and the budget losses.

Paragraph 2 of Article 54.1 of the Tax Code of the Russian Federation determines that, in the absence of the circumstances of paragraph 1 taxpayers have a right to reduce tax base and (or) tax payable on their transactions and operations, if the following requirements are met. Firstly, the principal purpose of the transaction is not underpayment, offset or tax refund. Secondly, the reality of the transaction. Obligations under the transaction should be performed by counterparties

[35] Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_220282/

At the same time, the provisions of Article 54.1 of RTC exclude the possibility for tax authorities to submit formal claims to taxpayers, such as: signing of the accounting documents by an unidentified or unauthorized person, violations of tax legislation by a taxpayer's counterparty. It is stipulated in tax law that certain facts shall not be considered as tax abuse and as separate grounds for denial in reduction of tax base and (or) tax payable, including available to taxpayers opportunities to archive the same results by completion of lawful transactions resulting in higher taxes. Therefore the role of the amendments under the Law 163-FZ was not simply to reveal the principle of good faith of the taxpayer, as prescribed in RTC but also to introduce legal certainty in the rules for evaluating if there is any abuse of tax law in the arrangements. And the burden of proof of the presence of tax abuse is laid on the tax authorities.

4.4 Controlled Foreign Company (CFC) Rules in Russian Tax Code

A controlled foreign company (CFC) is a structure wholly or partially owned by an individual or legal entity – a tax resident of the Russian Federation, (Article 25.13 of RTC)[36]. In practice, this means that when an entity is registered abroad and (or) carries out activities abroad, being owned by a Russian taxable person. In this regard, in relation to the organization and its owners, the state introduces restrictions. In 2018 the Russian tax law established certain criteria on the basis of which the company is classified as CFC: its actual owner is a resident of Russia and subordinate to the Tax Code, (article 25.13 of RTC); a company is registered abroad and is not a Russian tax resident but is a foreign entity or is a foreign structure other than a legal entity. The position of the CFC in the Russian Federation is regulated at the federal level and is determined by: Russian Tax Code (RTC) and federal laws amending the Tax Code dated November 24, 2014 No. 376-FZ[37], April 6,

[36]Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_19671/
[37]Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_171241/

2015 No. 85-FZ[38], June 8, 2015 No. 150-FZ[39]. These documents disclose the main definitions of concepts applicable to the activities of foreign companies that are recognized as controlled (what are CFCs and controlling persons, etc.), the procedure of obtaining the status of a CFC or a controlling person, the procedure for taxation of controlled foreign companies (accounting, calculation of profits and tax exemptions) as well as the procedure for notifying Federal Tax Service (FTS) about the activities of the CFC and the liability for the owners for not complying the CFC disclosure requirements[40].

In recent years, a course has been taken on the deoffshorization of foreign assets[41]. In this regard, a number of amendments were made to the legislation of the Russian Federation regarding the prosecution of CFC owners. Failure to provide information and documents for such companies may result in fines such as: a fine for failure to report on the existence of a CFC (paragraph 2.1 of article 129.1 of RTC); a fine for refusing or avoiding the provision of the company's documents (paragraph 1.1 of article 126 of RTC); a fine for non-payment of CFC's corporate income tax (20% of income, Article 129.5 of RTC); a fine for failure to give notice or for providing information that contains false information about CFC (Article 129.6 of RTC). The controlling person (individual or legal) is required to comply with the requirements of the Tax Code. FTS has the right to recover fines; recover the amount of unpaid taxes and penalties; impose tax liability on the violators up to disqualification; initiate criminal prosecution in case of non-payment of tax in large amounts.

The owners of CFC are required to notify on their activities abroad (subparagraph 3, paragraph 3, article 23, subparagraph 2, paragraph 1 of article 25.14 of RTC). Tax authorities use a notice to obtain information for their audits. The CFC notice contains the information on the owners, the

[38]Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_177597/
[39]Text in Russian available on legislation portal ConsultantPlus:http://www.consultant.ru/document/cons_doc_LAW_180743/
[40] Budylin, S.L. We will now live in a new way. Legislation on CFC, international exchange of information and international tax planning // Law. - 2015. - No. 2.
[41] Kikavets, V.V., Kovaleva, K.A. Deoffshorization of the Russian economy as an instrument of financial security of the state // Financial Law. - 2015. - No. 2.

shares of the owners, direct ownership and why this controlling person is recognized as such (Article 25.14 of RTC).

The document must also contain the details of the company: name; legal form; registration number and other mandatory details; notice period; the date and year of the last financial statements and the audit report, etc.

The deadlines for notification are fixed in clause 2 of article 25.14 of RTC. It is filed no later than March 20 of the year after the tax period in which income in the form of company profits will be recognized by its controlling person. In 2018, a notice is filed for 2016, as the profit for the end of this year is recognized as revenue in 2017. For failure to submit or untimely filing of a notice on controlled foreign companies or for providing false information, the legislator established liability (Article 129.6 of RTC).

