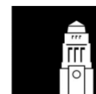

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EU General Anti-(Tax) Avoidance Mechanisms

Rita de la Feria*

I. Introduction

The EU principle of prohibition of abuse of law has been developing within the jurisprudence of the CJEU, through a process of reverberation, since the mid-1970s, and should now be recognised as a principle of EU law. Whilst the intensity of application of the EU principle of prohibition of abuse of law may vary depending upon the area of law at stake, its general applicability has been well defined since the CJEU decision in *Halifax*, namely: it applies to all areas of law, and to all types of legal instruments, whatever the legal source, and even in the absence of national legislation; and its scope is defined through the fulfilment of two cumulative conditions, namely purpose and artificiality. It is argued therefore that, as it stands, this principle cannot be regarded as a mere interpretative principle, but rather displays all the key characteristics of a general principle of EU.[1]

This chapter explores the consequences of such a characterisation insofar as taxation is concerned. First, it is argued that the recent decision in *Cussens and Others*,[2] where the principle was held to apply in a purely domestic situation, and in the absence of domestic provisions, confirms that, within taxation, the principle is now operating as a general anti-avoidance principle (GAAP); second, it is contested that this is not a merely interpretative GAAP, but rather a general principle one; third, it is asserted that the recent approval of an EU GAAR should be seen as a codification of the principle,[3] and this raises the question of whether the co-existence of the two- GAAP and GAAR - is problematic or redundant; fourth, it is argued that this is a natural development, which can be seen in various other jurisdictions

* I am grateful for the many comments received at the conference, and particularly those of the discussant, Eduardo Baistrocchi. This paper was finalised during a research visit to McGill University, Faculty of Law; I would like to thank the Faculty for hosting me, and particularly Allison Christians for the many discussions held during my visit. Any remaining errors are my own.

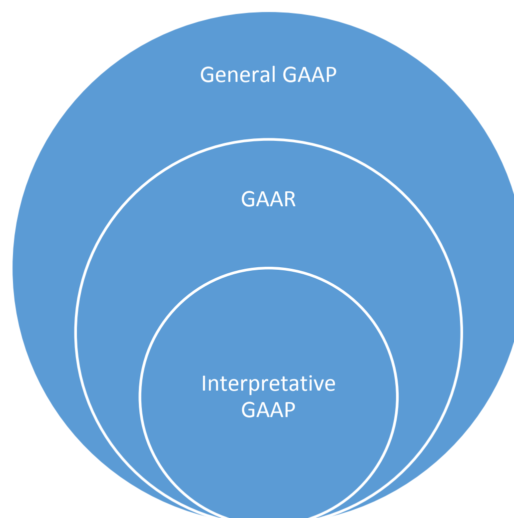
[1] As first argued in R de la Feria, 'Prohibition of Abuse of (Community) Law – The Creation of a New General Principle of EC Law Through Tax' (2008) 45 *Common Market Law Review* 395.

[2] Case C-251/16, ECLI:EU:C:2017:881

[3] 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, 1–14.

where the approval of a GAAR followed from the existence of a GAAP, either with the nature of an interpretative principle such as in the UK,[4] or of a general principle, such as substance over form.[5] Finally, it is claimed that there are no obvious obstacles to their co-existence, if a hierarchy of norms is followed, whereby the level of generality increases with each step. Following this approach an interpretative GAAP would be applied in the first instance, with a GAAR acting as a residual provision; or the GAAR would apply in the first instance, as a manifestation of a wider general GAAP, which will then act as the default anti-avoidance mechanism. Indeed, conceptually, there should be no obvious impediment to the co-existence of these three levels of general anti-avoidance mechanisms: an interpretative GAAP, a GAAR, and a general GAAP, applied in that order, as visually represented in Diagram 1 (below). On the contrary, such a structure can present significant advantages in terms of anti-avoidance protection, and as opposed to what may be the intuition, legal certainty.

Diagram 1: EU General Anti-(Tax) Avoidance Mechanisms by Level of Generality



This chapter is structured as follows. In Section II the process of co-constitutive reverberation that characterises the jurisprudential development of the EU principle of prohibition of abuse of law is analysed; Section III provides an in-depth examination of the nature and scope of that principle, and presents the arguments as to why it should now be regarded as a GAAP, which exhibits the

[4] The so-called *Ramsay* principle, as discussed in Section IV below.
[5] F Zimmer, 'Form and Substance in Tax Law – General Report' (2012) *IFA Cahiers de Droit Fiscal International* 87A.

characteristics of a general legal principle; in Section IV attention turns to the rationale for the approval of the new EU GAAR, and its key characteristics, arguing in favour of its characterisation as a natural process of codification, and presenting the parallels between that process, and the one that has been witnessed in other jurisdictions, such as the UK. Section IV concludes with considerations over the advantages of the coexistence of these different general anti-avoidance mechanisms, and their hierarchical application.

II. Developing the EU GAAP

The CJEU had been alluding to abuse and abusive practices in its rulings for more than forty years.[6] For a long time, however, the significance of these references was unclear. Several factors might have contributed to this lack of clarity, including the Court's failure to adopt a coherent terminology, using words such as 'avoidance',[7] 'evasion',[8] 'circumvention',[9] 'fraud',[10] and 'abuse',[11] in an apparently interchangeable fashion; as well as the absence of clear guidelines as to the scope, and the applicability, of the concept.[12] This state of affairs changed radically, however, in the early 2000s with two developments: first, the development by the Court of an abuse test in *Emsland-Stärke* in 2000;[13] and second, the subsequent emergence of an intense debate as to whether the Court would apply this new test to the field of taxation,[14] followed by the landmark decision in *Halifax.*[15] Together these two cases confirmed not only the criteria for determining the existence of abuse, but, more importantly, confirmed prohibition of abuse of law as an emerging general principle of EU law.

General principles of EU law do not appear in fully fledged form. They are unwritten principles, detected and recognised by the CJEU and extrapolated through a creative exercise, which often involves

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[6] Case 33/74, *Van Binsbergen*, ECLI:EU:C:1974:131.
[7] Case C-23/93, *TV10*, ECLI:EU:C:1994:362, para 21.
[8] Case 115/78, *Knoors*, ECLI:EU:C:1979:31, para 50.
[9] Case 229/83, *Leclerc*, ECLI:EU:C:1985:1, para 27.
[10] Case C-367/96, *Kefalas and Others*, ECLI:EU:C:1998:222, para 20.
[11] Case C-441/93, *Pafitis and others*, ECLI:EU:C:1996:92, para 68.
[12] R de la Feria (n 1) 395-98.
[13] Case C-110/99, ECLI:EU:C:2000:695.
[14] P Harris, '*Abus de droit* in the field of Value Added Taxation' [2003] BTR 131; and P Farmer, 'VAT Planning: Assessing the "Abuse of Rights" Risk' *Tax Journal* (27 May 2002) 15-17.
[15] Case C-255/02, ECLI:EU:C:2006:121.

a deductive approach whereby the principle is derived from the objectives of the law and its underlying values.[16] As such, creation and development of these principles is better characterised as a co-constitutive process,[17] the result of a dialectical interaction between national laws and EU law, where both the outcome and the source of a long process of cross-fertilisation, back and forth, between the national legal orders and the EU legal order.[18] The origins of this process, which can be witness in the development of all general principles, can be traced back to the early days of the Court in cases decided under the Coal and Steel Community. Both the general principle of proportionality and general principle of equal treatment were first mentioned in the case law of the 1950s,[19] and the general principle of the right to defence is found in staff cases dating back to the early 1960s.[20] As the European integration process evolved, the application of general principles expanded with a proliferation of cases in the 1970s, where the basic features of principles such as proportionality and equal treatment were laid down.[21] Today these general principles are amongst the most prominent general principles of EU law, regularly applied by the CJEU in its case-law across all areas of EU law.

This judicial evolution can be better understood in the context of a theoretical framework, which distils the various elements of the co-creation and the co-development of general principles of EU law. Words usually applied in the context of the extensive literature on diffusion of law, such as 're-transplantation' and 'reception', have been employed in association with the whole or part of this dynamic process.[22] Nevertheless, it is argued that the process is better designated as a one of co-

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[16] See T Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2006), 4-6; B de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in U Bernitz and J Nergelius (eds), *General Principles of European Community Law* (The Hague, Kluwer Law International, 2000), 143; M Herdegen, 'General Principles of EU Law – the Methodological Challenge' in U Bernitz, J Nergelius and C Cardner (eds), *General Principles of EC Law in a Process of Development* (Alphen aan den Rijn, Wolters Kluwer 2008), 353; and X Groussot and HH Lidgard, 'Are There General Principles of Community Law Affecting Private Law?' in Bernitz, Nergelius and Cardner, ibid, 159.

[17] On co-constitutive theory generally see J. Nice, 'The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes' (1999) 4 *University of Illinois Law Review* 1209-1272.

[18] W van Gerven, 'Two Twin-Principles of EU Law: Democracy and Accountability, Consistency and Convergence' in Bernitz, Nergelius and Cardner (n 13) 28-29

[19] On proportionality see case 8/55, *Fédération Charbonnière de Belgique*, ECLI:EU:C:1956:7; on equal treatment see case 14/59, *Société des fonderies de Pont-à-Mousson v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1959:31.

[20] See case 32/62, *Maurice Alvis v Council of the European Economic Community*, ECLI:EU:C:1963:15.

[21] T Tridimas (n 13) 7-8.

[22] See respectively G de Búrca, 'Proportionality and Subsidiarity as General Principles of Law' in Bernitz and Nergelius (n 13) 95; and J Usher, 'The Reception of General Principles of Community Law in the United

constitutive process of reverberation,[23] and can be distilled into three stages.

The process starts at the pre-cognisance level with similar principles or legal concepts applied within different Member States' jurisdictions – not necessarily all – being cast into the centre of questions referred to the CJEU. Often these principles or concepts are similar only to the extent that at their core they express an identical legal essence, even though its particular characteristics, such as scope and criteria for application and name or designation, differ from Member State to Member State. This vagueness that results from the discrepancies between Member States also gives the Court a higher level of flexibility to use the concept in whatever context it feels more appropriate, providing it with a specific scope and criteria for application, definition, etc. The concept or principle is then used in different judgments, reiterated and added-to, without full awareness of its significance, scope or meaning. Realisation of the process of creation of a new principle of EU law is at that point unavoidable, with cognisance being not necessarily triggered internally within the CJEU itself, but often externally, either by national courts or legal commentators – or both. Once made aware of the process in due course, the Court has to decide on whether to proceed or not – thus, whilst the process involves various agents, the Court is in essence the sole cognisance-agent.

As the stage of post-cognisance, the intensity of the dialectic debate increases significantly, with the interaction also becoming more focused: the CJEU tends to frame its decisions differently, imposing a new structure in light of the new legal principle; whilst national courts' requests for preliminary rulings also become more specific and targeted around the principle.[24] As the new principle develops, legal commentators focus their attention more closely on the topic and national legislatures may also react by imposing new rules which better reflect – or respect – the new principle of EU law. At this stage the dialectic process is no longer solely vertical, but also horizontal, with national courts and even legislatures responding both to doctrinal and jurisprudential developments in other Member States.[25]

Kingdom' (2005) 16 *European Business Law Review* 489.

[23] On the concept of reverberation, see R de la Feria, 'Introducing the Principle of Prohibition of Abuse of Law' in R de la Feria and S Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Oxford, Hart Publishing, 2011) xv.

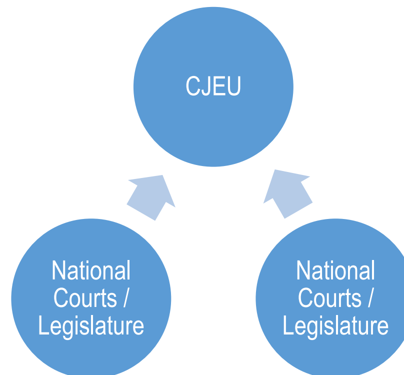
[24] On this collaboration and mutual deference between the CJEU and national courts, see CF Sabel and O Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) *European Law Journal* 16, 511.

[25] J Usher, 'General Principles and National Law – A Continuing Two-Way Process' in Bernitz, Nergelius and

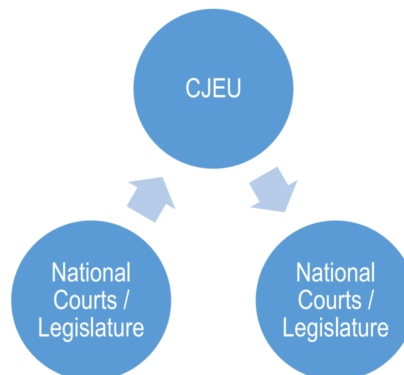
Diagram 2 below provides an illustration of the co-constitute reverberation process through its different stages.

Diagram 2: Co-Constitutive Process of Reverberation

Phase I: Pre-Cognisance

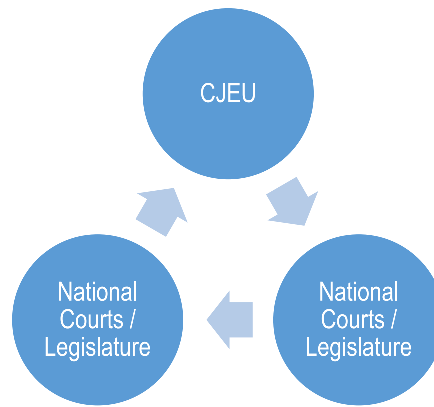


Phase II: From Pre-Cognisance to Cognisance



Phase III: From Cognisance to Post-Cognisance

Cardner (n 13) 393, 415.



This co-constitutive process of reverberation in its different stages can be observed as regards the co-creation and co-production of various principles relevant to tax law, including most recently, the principle of third-party liability for fraud.[26] As discussed below, it can also be clearly observed as regards the principle of prohibition of abuse of law.

A. Pre-Cognisance Period: From *Van Binsbergen* to *Halifax*

The pre-cognisance stage can be said to extend from the first references by the CJEU to abuse and abusive practices in *Van Binsbergen* in the 1970s, to the ruling in *Halifax* in 2006. During this period, the Court made consistent reference to prohibition of abuse and abusive practices in response to questions referred to it by national courts. Similar to other principles and legal concepts, the concept of abuse was present within the legal systems of many – it has been argued that in all – Member States,[27] but its particular characteristics, such as the scope and criteria for application and designation, differed from Member State to Member State.[28] The vagueness resulting from these discrepancies gave the Court the freedom to slowly and progressively develop – via the dialectic process between the CJEU and the national courts – a new EU concept of abuse, with a specific meaning, scope and criteria for application.

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[26] R de la Feria and R Foy, '*Italmoda*: the birth of the principle of third-party liability for VAT fraud' [2016] BTR 3.
[27] A Sayde, *Abuse of EU Law and Regulation of the Internal Market* (Oxford, Hart Publishing, 2014), 32 et seq; see also AK Lenaerts, 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law' (2010) 18 *European Review of Private Law* 1121–1154, 1125.
[28] J Freedman, 'The Anatomy of Tax Avoidance Counteraction: Abuse of Law in a Tax Context at Member State and European Union Level', in R de la Feria and S Vogenauer (eds) (n 19) ch 25.

Van Binsbergen concerned free movement of services,[29] and whether rules preventing a Dutch lawyer, who had moved to Belgium, from appearing before the Dutch courts, were justified to prevent the circumvention of Dutch professional rules. The Court, in a landmark statement, which has been consistently cited in later rulings, concluded:

> Likewise, a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article [49] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.[30]

In the early 1990s a number of cases were referred to the CJEU concerning circumvention transactions within the field of broadcasting.[31] The cases, which became known as the broadcasting cases, focused on the interpretation not only of the Treaty provisions on free movement of services, as well as the provisions of the Television Without Frontiers Directive.[32] In all cases, the Court was essentially asked whether restrictions imposed by Member States on free movement of broadcasting services could be justified in light of the Court's approach to abuse and abusive practices, as set out in *Van Binsbergen*; and in all cases the Court considered that it did indeed apply. Apart from reiterating the decision in that case, the cases were particularly significant as regards the development of the principle of prohibition of abuse of law as a result of the Opinion of Advocate General Lenz in one of them, *TV10*.[33] Indeed two aspects of this Opinion can potentially be regarded as constituting a precursor of, or a basis for, the development by the CJEU of the abuse doctrine in later rulings, as follows:

(a) the view expressed in the Opinion that an activity, even if abusive, should be regarded as falling within the scope of the free movement provisions, with the abuse principle seen as 'an exception' to those provisions, could arguably be regarded as the theoretical framework behind the *Centros* line of case law;

[29] Case 33/74, ECLI:EU:C:1974:131.
[30] ibid para 13.
[31] Cases C-211/91, *Commission v. Belgium*, ECLI:EU:C:1992:526; C-148/91, *Veronica*, ECLI:EU:C:1993:45; C-23/93, *TV10*, ECLI:EU:C:1994:362.
[32] Council Directive 89/552/EEC of 3 Oct. 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, [1989] OJ L 298/23.
[33] Case C-23/93, ECLI:EU:C:1994:251.

(b) the reference in the Opinion to the need for the establishment of criteria for the determination of the existence of abuse, and in particular to the possible use of objective and/or subjective criteria, could arguably be regarded as the origin of the abuse test, set out by the some years later in *Emsland-Stärke*.

The CJEU decision in *Centros*,[34] although not completely surprising from an abuse of law perspective,[35] gave rise to immense controversy in the context of company law.[36] Like prior cases, *Centros* was a circumvention case, it concerned a company, owned by Danish citizens, but incorporated in the UK, allegedly with the sole aim of avoiding the application of Danish rules on minimum capital. The Court started by reinstating that Member States were entitled to introduce national measures to prevent abuse, but then went on to introduce the concept of legitimate circumvention by affirming that a move to another Member State is not in itself abusive. Under this new approach, the previous broad - and perhaps simplistic - conceptualisation of abuse, under which all circumvention situations were regarded as abusive, was therefore substituted for a narrower - and perhaps more sophisticated - conception of it, under which not all circumvention situations would be tantamount to an abuse of EU law.

Emsland-Stärke concerned the interpretation of Regulation 2730/79 on export refunds on agricultural products.[37] The factual circumstances of the case were relatively straightforward: Emsland-Stärke, a German company, exported a potato-based product to Switzerland, for which it received export refund; however, immediately after their release for use in Switzerland, the products were transported back to Germany unaltered, by the same means of transport, and released for use therein.[38] The question for the CJEU was essentially whether in these circumstances the emerging principle of abuse could preclude Emsland-Stärke's right to export refund. At the hearing, the European Commission argued that, although the Court had not expressly recognized it as a general principle of EU law, a general legal principle of abuse of rights existed in almost all the Member States and had, in practice, already been

[34] Case C-212/97, ECLI:EU:C:1999:126.
[35] The case emerged in the context of the so-called Greek Challenge Cases on company law rules, see cases C-367/96, *Kefalas and Others*, ECLI:EU:C:1998:222; C-441/93, *Pafitis and others*, ECLI:EU:C:1996:92; C-373/97, *Diamantis*, ECLI:EU:C:2000:150.
[36] Reflected in the fact that the decision is one of the most commented upon in the history of the CJEU.
[37] Commission Regulation (EEC) No 2730/79 of 29 November 1979 on the application of the system of export refunds on agricultural products, [1979] OJ L 317/1.
[38] Case C-110/99, ECLI:EU:C:2000:695.

applied in the case law of the CJEU. Without charactering its previous jurisprudence as a 'general principle' (yet), the Court agreed. It then went on to set out the abuse of law test, as follows:

> 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.[39]

The debate over the implications of the new abuse test for other areas of EU law was directly associated with the Court's rationale in *Emsland-Stärke*. Although the ruling provides no express statement in this regard, it was assumed by many immediately after the judgment that the fact that agricultural levies constituted a Community's own resource had played a major role.[40] Indeed, a few years before, the European Commission had put forward a proposal on the protection of the Community's own resources, which included a definition of 'abuse of Community law',[41] and whilst following negotiations soften the language used and limited the scope of the clause,[42] the final version did include a general anti-abuse provision.[43] On this basis it was argued by some Member States' tax authorities that, as VAT was also part of the Union's own resources,[44] the abuse test should apply within the field of that tax.[45] Thus, it was in this manner that the then emerging general principle of prohibition of abuse of law, firmly arrived to taxation.