Deoffshorization is one of the highest priority issues within which tax authorities operate[42]. In this regard, they show increased attention to the assets of Russian tax residents abroad. The tax authorities carry out checks to identify the complete chain of companies that affect a specific foreign structure. These checks are carried out when there is reason to suspect the ultimate Russian owner. If the owner is in Russia, sometimes this means completely different approaches to taxation of income of such a foreign structure. So, if a company is a resident of another state, its income is almost always removed from taxation in the Russian Federation. But if the tax authorities prove that the controlling person of a foreign company is a resident of Russia, sanctions in the form of fines and penalties may be imposed on him and taxes will be levied on the profits of the controlled organization. Tax authorities widely use the concepts of "unjustified tax benefit" and "final recipient of income"[43]. In the case of CFCs, this means claims in the case of lower rates when paying, for example, dividends to a foreign company. For such payments, a bilateral double taxation treaty is applied[44]. But if the final

[42] Tsvetkov, V. Deoffshorization in Russian: how the Law on CFC will be applied // Tax Bulletin. - 2015. - No. 1.
[43] Kikavets, V.V., Kovaleva, K.A. Deoffshorization of the Russian economy as an instrument of financial security of the state // Financial Law. - 2015. - No. 2.
[44] Sasov K. The justification of tax benefit: a doctrinal crisis or a legal collapse? // Tax Expert. – 2016. – No. 11.

recipient of the income is a Russian person, there are no grounds for preferential rates. In such a situation, the claim can be both to the one who pays dividends, and to their final recipient. The tax authorities carefully examine the composition of revenues, which are included in the composition of the CFC profit. If the owner does not include any income item in taxable profit, the FTS will file a claim. Tax authorities receive information through exchange with colleagues from other states.

5. Conclusion

The development of methods of combating tax avoidance was provided for by the provisions of the Main Directions of the Tax Policy of the Russian Federation for 2016 and the planning period of 2017 and 2018[45], which focused on the active participation of the Russian Federation in the implementation of BEPS. The document stated that the Russian tax legislation does not contain a proper mechanism to tackle tax avoidance and combat obtaining unreasonable tax benefits. At the same time, the best practices of European countries indicate that measures to combat aggressive tax planning are reflected in the EU law and in particular in ATAD. In this regard, Russia is in progress to enforce the mechanisms for tackling tax avoidance into its tax legislation. A proper solution would be to consider tests used by EU MS to identify abuses.

In addition to the systematic approach to tax abuse reflected in the understanding of the principles used to tackle abusive practices and the role of the Court of Justice of the European Union, the significant differences between Russian GAAR and the European GAARs lies in the methodological approach in testing.

In addition to the tests on subjective criteria and tests on objective criteria there are different approaches to the tax avoidance as a sole purpose, the essential aim and the principal purpose. For instance in the judgement on *Cadburry Schweppes* case the subjective test with sole purpose was used (same as in Article 6 of ATAD), in the judgement on *Kofoed (C-321/05)* case the subjective test with principle purpose was used (same as in Parent-Subsidiary Directive, Merger Directive and Interest and Royalties Directive) in *Emsland-Stärke* case the objective test with subjective element was applied while in *Halifax* case the objective test with essential purpose.

In indirect taxation (VAT and customs duties), the subjective test is much less significant: the higher the degree of harmonization in a particular area, the

[45] Text in Russian available on legislation portal ConsultantPlus: http://www.consultant.ru/document/cons_doc_LAW_183748/

more important the objective test is. In the Halifax judgment, the subjective test is not even mentioned.

In direct taxation, the statutory GAARs in these three directives require the primary goal of obtaining a tax advantage, that is, a subjective test for qualifying tax evasion.

The most stringent is a subjective test, based on decisions in cases on the compatibility of national anti-abuse legislation with fundamental freedoms of the EU. It requires a tax advantage as the "sole purpose" of the transaction.

Article 6 of the ATAD does not require Member States to introduce legislative anti-abuse rules: countries that have a judicial doctrine in line with the general idea of this article can be guided by the provisions laid down in the *Kofoed* case[46] and apply this practice in the future.

In recent years, the institutions established and applied in the tax laws of foreign (mostly European) countries have been introduced into Russian tax law. These legislative innovations are held in the global trend of combating corporate tax evasion, which is expressed primarily in the BEPS project. Participation in this project provides the Russian Federation with opportunities for the development of certain norms aimed at combating base erosion and the implementation of world experience in combating abusive tax practices into national legislation. However, these processes are characterized by frequent changes in legislation, which indicates that the concept of deoffshorization and the implementation of the BEPS Action Plan is not always worked out in detail in the draft laws at the time of their adoption.

The development of legal regulation on issues of international cooperation in the area of taxation and the exchange of tax information allows us to positively characterize the process of using the best modern tax practices by the Russian Federation. I believe that the development of a unified integrated approach to combating abusive tax practices will not only incorporate into the Tax Code developments and mechanisms of foreign and international tax law,

[46] Case C-321/05 Hans Markus Kofoed v. Skatteministeriet, ECJ, judgment of the Court (First Chamber) of 5 July 2007, ECLI:EU:C:2007:408

but will also create a qualitatively new approach to the implementation of international program documents at the level of Russian tax legislation.

The Court of Justice of the European Union has repeatedly explained that in direct taxation Member States are not obliged to introduce measures aimed at combating avoidance schemes. However, in the light of EU legislative initiatives in corporate taxation, expressed in the form of directives that eliminate specific tax barriers in the domestic market, the trend has tended towards obligations to introduce these measures imposed on Member States.

GAAR finds its roots in the practice of the EU Court of Justice on violations of the primary and secondary law of the European Union. It is not clear whether the EU Court will be forced to apply more stringent tests with the adoption of ATAD. The gap of the Directive also remained the consequences of identifying an abusive measure, since this issue was left entirely to the discretion of Member States.

After revising the general anti-evasive rules in EU secondary law and in judicial practice, I can conclude that the different formulations of subjective tests of these GAARs still follow a predictable pattern. In addition to developing "statutory" rules, the European Commission also improved its legislative technique and laid down GAARs, which are in line with the current practice in the Court of Justice of the EU.

Finally, the use of a three-tier GAAR interpretation structure can mitigate uncertainty for taxpayers and also preserve the necessary abstract nature of EU law.

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https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0049

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