B. From Pre-Cognisance to Cognisance: *Halifax*

Almost thirty years later, the passage from dormant status to full consciousness, from pre-cognisance to cognisance, finally came with *Halifax*. Engulfed in an intense stream of legal commentary, the

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[39] ibid, paras 52-54.
[40] See Harris (n 11).
[41] European Commission, *Proposal for a Council Regulation (EC, Euratom) on protection of the Community's financial interests*, COM(94) 214 final, 7 July 1994.
[42] Sayde (n 23) 44 et seq.
[43] Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial services, [1995] OJ L312/1.
[44] There is a substantial amount of legislation in this area, see R de la Feria, *A Handbook of EU VAT Legislation*, Vol III, (Kluwer Law International, 2004-), at table V.A.1.
[45] Harris (n 11); D Ladds and M Chowdry, '*Debenhams Retail Plc v. Commissioners of Customs and Excise*' [2004] BTR 26, 32.

reference by the London VAT and Duties Tribunal arrived to the CJEU in 2002; it was the first of several referrals which arrived to the Court between 2002 and 2004,[46] on the application of what was designated then by the national referring courts as the doctrine or principle of abuse of rights to VAT.[47] Yet, the case was not decided until 2006, and on the intervening period, the Court decided on some of the other references.

The first of these judgments delivered by the CJEU was *RAL*, a case concerning the determination of the place of supply of services, where the supplier, the RAL Group, had – through a restructuring scheme – located its place of business outside EU territory for VAT purposes, with the sole aim of avoiding output VAT. Although the potentially application of the principle of abuse of law had been specifically raised by HMRC and covered by the referring court in its question, the Court refused to answer, adopting instead what was regarded at the time as a novel interpretation of the VAT Directive's rules on place of supply of services.[48] Soon after, the Court decided in *Centralan*, which concerned transactions entered into by the University of Central Lancashire allegedly with the exclusive aim of maximizing the recovery of input VAT incurred on the construction costs of one of its buildings.[49] Whilst the questions referred by the national court concerned solely the interpretation of VAT Directive's provisions, in its written observations, the European Commission raised the issue of the potential application of the principle of abuse of rights to the case. Once again, however, as it had done in *RAL*, the Court avoided answering on this point, preferring instead to adopt a teleological interpretation of the provisions in the Directive.

The delay in issuing its judgment in *Halifax*, as well as in providing a definite answer in any of the above cases is in indicative of the Court's transition to a cognisance stage in the process of creating a new legal principle. Finally, in 2006, following the comprehensive Opinion of Advocate General Maduro, the Court finally delivered its decision in *Halifax*. The factual circumstances, by now well

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[46] On the proceedings in the UK courts that preceded the preliminary references, see P Pincher, 'What is avoidance' [2002] BTR 9.
[47] Cases C-419/02, *BUPA*, ECLI:EU:C:2006:122; C-223/03, *University of Huddersfield*, ECLI:EU:C:2006:124; C-452/03, *RAL (Channel Islands)*, ECLI:EU:C:2005:289; and C-63/04, *Centralan Property*, ECLI:EU:C:2005:773.
[48] For an analysis of this decision and its implications, see R de la Feria, '"Game Over" for aggressive VAT planning?: *RAL v Commissioners of Customs & Excise*' [2005] BTR 394.
[49] Case C-63/04, ECLI:EU:C:2005:773.

known, can be summarised as follows: Halifax, a financial institution with a limited right to deduct input VAT, engaged in a series of transactions with the main aim of being allowed to deduct the totality of the VAT incurred in the construction of its new call centres.[50] In the judgment, the CJEU confirmed that the principle of prohibiting of abuse also applied to the sphere of VAT, and therefore the VAT Directive should be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derived constituted an abusive practice. In order to determine whether an abusive practice has taken place, the Court then set out a two-part test, an abusive practice will be found to exist where:

(1) the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the [VAT Directive] and the national legislation transposing it, resulted in the accrual of a tax advantage, the grant of which would be contrary to the purpose of those provisions; and

(2) it is apparent from a number of objective factors, such as the purely artificial nature of the transactions and the links between operators involved in the scheme, that the essential aim of those transactions concerned was to obtain a tax advantage.[51]

According to the CJEU, it is for the national courts to verify in each specific case, and in light of the evidence presented, whether these conditions are fulfilled and consequently, whether an abusive practice has taken place. Once such practice has been established, the transactions involved 'must be redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.'[52] Whilst no one doubted the landmark status of the *Halifax* decision,[53] it was also clear from the outset that further guidance would be required on the application

[50] For a detailed analysis of the facts in the case, see R de la Feria, 'Giving themselves extra (VAT)? The ECJ ruling in *Halifax*' [2006] BTR 119.
[51] C-255/02, ECLI:EU:C:2006:121, paras 74, 75 and 81.
[52] ibid, para 94.
[53] It has even been argued that 21 February 2006, nicknamed 'Halifax Day', marked the beginning of a new stage of evolution for the EU VAT system, see J Swinkels, 'Halifax Day: Abuse of Law in European VAT' (2006) *International VAT Monitor* 173.

of the abuse principle to VAT, and thus, that new cases were likely to arise in this area.[54]

C. Post-Cognisance: From *Halifax* to *Cussens and Others*

Since the decision in Halifax we have entered the post-cognisance period, with the intensification of vertical interaction between the EU judicial arm and the courts and legislatures of the Member States, and horizontal interaction between courts and legislatures of different Member States amongst themselves.[55] National legislation of various Member States was altered as a result of the Court's rulings, and national courts reportedly started to apply the EU principle of abuse of law to purely internal situations, including in France,[56] Italy,[57] Netherlands,[58] and the UK.[59] At EU level the number of cases referred to the CJEU on the new EU principle of prohibition of abuse of law increased significantly.

In direct taxation the significance of *Cadbury Schweppes*, which concerned the compatibility of Control Foreign Companies (CFC) rules, can hardly be overstated. This significance does not rest in the statement by the CJEU that establishing subsidiaries in another Member State, for the purpose of benefitting from the favourable tax regime which that establishment enjoys, does not in itself constitute abuse; the legitimacy of so-called 'tax location shopping' could have already been inferred from the *Centros*' line of case law.[60] Nor in the Court's reference in the judgment to 'wholly artificial arrangements'; in ICI the Court had already held that national legislation, which restricts the exercise

[54] As the Court itself acknowledged in *Halifax*, at para 77. See also comments in R de la Feria, 'The European Court of Justice's solution to aggressive VAT planning – further towards legal uncertainty?' (2006) *EC Tax Review*, 27.
[55] As Freedman (n 24) commented, 'the traffic is not one-way but multi-directional'.
[56] L Leclercq, 'Interacting Principles: The French Abuse of Law Concept and the EU Notion of Abusive Practices' (2007) *Bulletin for International Taxation* 235; S de Monès et al, 'Abuse of Tax Law Across Europe (Part One)' (2010) *EC Tax Review* 85.
[57] Italy is said to be a paradigmatic example of the reverberation process, see D Carolis, 'The Reverberation Effect on the EU Notion of Abuse of Law on the Italian Tax Legal System: Towards and Enhanced Horizontal Interaction Among National General Anti-Abuse Rules?' (2017) 45 *Intertax* 169. See also C Garbarino, 'The Development of a Judicial Anti-Abuse Principle in Italy' [2009] BTR186; and S. de Monès et al, 'Abuse of Tax Law Across Europe (Part Two)' (2010) *EC Tax Review* 123.
[58] Case C-352/08, *Modehuis A Zwijnenburg*, ECLI:EU:C:2010:282
[59] R de la Feria, '*HMRC v Weald Leasing Ltd*. Not Only Artificial: The Abuse of Law Test in VAT' [2008] BTR 556.
[60] C Panayi, *Double Taxation, Tax Treaties, Treaty Shopping and the European Community* (Eucotax Series, Kluwer Law International, 2007), 179-193; see also T O'Shea, 'The UK's CFC rules and the freedom of establishment: Cadbury Schweppes plc and its IFSC subsidiaries – tax avoidance or tax mitigation?' (2007) *EC Tax Review*, 13.

of the freedom of establishment, could only be justified where it had 'the specific purpose of preventing wholly artificial arrangements.'[61] Rather, the novelty of *Cadbury Schweppes* rested in the definition of 'wholly artificial arrangement' given by the Court, namely its alignment with the principle prohibition of abuse of law, as set out in Halifax. Significant as well, was the decision in *Kofoed*,[62] which concerned the interpretation of an anti-abuse clause set out in the Merger Directive.[63] In its judgment the Court refers for the first time to the principle of prohibition of abuse of law as a 'general Community law principle'. Since those first decisions in direct taxation in the post-cognisance area, more cases continued to be decided by the CJEU on the basis of the EU principle of prohibition of abuse of law.

Developments to the application of the principle to VAT cases were also fast coming. Soon after *Halifax*, the Italian courts forwarded *Part Service*, in which the Court was essentially asked whether 'there can be a finding of an abusive practice when the accrual of a tax advantage is the principal aim of the transaction or the transactions in question, or if such a finding can only be made if the accrual of that tax advantage constitutes the sole aim pursued, to the exclusion of other economic objectives'.[64] The Court seemed to confirm its – English version – decision in Halifax, stating that obtaining a tax advantage need not be the sole aim of the transaction, but merely the principal aim, thus significantly broadening the scope of the abuse of law principle. In 2008 the UK courts, perhaps unsurprisingly given the level of litigation at national level which followed *Halifax*,[65] referred two more cases to the CJEU. *Weald Leasing* and *RBS Holdings* concerned arrangements entered into by financial institutions with the sole aim of obtaining a tax advantage.[66] In *Weald Leasing*, the most significant of the two decisions, the focus was upon three aspects of the principle of prohibition of abuse of law, as applied to VAT, as follows: the interpretation of the first element of the abuse of law test; the meaning and

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[61] Case C-264/96, *ICI*, ECLI:EU:C:1998:370, para 26. This approach was confirmed in later cases, see cases C-324/00, *Lankhorst-Hohorst*, ECLI:EU:C:2002:749, para 37; C-9/02, *de Lasteyrie*, ECLI:EU:C:2004:138, para 50; and C-446/03, *Marks & Spencer*, ECLI:EU:C:2005:763, para 57.
[62] Case C-321/05, ECLI:EU:C:2007:408.
[63] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, [1990] OJ L 225/1.
[64] Case C-425/06, ECLI:EU:C:2008:108, para 40.
[65] For an analysis of the UK cases decided in the interim period see de la Feria (n 1) and R de la Feria, '*Weald Leasing*. Application of the abuse of law test in the VAT sphere. Court of Justice' (2011) *Highlights & Insights on European Taxation* 3.
[66] Cases C-103/09, ECLI:EU:C:2010:804; and C-277/09, ECLI:EU:C:2010:810.

significance of the expression 'normal commercial operations' in the context of the test; and the re-definition of abusive transactions. In an unequivocal judgment the Court reinstated the need for the fulfilment of the first element of the test in order to establish the existence of abuse, denied significance to the expression 'normal commercial operations' for the purposes of that test, and reiterates previous statements as regards the re-definition of abusive transactions.

The decision in *Weald Leasing* seemed to have sufficiently clarified the scope of the principle of prohibition of abuse of law for VAT purposes. A few years later, however, the CJEU was asked to decide in *Newey* (*Ocean Finance*),[67] which concerned a loan broker setting-up a structure that involved a company in Jersey, with the aim of avoiding paying input VAT on advertising services. The arrangements had been challenged by HMRC on the basis – amongst other aspects – that they were contrary to the principle of prohibition of abuse of law; indeed, on the facts, case appeared to fulfil both elements of abuse of law test, as set out in Halifax, and re-instated in *Weald Leasing*. In a rather surprising decision, however, the Court stated:

> the contractual terms, even though they constitute a factor to be taken into account are not decisive (…). They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set-up with the sole aim of obtaining a tax advantage, which it is for the national court to determine.[68]

The decision raises various questions, in particular over the scope of the principle insofar as VAT is concerned: does the scope of the principle encompass only transactions which fulfil the two-elements of the test, namely purpose and artificiality, or is only artificiality enough? Is it necessary for abuse to be found that the transactions are wholly artificial, or only that the principal aim is to obtain a tax advantage? Does the expression 'normal commercial operations' have a role in defining the scope of the abuse of law principle? Overall, either purposely or unwillingly, there was an apparent departure from previous case-law, the ratio of which was unclear, although the language used was reminiscent of

[67] Case C-653/11, ECLI:EU:C:2013:409.
[68] ibid, para 52.

previous judgments on the application of the principle of prohibition of abuse of law to direct taxation cases.[69] The decision in *WebMindLicences* confirmed, however, that the apparent language departure in *Newey (Ocean Finance)* did not in fact reflect a real departure in case-law.[70] Reiterating its previous decisions, in particular those in *Halifax* and *Weald Leasing*, and clearly inspired by *Centros* and *Cadbury Schweppes*, the Court went back to applying the two-part test for determining the existence of abuse of law to the circumstances of the case, namely: whether a transaction, such as that in the main proceedings, results in the accrual of a tax advantage contrary to the objectives of the VAT Directive;[71] and, whether the essential aim of a transaction is solely to obtain that tax advantage.[72]

As this discussion is unfolding within VAT, interesting developments were also happening within direct taxation cases concerning the interpretation of the principle of prohibition of abuse of law. One of the most significant decisions, which has since framed much of the debate, is that in *3M Italia*.[73] In this case, concerning the taxation of dividends, asked about the applicability of the principle, in light of *Halifax* and *Cadbury Schweppes*, the Court stated that 'no general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation'.[74] The statement was interpreted as indicating a limited scope of application of the principle within the field of non-harmonised direct taxation,[75] and even confirming the non-existence of an EU GAAP insofar as non-harmonised taxes were concerned.[76] Whether the Court would have decided the same way today is difficult to say. It is worth noting that in one of its most recent decisions on the principle, *Cussens and Others*, the Court confirmed that the principle 'displays the general, comprehensive character which is naturally inherent in general principles of EU law',[77] and in *Argenta*

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[69] For an analysis see R de la Feria and M Silva Costa, 'O Impacto de *Ocean Finance* no Conceito de Abuso de Direito Para Efeitos de IVA' (2013) 6 *Revista de Finanças Públicas e Direito Fiscal* 321.
[70] Case C-419/14, ECLI:EU:C:2015:832.
[71] ibid, paras 37, 40, and 41.
[72] ibid, paras 42-44.
[73] Case C‑417/10, ECLI:EU:C:2012:184
[74] ibid, para 32.
[75] L de Broe and D Beckers, 'The General Anti-Abuse Rule of the Anti-Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of Law' (2017) *EC Tax Review* 133, 138. See also R Szudoczky, '*3M Italia*: Tax Amnesty Aimed at Concluding Tax Litigation Prolonged for an Unreasonable Time Does Not Constitute State Aid' (2013) 12 *European State Aid Law* 162.
[76] C Panayi, *European Union Corporate Tax Law* (Cambridge, Cambridge University Press, 2013), 337 et seq.
[77] Case C‑251/16, ECLI:EU:C:2017:881, para 31.

Spaarbank, it stated that the Special Anti-Avoidance Rule (SAAR) in the Parent-Subsidiary Directive (PSD) 'reflects the general EU law principle that abuse of rights is prohibited'.[78] Regardless of whether this is the case, however, the decision in *3M Italia* does not deny the existence of the principle, but merely indicates a possible sliding scale of judicial review, which is also evident in others areas of EU law, particularly as regards free movement of persons and citizenship.

As the development of the EU principle of prohibition of abuse of law continued within tax, arguably only one area remained relatively unaffected by the principle, namely that of free movement of persons and citizenship. Whilst the principle has often been invoked in the context of cases in these areas of EU law,[79] and Court has never rejected the application of the principle *per se*, it has indeed failed to find abuse of law in any of these cases,[80] leading many commentators to reject the relevance of the principle to free movement of persons and citizenship rights.[81] However, whether there should be full convergence between free movement of persons and the other freedoms,[82] is not fundamental for the debate: indeed, one can easily envisage a situation where the Court – perhaps justifiably – does not apply the principle for the purposes of judicial review uniformly across all areas of EU law, and the intensity of judicial review exercised varies depending on the subject-matter.[83]

In that context, it is also interesting to note the range of European law areas in which the EU principle of prohibition of abuse of law has been invoked, which includes *inter alia*: contractual liability;[84] free

[78] Case C-39/16, EU:C:2017:813, para 60. On the relevance of the principle in direct taxation directives, see A Cordewener, 'Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards Under Treaty Freedoms and EU Directives' (2017) *EC Tax Review* 60.

[79] It has even been used by the UK to justify the deportation of EU citizens, see *Gunars Gureckis v Secretary of State for the Home Department* [2017] EWHC 3298.

[80] See in particular cases C-413/01, *Ninni-Orasche*, ECLI:EU:C:2003:600; C-109/01, *Akrich*, ECLI:EU:C:2003:491; C-200/02, *Chen*, ECLI:EU:C:2004:639; C-138/02, *Collins*, ECLI:EU:C:2004:172; C-147/03, *Commission v. Austria*, ECLI:EU:C:2005:427

[81] See KS Ziegler, ''Abuse of Law' in the Context of the Free Movement of Workers', E Spaventa, 'Comments on Abuse of Law and the Free Movement of Workers', C Costello 'Citizenship of the Union: Above Abuse?', and M Dougan, 'Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens', in de la Feria and Vogenauer (n 19) chs 21 to 24.

[82] See P Oliver and WH Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407; and C Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26 *European Law Review* 35.

[83] The 'sliding scale of judicial review' is a well-known phenomenon within constitutional law literature. See D Doukas, Werbefreiheit und Werbebeschränkungen: Eine europa- und grundrechtliche Untersuchung der Kontrollmaßstäbe für Beschränkungen der kommerziellen Kommunikation, dargestellt am EG-Recht, an der EMRK, am deutschen Grundgesetz und an der griechischen Verfassung (Baden-Baden, Nomos, 2005).

[84] Case T-271/04, *Citymo*, ECLI:EU:T:2007:128.

movement of workers and recognition of professional qualifications;[85] freedom of establishment and company law;[86] social policy;[87] competition;[88] common customs tariff;[89] agricultural policy;[90] and EU citizenship.[91] Even more interestingly perhaps, the principle has also been invoked within the area of freedom, security and justice,[92] and in a case concerning external relations where the principle was invoked by the UK Government and its applicability implicitly accepted by the Court, even though on the claim of abuse of law was rejected on the case.[93] More cases are pending at the CJEU where the principle has been invoked, expanding it to new areas, such as criminal procedure,[94] and employment law.[95] Equally noteworthy is the fact that, from the 1990s onwards, the EU legislator started enacting legislative provisions on various areas of EU law,[96] including: EU citizenship,[97] use of EU budget resources;[98] cross-border transmission of broadcasting services;[99] international civil procedure;[100] and enforcement of intellectual property rights.[101] To these sporadic references in secondary legislation, which seem to be perceived by the Court itself as 'codifications' or 'reflections' of its case law – [102] a trend common to other general principles of EU law –[103] the EU legislator has now added in 2000, a

[85] Case C-311/06, *Consiglio Nazionale degli Ingegneri (CNDI)*, ECLI:EU:C:2009:37; and joint cases C-58-59/13, *Torresi*, ECLI:EU:C:2014:265.
[86] Case C-210/06, *Cartesio*, ECLI:EU:C:2008:723.
[87] Cases C-396/07, *Mirja Juuri*, ECLI:EU:C:2008:656; and C-222/14, *Dikaiosynis,* ECLI:EU:C:2015:473.
[88] Case C-260/07, *Total España*, ECLI:EU:C:2009:215.
[89] Cases C-7/08, *Har Vaessen Douane Service*, ECLI:EU:C:2009:417; C-607/13, *Cimmino and Others*, ECLI:EU:C:2015:448; and C-131/14, *Cervati*, ECLI:EU:C:2016:255.
[90] Case C-434/08, *Harms*, ECLI:EU:C:2010:285.
[91] Case C-202/13, *McCarthy and Others*, ECLI:EU:C:2014:2450.
[92] Cases C-168/08, *Hadady,* ECLI:EU:C:2009:474; C-C-254/11, *Shomodi*, ECLI:EU:C:2013:182; and C-352/13, *CDC Hydrogen Peroxide*, ECLI:EU:C:2015:335.
[93] Case C-16/05, *R*, ECLI:EU:C:2007:530.
[94] Case C-612/15, *Kolev and Others*, ECLI:EU:C:2018:392.
[95] Case C-423/15, *Kratzer*, ECLI:EU:C:2016:604.
[96] As noted by S Vogenauer, The Prohibition of Abuse of Law: An Emerging General Principle of EU Law' in de la Feria and Vogenauer (n 19) ch 36.
[97] Article 35 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,
[98] Article 4(3) of Regulation 2988/95 concerning the protection of the European Communities financial interests [1995] OJ L312/1.
[99] Article 3 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23, as amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 [2007]
OJ L332/27.
[100] Article 6(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
[101] Article 3(2) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.
[102] Vogenauer (n 92) above.
[103] As explained by Tridimas (n 13) 11 et seq.

broader provision, Article 54 of the Charter of Fundamental Rights of the European Union, under the heading 'Prohibition of abuse of rights'.

As the EU principle of prohibition of abuse of law is increasingly densified, as well as invoked across a greater diversity of contexts, the co-constitutive process of reverberation, in its post-cognisance stage, continues, and its status as a general principle of EU law solidifies.

III. EU Principle of Prohibition of Abuse of Law as a EU General GAAP

Within taxation, despite the ongoing densification of the principle of prohibition of abuse of law, it is argued that its status as a *de facto* GAAP can hardly be contested. The question that arises then is as regards the nature of that GAAP, namely as an interpretative principle or as general principle; the answer is in turn dependent on the characterisation of the principle of prohibition of abuse of law as a general principle, or as an interpretative principle. It is true that, in many cases the exact nature of the principle will be, from a practical perspective, irrelevant,[104] as one of the main function of general principles is to operate as interpretative aids, and gap fillers.[105] There are, however, many situations where the distinction is legally, and practically, relevant: beyond their role as interpretative aids, general principles can also act as overriding rules of law,[106] they can therefore trigger *contra legem* interpretation, acting as instruments of judicial review, and apply directly at national level, in the absence of domestic legislation to the effect. General principles have, therefore, all the legal functions of interpretative principles, as well as others.

It is the presence of those other legal functions which makes the characterisation of principle of prohibition of abuse of law as a general principle, or as an interpretative principle, crucial for taxation. An interpretative GAAP is only applicable in the presence of EU legislation, and it is limited by its wording; whilst, a general GAAP can be applied in the absence of EU legislation, and act as an

[104] P Farmer, 'VAT Planning: Assessing the 'Abuse of Rights' Risk' *Tax Journal* (27 May 2002) 15-17.
[105] X Groussot, 'The General Principles of Community Law in the creation and development of due process principles in competition law proceedings: From Trans ocean Marine Paint (1974) to Montecatini (1999)', in Bernitz and Nergelius (n 13) 185-204.
[106] J Nergelius, 'General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy', in Bernitz and Nergelius (n 13) 223-34.

instrument of judicial review. Whilst the question cannot be said to be completely settled, it is argued that the principle, as developed by the Court, displays the key characteristics of a general principle of EU law, and consequently, within taxation, it should be regarded as a general GAAP. Table 1 provides an overview of the principle as it stands, with reference to key CJEU case-law in taxation.

Table 1: EU Principle of Prohibition of Abuse of Law as General GAAP

APPLICABILITY	SCOPE	CONSEQUENCES
Applies to all type of legal instruments, including to primary EU legislation (*Cadbury Schweppes*), and to secondary EU legislation (*Halifax*) **Applies to purely domestic situations, and in the absence of national legislation (*Cussens and Others*)**	Applies where two cumulative conditions are fulfilled: (1) despite formal observance of the law, tax advantage obtained is against its purpose; and (2) principal aim of transactions, as established by objective factors, is to obtain tax advantage (*Halifax, Part Service, Weald Leasing, WebMindLicences*)	Right conferred by the legal provision is removed, and any advantage obtained must be object of restitution (*Halifax*) Transactions to be re-defined so as to re-establish the situation in the absence of the abusive transactions (*Halifax*), even where re-definition results in a less favourable tax treatment (*WebMindLicences*), applied with retroactive effect (*Halifax*)

It could have been argued that the Court itself settled the matter by characterising the principle as a general principle of EU law in *Kofoed.*[107] This, however, would have amounted to a strictly formalist approach of one single case, which is difficult to justify, particularly in the context of previous terminological confusions in this area. Whilst relevant, therefore, the wording used by the Court cannot

[107] Case C-321/05, ECLI:EU:C:2007:408, para 38.

be the sole determining factor in the characterisation of this principle as a general one,[108] and indeed such the designations of the CJEU have in the past been questioned.[109] The core issue is therefore is whether or not the principle displays the key characteristics of a general principle of EU law. It is argued that it does.

Although there is no full doctrinal agreement on what constitutes a general principle of EU law,[110] the main characteristics usually attributed to them, namely generality, weight, and non-conclusiveness, are all present in the jurisprudence of the CJEU regarding the principle of prohibition of abuse of law.[111] Beyond these key characteristics, however, there are several other factors that confirm the principle – and by consequence the GAAP – as it stands today, as general, rather than merely interpretative.

First, as it has rightly been argued,[112] the conceptualisation of the principle of prohibition of abuse of law as interpretative ignores the second element of the abuse of law test – which many have sought to argue, in cases such as *Weald Leasing,* as its main element – namely artificiality, that the principal aim of the transaction is to obtain an advantage. A finding that the application of the rule in question is contrary to its purpose is not regarded as sufficient; the reliance of those invoking the rule must be abusive – this is more than reading down the relevant rule through interpretation. This reality was acknowledged by Advocate General Mazak in *RBS Holdings*, who stated that interpreting a provision of EU law and establishing an abusive practice were 'conceptually distinct and should accordingly be dealt with one after the other'.[113]

Second, the principle has been used by the CJEU on various occasions as an instrument of judicial review of national legal provisions. It was arguably in that capacity that the principle was applied in *Cadbury Schweppes* and other direct taxation cases regarding non-harmonised areas: in these cases the principle of prohibition of abuse of law does not influence the interpretation of the scope of the freedom

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[108] Arguing event against its necessity, see S Prechal and M de Leeuw, 'Transparency: A General Principle of EU Law?' in Bernitz, Nergelius and Cardner (n 13) 201, 203.
[109] J Raitio, 'The Principle of Legal Certainty as a General Principle of EU Law' in Bernitz, Nergelius and Cardner (n 13) 47, 52.
[110] As reported by X Groussot, *General Principles of Community Law* (Europa Law Publishing, 2006) 129-30.
[111] For a detailed analysis see de la Feria (n 1).
[112] ibid.
[113] Case C-277/09, ECLI:EU:C:2010:566, para 29.

of establishment, which is deemed to apply, but on the contrary, it is used as a stand-alone exception to the applicable free movement right; this then resulted in the disapplication of the national provisions, as per the principle of supremacy of EU law, *not* in an interpretation of the national provision in conformity with EU, as per the principle of indirect effect.

Third, it is clear from the CJEU jurisprudence that the principle applies in the absence of national legislation to the same effect. Arguably, it was this characteristic that sparked the various preliminary references to the Court coming from the UK courts, following the decision in *Emsland-Stärke*: it is hardly coincidental that these cases emerged from the UK, which lacked at that time a general anti-avoidance, or anti-abuse provision; it rather reflects the willingness of HMRC to invoke what was then known as the abuse of rights doctrine against VAT avoidance schemes, in the absence of national legislation to that effect. It does not result necessarily from either the statement in *Kofoed* – according to which, in the absence of the transposition of a specific anti-avoidance provision in Merger Directive, the principle should not substitute it – or that in *3M Italia* – according to which there is no obligation upon the Member States to combat abusive practices in the field of direct taxation – that the principle does not apply in the absence of national legislation. Yet, to the extent that it could have been interpreted in that manner, the decision has been arguably reversed in *Italmoda*, *Cussens and Others*, *N Luxembourg 1, and T Danmark*.[114] In *Italmoda* the Court asserted that 'express authorisation cannot be required in order for the national authorities and courts to be able to refuse a benefit under the common system of VAT',[115] and relying on that statement, the Court finally settled the matter in *Cussens and Others* expressly stating that 'the principle that abusive practices are prohibited may be relied on … even in the absence of provisions of national law'. [116] As the Court indicated in that judgment, this characteristic of the principle entails more than interpretation; it implies direct applicability, which is a feature of general, rather than interpretative, principles. This judgment has now been confirmed in *N Luxembourg 1*, where the Court stated that 'even if it were to transpire, in the main proceedings, that

[114] On the constitutional significance of *Cussens and Others* see D Leczykiewicz, 'Prohibition of abusive practices as a "general principle" of EU law' (2019) 56 *Common Market Law Review* 703.
[115] Case C-131/13, ECLI:EU:C:2014:2455, para 59. For an analysis of the case, see R de la Feria and R Foy, '*Italmoda*: the birth of the principle of third-party liability for VAT fraud' [2016] BTR 262.
[116] Case C‑251/16, ECLI:EU:C:2017:881, paras 33-34.

national law does not contain rules…Member States must, therefore, refuse to grant the advantage resulting from [Mergers Directive], in accordance with the general principle that abusive practices are prohibited'.[117]

Finally, whilst the terminology used within CJEU is still not uniform, it is noteworthy that there are now several – and growing – number of statements confirming the nature of the principle of prohibition of abuse of law as a general principle of EU law, not only made by several Advocates General, but also by the Court itself, the most recent of which in *Cussens and Others*, *Argenta Spaarbank*,[118] *N Luxembourg 1*,[119] and *T Danmark*.[120] Indeed a brief analysis of the various statements on the general vs interpretative nature of the principle of prohibition of abuse of law, as summarised in Table 2 below, highlights the fact that not since 1998 has an Advocate General expressly supported the characterisation of the principle as interpretative – although in 2004 the Advocate General in *Chen* did express some reservations as to its characterisation as general;[121] on the contrary, not only there have been multiple references to the principle as a general principle of EU law, but these have grown in intensity during the post-cognisance period starting in *Halifax*. In this regard, it is also significant to note that, as it is acknowledged within the EU constitutional law doctrine, one of the most significant roles of Advocates General has been their contribution to the development of general principles of EU law.[122]

Table 2: CJEU References to Nature of EU Principle of Prohibition of Abuse of Law

GENERAL PRINCIPLE	INTERPRETATIVE PRINCIPLE
***Centros* (Advocate-General La Pergola), 1999** ***Diamantis* (Advocate-General Saggio), 2000** ***Halifax* (Advocate-General Maduro), 2006**	*Kefalas* (Advocate-General Tesauro), 1998 *Chen* (Advocate General Tizzano), 2004?

[117] Case C-115/16, ECLI:EU:C:2019:134, paras 117-121.
[118] Case C-39/16, EU:C:2017:813, para 60.
[119] Case C-115/16, ECLI:EU:C:2019:134, paras 96-97. See also, in the area of free movement of workers, Case C‑359/16, *Ömer Altun*, ECLI:EU:C:2018:63, para 49.
[120] Case C-116/16, EU:C:2019:135, paras 70-71.
[121] Case C-200/02, n. 67 above, ECLI:EU:C:2004:307, at para 111.
[122] N Burrows and R Greaves, *The Advocate General and EC Law* (Oxford, Oxford University Press, 2007) 7; and T Tridimas, 'The role of the Advocate General in the development of Community Law: Some reflections' (1997) 34 *Common Market Law Review* 1349, 1386.

***Kofoed*, 2007** ***Bozkurt* (Advocate-General Sharpston), 2010** ***Oberto and O'Leary* (Advocate-General Mengozzi), 2014** ***CASTA and Others*, 2016** ***Cussens and Others*, 2017** ***Argenta Spaarbank*, 2017** ***N Luxembourg 1*, 2018**	

Over the last decade various arguments have been presented against the characterisation of the principle of prohibition of abuse of law as a general principle of EU law. Most of these have now been expressly addressed by the jurisprudence of the CJEU,[123] but two arguments are arguably still relevant, and thus merit closer scrutiny. The first is that the principle is inconsistently applied by the Court, and that this lack of uniform application somehow prevents its characterisation as a general principle of EU law.[124] The answer to this argument, however, is that uniformity of application is not a fundamental characteristic of general principles, due to their inherent structural generality and scope-related generality.[125] It is not surprising therefore that, as mentioned above, the intensity and the scope of application of a general principle may vary depending on the subject matter,[126] and that this is a phenomenon present as regards other (uncontested) general principles of EU law, such as the principle of proportionality.[127]

The second argument is that characterising the prohibition of abuse of law as a general principle

[123] de la Feria (n 1) 436-37.
[124] N Brown, 'Is there a general principle of abuse of rights in European Community Law?', in Heukel and D Curtin (eds), *Institutional Dynamics of European Integration*, Vol. II, (Martinus Nijhoff Publishers, 1994) 511, 511.
[125] C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) 19 *European Law Journal* 457, 461.
[126] See section II above on the sliding scale of judicial review.
[127] TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158.

carries significant risks of undermining the general principle of legal certainty.[128] The characterisation as a general principle does indeed carry risks to legal certainty, as expressly acknowledged by Advocate General Maduro in *Halifax*,[129] which should not be underestimated. The principle of legal certainty is inherent to any legal system and in essence requires that the application of the law to a specific situation must be predictable.[130] Within the EU context, the principle was first invoked by the CJEU in 1961,[131] has long been recognised as general principle of EU law,[132] and it often features in the case law of the CJEU, with reportedly over 2,500 decisions of the Court making express reference to it.[133] Despite its notorious ambiguity and vagueness,[134] it is said to encompass several other principles, and in particular the principle of legitimate expectations, which requires that those who act reasonably and in good faith on the basis of the law should not see those expectations defrauded.[135]

The contra-argument to the contention that the principle of prohibition of abuse of law should not be characterised as a general principle of EU law because it undermines legal certainty is two-fold. Firstly, acknowledging the risks which characterising the principle of prohibition of abuse of law as a general principle of EU law, does not – indeed cannot – equate to denying its existence; disagreeing with a specific legal development, cannot mean denying that the development ever took place. Secondly, the principle of prohibition of abuse of law must be balanced against other principles, and vice-versa, other principles must be balanced against the principle of prohibition of abuse of law; indeed conflicts between two or more general principles is not uncommon, and a balance must always be achieved between different principles that 'form part of the Community legal system'.[136] Despite its status as a general principle of EU law, the principle of legal certainty is not absolute and should not be

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[128] A Arnull, 'What is a General Principle of EU Law?' in de la Feria and Vogenauer (n 19) ch 2, 22-23.
[129] Case C-255/02, ECLI:EU:C:2005:200, para 77.
[130] Raitio (n 105) 52.
[131] Case 42/59, *SNUPAT*, ECLI:EU:C:1961:5.
[132] See amongst many others, cases 52/69, *Geigy*, ECLI:EU:C:1972:73; C-323/88, *Sermes*, ECLI:EU:C:1990:299; C-154/05, *Kersbergen-Lap*, ECLI:EU:C:2006:449; C-345/06, *Heinrich*, ECLI:EU:C:2009:140; C-337/07, *Altun*, ECLI:EU:C:2008:744; C-201/08, *Plantanol*, ECLI:EU:C:2009:539; C-72/10, *Costa*, EU:C:2012:80.
[133] J Van Meerbeeck, 'The principle of legal certainty in the case-law of the European Court of Justice: from certainty to trust' (2016) 41 *European Law Review* 275.
[134] ibid.
[135] Raitio (n 105) 54.
[136] Case C-255/02, ECLI:EU:C:2005:200, para 84.

safeguarded at all costs, but rather outweighed by other legal principles.[137] As demonstrated by the CJEU case-law, often resource to other general principles will undermine legal certainty: [138] paradigmatic examples of this phenomenon would be cases involving the general EU principle of proportionality,[139] or the general principle of the general EU principle of equal treatment.[140]

It is therefore in this context that the discussion as regards the risks to legal certainty presented by the EU principle of prohibition of abuse of law should be held. Those risks are often raised in the context of general anti-avoidance mechanisms;[141] however, as it has been argued, these principles 'cut(s) across an immemorial debate between two legitimate objectives of any legal order: legal certainty (the tendency to yield predictable legal outcomes) and legal congruence (the tendency to yield equitable legal outcomes)';[142] or said in a different way, the principle of prohibition of abuse of law should be set in the context of the wider debate over security versus justice. Blind respect for legal certainty and the rigid respect of the letter of the law will lead to inequity, and jeopardise what has been designated as 'legal congruence'.[143] This is particular true in the context of EU law, not least since hard law is often difficult to approve, so that reliance on judicial discretion in its application is particular necessary in the context of changing realities. [144]

All the above leads to the inescapable conclusion that the principle of prohibition of abuse of law is now a general principle of EU law, and as such general GAAP, rather than an interpretative one, with all the legal consequences which being characterised as such entails. In particular, general principles are regarded as primary EU law, and described by the CJEU as having constitutional status.[145] They

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[137] Raitio (n 105) 58.
[138] On the balancing of the principle of legal certainty with that of legality, for example, see X Groussot and T Minssen, '*Res judicata* in the Court of Justice case-law: balancing legal certainty with legality?' (2007) 3 *European Constitutional Law Review* 385.
[139] T Lyons, 'State Aid, Taxation and Abuse of Law' in de la Feria and Vogenauer (n 19) 508.
[140] Joined cases C-402/07 and C-432/07*, Air France*, ECLI:EU:C:2009:716; and C-581/10 and C-629/10, *Deutsche Lufthansa and Others*, ECLI:EU:C:2012:657.
[141] J Freedman, 'The UK GAAR' in M Lang *et al* (eds), *General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS World* (Amsterdam, IBFD, 2016). See also M Gammie, 'Moral Taxation, Immoral Avoidance – What Role for the Law?' [2013] BTR 577.
[142] A Sayde (n 23) 167.
[143] ibid, 168 et seq.
[144] As discussed in R de la Feria, 'EU VAT Principles as Interpretative Aids to EU VAT Rules: The Inherent Paradox' in M Lang et al (ed.), *Recent VAT Case Law of the CJEU* (Vienna, Linde, 2016).
[145] Cases C-101/08, *Audiolux and Others*, ECLI:EU:C:2009:626, para 63; C-174/08, *NCC Construction Denmark*, ECLI:EU:C:2009:669, para 42.

therefore carry significant legal force, and their significance within the development of the EU legal system has been profound.[146] Given their constitutional status they obviously take precedent over EU secondary legislation, by virtue of the hierarchy of EU norms, and over national legislation, by virtue of the principle of supremacy of EU law;[147] they are directly applicable, and they are regularly applied by the CJEU, in the absence of national or EU law to that effect, often producing a decisive effect on the outcome of a case, by helping to define the scope of rights granted by legislation. It is against this background that the approval of the EU GAAR should be read.

IV. From EU GAAP to EU GAAR

Whilst relatively new within the EU legal system, GAAPs and GAARs have played a central role within tax systems worldwide for over a century.[148] It is, however, undeniably that over the last two decades general anti-tax avoidance mechanisms have become increasingly popular around the globe,[149] and that this trend intensified in the wake of the financial crisis in 2008-09, as the public's reaction to tax avoidance at a time of austerity created a political momentum which favoured the approval of new (general) anti-avoidance mechanisms.[150] Within the EU, by 2002, only a few EU Member States had neither a GAAP, nor a GAAR, in their legal systems,[151] and those that did not have approved one since, either independently,[152] or as result of EU jurisprudential,[153] and legislative developments.[154] This trend is also evident internationally, and the multiplication of anti-avoidance mechanisms witnessed in the

[146] As pointed out by Arnull (n 124) 18.
[147] Case C-2/08, *Olimpiclub*, ECLI:EU:C:2009:506.
[148] The first GAAR is thought to be the New Zealander, which dates back more than 130 years, see C Ellife, 'New Zealand's General Anti-Avoidance Rule – A Triumph of Flexibility Over Certainty' (2014) 62 *Canadian Tax Journal* 147. In Europe, the German GAAR is also over 100 years old now, see G Staringer, 'GAAR-dians of the Tax Galaxy. A 100-year GAAR Journey from Germany to Austria and Back to the EU' (2019) 47 *Intertax* 47 986.
[149] C Waerzeggers and C Hillier, 'Introducing a General Anti-Avoidance Rule (GAAR)' (2016) *IMF Technical Note – Tax Law* 1; and I Mosquerra et al, 'Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency' (2018) 46 *Intertax* 140.
[150] J Freedman, 'GAAR as a process and the process of discussing a GAAR' [2012] BTR 1, 22-27. See also see generally RC Christensen and M Hearson, 'The new politics of global tax governance: taking stock a decade after the financial crisis' (2019) 26 *Review of International Political Economy*.
[151] F Zimmer, n xx, 37-38.
[152] Such as the UK, see Freedman (n 146).
[153] This was the case in Italy, see Carolis (n. 53).
[154] As was the case in Greece, see V Athanasaki, 'A Critical Approach to GAARs in the Greek and the EU Tax Law' (2019) 4 *EC Tax Review* 183.

last decade has now culminated with the introduction of a GAAR at Treaty level: the Principal Purpose Test.[155] It is against this background that the approval of an EU GAAR should be considered.

A. Developing the EU GAAR: ATAD

The process of partial codification of the principle of prohibition of abuse of law took place in stages, even if arguably rather quickly. The first step came in 2012, with the release of the European Commission's recommendation on aggressive tax planning, which advised Member States to adopt a general anti-avoidance rules to counteract avoidance that falls outside the scope of SAARs, 'adapted to domestic and cross-border situations'.[156] Three key elements stand out as regards this recommendation.

First, the recommendation constitutes an implicit acknowledgement of the contested nature of the principle of prohibition of abuse of law, as recently as 2012. Whilst it could be – and was – argued that by then the principle already exhibited the key characteristics of a general principle of EU law,[157] and thus applied to domestic situations, in the absence of national legislation, the decision in *3M Italia* that same year could be read as denying the applicability of the EU GAAP to non-harmonised areas. Second, the recommendation is also indicative of the Commission's emerging concerns over creating an equal playing field on anti-avoidance rules, which was arguably the key motivator for the ATAD proposal a few years later. Finally, although it has been contested that the recommendation clearly attempts to conform, and partially codify, with the CJEU case law on the principle of prohibition of abuse of law,[158] the proposed GAAR was arguably less clear that the case-law. Whilst ostensibly soft law, the recommendation had an immediate and concrete effect, triggering legislative changes in various

[155] For an analysis of this new GAAR, which is outside the scope of this chapter, see C Palao Toboada, 'OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule' (2015) 69 *Bulletin of International Taxation* 602; A Baez Moreno, 'GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6?' (2017) 45 Intertax 432; and D Duff, 'Tax Treaty Abuse and the Principal Purpose Test: Part II' (2018) 66 *Canadian Tax Journal* 619
[156] Commission Recommendation 2012/772/EU of 6 December 2012 on aggressive tax planning, *OJ L 338, 12.12.2012, p. 41–43*
[157] See de la Feria (n 1).
[158] AP Dourado, 'Aggressive Tax Planning in the EU Law and in the Light of BEPS: the EC Recommendation on Aggressive Tax Planning and BEPS Action 6' (2015) 42 *Intertax* 43.

Member States.[159]

The next significant development came soon after the 2012 recommendation, with the appearance of EU SAARs: rules that similarly to GAARs are designed to combat avoidance schemes, regardless of their specific characteristics or methods, but in the context of a specific area of taxation.[160] Both the proposal for a Financial Transactions Tax (FTT),[161] and the proposal amending the PSD, included SAARs, and in both cases the rationale presented by the Commission was to ensure an equal playing field. Although the FTT proposal was never approved, the SAAR in the PSD has been in force since 2015,[162] and it is broadly regarded as the inspiration for the EU GAAR in the ATAD.[163] There are two key elements to that SAAR: definition of what constitutes abuse, with reference to artificiality, and purpose of the law; and stipulation of the basic consequences of finding that abuse, namely the removal of the benefits granted by the Directive. Whilst it could be reasonably argued that that definition of what constitutes abuse closely follows the CJEU case law on the principle of prohibition of abuse of law, and as such should be regarded as a codification – albeit partial, insofar as it only applies to one area of taxation – of the EU GAAP, the criteria set out therein for determining artificiality is problematic. In the first instance the provision defines artificiality by reference to 'an arrangement or a series of arrangements… put in place for the main purpose or one of the main purposes of obtaining a tax advantage', but it then goes on to state that those arrangements 'shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality'. Although the references to economic reality and commercial reasons, or normal commercial operations,

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[159] Carolis (n 53) and Athanasaki (n 150).

[160] Distinct from TAARs, anti-avoidance rules that targeted specific types of avoidance, such as thin-capitalisation or transfer pricing rules. The terminology is not always consistent however, and at times authors refer to TAARs, as SAARs and vice-versa, or as 'proper' and 'improper' SAARs, see J Zarnoza and A Baez, 'Spanish Report' in Lang et al (n 137).

[161] European Commission, *Proposal for a Council Directive Implementing Enhanced Cooperation in the Area of Financial Transaction Tax*, COM(2013) 71 final, February 14, 2013. See J Englisch *et al*, 'The financial transaction tax proposal under the enhanced cooperation procedure: legal and practical considerations' [2013] BTR 223; and G Maffini and J Vella, 'Evidence-Based Policy Making? The Commission's Proposal for an FTT' (2015) *Oxford University Centre for Business Taxation Working Paper* WP15/15.

[162] Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, *OJ L21, 28/01/2015, p. 1-3*.

[163] Debelva and Luts, 'The General Anti-Abuse Rule of the Parent-Subsidiary Directive' (2015) 55 *European Taxation* 223; and D Weber, 'The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect' (2016) 44 *Intertax* 98.

do appear frequently within the case law of the Court, it is difficult to know what it is meant by them,[164] and in at least one occasion the Court went as far as to expressly reject the significance of one of those expressions as a criterion for determining abuse.[165] It would have been preferable, therefore, if the Directive, define artificiality solely with reference to 'the main purpose or one of the main purposes'. Nevertheless, one year later, a similar approach was adopted by the ATAD.

In early 2016, the European Commission presented its legislative proposal for a new ATAD,[166] reportedly as a vehicle to implement BEPS: the new Directive would imposed legally binding obligation upon Member States to incorporate the conclusions of Action 2 on hybrid mismatches, Action 3 on CFC rules, and Action 4 on interest deductibility.[167] Yet, even if the proposed Directive was reportedly aimed at cross-border practices, in the framework of BEPs, some of the proposed rules had a broader focus, including the proposed EU GAAR, which would apply both to domestic and cross-border situations. According to the Commission, the key aim was to limit tax competition and ensure an equal playing field: national GAARs might make certain Member States less attractive than those without a GAAR, or with a less strict GAAR,[168] an issue often designated as the early adopters problem;[169] an EU GAAR would therefore ensure that national GAARs applied uniformly within the Union and vis-à-vis third countries.

Although EU harmonisation within direct taxation has traditionally been slow, with proposals lingering for years on the EU policy agenda, the ATAD was adopted in merely six months after it was proposed. The speed in which the proposal was approved is undoubtedly symptomatic of the trend towards, and political momentum behind, the introduction of new general anti-tax avoidance mechanisms,[170] but it is also indicative of how little scrutiny were its provisions subject to. From a

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[164] Freedman (n 137). Similarly, M de Wilde, 'The ATAD's GAAR: A Pandora Box?' in P Pistone and D Weber (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (Amsterdam, IBFD, 2018).
[165] Case C-103/09, *Weald Leasing*, ECLI:EU:C:2010:804. See also de la Feria and Silva Costa (n 65).
[166] European Commission, *Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, COM(2016) 26 final, 28 January 2016.
[167] A Cedelle, 'The EU Anti-Avoidance Directive: a UK Perspective' [2016] BTR 490. See also R de la Feria, 'Harmonising Anti-Tax Avoidance Rules' (2017) 3 *EC Tax Review* 140.
[168] G Sinfield, 'The *Halifax* principle as a universal GAAR for tax in the EU' [2011] BTR 235; T Lyons, 'The financial crisis, tax avoidance and an EU GAAR' [2013] BTR 111; and T Franz, 'The General Anti-Abuse Rule Proposed by the European Commission' (2015) 43 *Intertax* 660.
[169] Cedelle (n 163).
[170] ibid.

technical perspective, although, the ATAD was not automatically accepted, and the final text does reflect some political compromise, the EU GAAR, as set out in Article 6 of the ATAD, is said to have been mostly settled as from the start of the negotiations,[171] and it reads, as follows:

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.

The speed of approval has resulted in concerns being raised over the lack of scrutiny, namely comprehensive technical discussions, and an impact assessment, to which the new EU GAAR was subject.[172] From a constitutional perspective, questions have also been raised over its compatibility with the EU principles of conferral of powers, subsidiarity and proportionality, on the basis that the Directive was not necessary in order to ensure the effective functioning of the internal market.[173] Whilst the argument does not necessarily convince, as the concept of internal market, as devolved by the CJEU since *Titanium Dioxide*,[174] includes elimination of distortions to competition, which lack of harmonisation of anti-avoidance rules does arguably cause, the matter merited, nevertheless, higher scrutiny.

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[171] A Rigaut, 'Anti-Avoidance Directive (2016/1164): New EU Policy Horizons' (2016) 56 *European Taxation* 502.
[172]de Broe and Beckers (n 71); and Cedelle (n 163).
[173] Lazarov and Govind, 'Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law' (2019) 47 *Intertax* 852.
[174] For a detailed analysis of the Court's case-law on the concept of internal market, see R de la Feria, 'VAT and the EU Internal Market: The Paradoxes of Harmonisation' in D Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (Amsterdam, IBFD, 2010) 267.

B. EU GAAP vs EU GAAR

The introduction of the GAAR in the EU legal system raises various questions over its interaction with the principle of prohibition {of abuse of?] of EU law, in its role as EU GAAP. According to the explanatory memorandum to the ATAD, the new EU GAAR is 'designed to reflect the artificiality tests of the CJEU', and thus the stated objective is clearly one of (partial) codification: the EU general principle of prohibition of abuse of law, the EU GAAP, is codified for direct taxation purposes. The first question which arises, therefore, is whether, as implied by the Commission, this is truly a codification act. For those that argued that the principle of prohibition of abuse of law did not constitute a general principle of EU law, but merely an interpretative principle, which did not apply in the absence of national provisions, and did not constitute therefore an EU GAAP, the new EU GAAR goes beyond codification, significantly enlarging the scope of application of the principle to (now) apply to domestic situations.[175] Significantly, this seems also to be the opinion of Advocate General Kokott, as expressed in *N Luxembourg 1*.[176] Yet, for those that argued that the principle of prohibition of abuse of law already displayed the characteristics of general principle of EU law, and thus applicable to domestic situations, and in the absence of national provisions, the new EU GAAR constitutes indeed a partial codification of the principle for the purposes of direct taxation.

The question is then, what does codification add, and how should the interaction between the EU GAAP and the EU GAAR be conceptualised. The main advantage of codification is legal certainty: whilst before there was a debate on whether the EU principle of prohibition of abuse of law should apply characterised as an EU GAAP, applied to non-harmonised areas of direct taxation, in the absence of domestic provisions, now this debate has been settled by statute; equally, where there was debate about the main elements of the EU GAAP, now those elements (test, consequences) are set in hard law.

[175] de Broe and Beckers (n 71); Franz (n 164); C Brokelind, 'Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as Follow-Up to the BEPS Project' (2015) 43 *Intertax* 816; and G Bizioli, 'Taxing EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedent Over the Single Market?' (2017) 26 *EC Tax Review* 167.

[176] I Lazarov, '(Un)Tangling Tax Avoidance Under the Interest and Royalties Directive: The Opinion of AG Kokott in *N Luxembourg 1*' (2018) 46 *Intertax* 873.

It is also noteworthy that this evolution from GAAP to GAAR is not unique to the EU, and there are significant parallels between the EU process and that in the UK – or in the US.[177] At the time of the decision in *Halifax*, it was often stated that the judgment was to the EU legal system, what *Ramsay* had been for the UK one,[178] and whilst there are significant differences, not least the fact that, as opposed to the principle of prohibition of abuse of law, the so-called *Ramsay* principle has been confirmed by the courts as merely an interpretative principle, or a principle of statutory construction,[179] there is some truth to this statement. Both the *Ramsay* principle and the EU principle of prohibition of abuse of law are jurisprudentially constructed GAAPs, broadly developed to address similar concerns, and applying a similarly criteria / test. Despite the different internal market dynamics, namely the need to ensure a level playing field, the approval of the UK GAAR speaks to a large extent to the same concerns as the approval of the EU GAAR: with *Ramsay* confirmed as an interpretative principle, its effectiveness was, by nature, limited by the wording and context of any given provision; and whilst a case could, and was, made since *Halifax* that the EU principle of prohibition of abuse of law did not display the characteristics of a mere interpretative principle, doubts remained in some quarters, which the Commission was clearly keen to remove.

The partial codification in the form of the EU GAAR does not, however, alter the nature of the EU principle of prohibition of abuse of law as a general principle of EU law, with all constitutional consequences which that characterisation entails. In particular, the EU GAAP will continue to hold the two-key functions of any general principle of EU law, namely as a default provision, and as an instrument of judicial review. As a gap filer, the principle will continue to hold its relevance despite the new EU GAAR, acting as default mechanism, applicable not only to areas outside taxation, but in any

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[177] For a detailed analysis of the process in the UK, see Freedman (n 146); for an overview of the US process see R Prebble and J Prebble, 'General Anti-Avoidance Rules and the Rule of Law' in N Hashimzade and Y Epifontseva (eds), *The Routledge Companion to Tax Avoidance Research* (Routledge, 2017), citing also C Pietruszkiewicz, 'Economic Substance and the Standard of Review' (2009) 60 *Alaska Law Review* 339, and A Likhovski, 'The Duke and the Lady: Helvering v Gregory and the History of Tax Avoidance Adjudication' (2004) 25 *Cardozo Law Review* 953.

[178] *WT Ramsay Ltd v IRC* [1982] AC 300. See R Lyal, '*Cadbury Schweppes* and Abuse: Comments' in de la Feria and Vogenauer (n 19).

[179] J Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' (2007) 123 *Law Quarterly Review* 53; and M Gammie, 'The Judicial Approach to Avoidance: Some Reflections on BMBF and SPI' in J Avery Jones, P Harris and D Oliver (eds), *Comparative Perspectives on Revenue Law: Essays in Honour of John Tiley* (Cambridge, Cambridge University Press, 2008) 25.

taxation matter that may possibly fall outside the scope of the EU GAAR, under the standard *lex specialis derogat legi generali* rule.[180] As an instrument of judicial review, the principle will – in theory – be the standard against which secondary legislation, either domestic or EU, can be assessed. This function is particularly important in the context of the new EU GAAR: the principle of prohibition of abuse of law, as a general principle of EU law, constitutes primary legislation, and thus, under the EU hierarchy of norms, the GAAR must comply with it.[181] Yet, despite the express references to the CJEU case-law in the ATAD proposal, there are not-insignificant differences between that case-law and the new EU GAAR.

The first key difference between the principle of prohibition of abuse of law as a GAAP, and the new GAAR, is the relevance afforded to 'economic reality', which from passing references, seemingly *obiter dictum*, in the case-law,[182] is now elevated into one of the key criteria for assessing artificiality, without any guidance as to its meaning. The second, probably more significant, difference is the use of 'main purpose or one of the main purposes' as another key criteria for assessing artificiality. This is a very different artificiality threshold from that used by the Court in direct taxation cases, where the criterion under the principle of prohibition of abuse of law has tended to be 'wholly artificial transactions', a much higher artificiality threshold. Why the preference for a lower threshold in the new GAAR one can only speculate: a lower threshold is used in VAT, where the standard artificiality test has been, since *Part Service*, the 'principle aim', and the new SAARs in the PSD and the Merger Directive also include a lower threshold, so it is possible that some contamination across tax areas was at play. In any event, such differences raise the question as to whether the GAAR could be tested against – and ultimately be regarded as incompatible with – the GAAP.

This risks of judicial review of the GAAR appears to have been one of the reasons behind Advocate General Kokott's opinion in *N Luxembourg 1*, denying the principle of prohibition of abuse of law the status of general principle of EU law, directly applicable in the absence of relevant domestic rules.[183]

[180] On the application of this rule in the context of anti-avoidance mechanisms, see also Zarnoza and Baez (n 156).
[181] As currently pointed out by Lazarov and Govind (n 169).
[182] See discussion above on the Court's references to economic reality and normal commercial operations.
[183] Case C-115/16, ECLI:EU:C:2018:143.

Others have highlighted the possibility of such a review under the EU hierarchy of norms, welcoming the potential scrutiny.[184] It is indeed true that, under the EU hierarchy of norms, the new GAAR can indeed be subject to review against general principles of EU such, including the principle of prohibition of abuse of law. This constitutional truth, however, ignores the practical reality that, within taxation, the Court has been extremely reticent to review secondary EU legislation in light of EU primary legislation, being it Treaty provisions or general principles of EU law.[185] Whether the Court will depart from this so-called tax exceptionalism, and assess the compatibility of the GAAR with the GAAP, only time will tell – but on the basis of its previous case-law, the opposite seems rather more likely, namely that the GAAP will evolve in line with the GAAR.

V. Conclusion

In the last two decades, general anti-avoidance mechanisms have become increasingly popular around the globe. Yet this global trend hides significant variation: anti-avoidance mechanisms are not uniform, but rather differ significantly in design, function, scope, and choice of legal instrument. Whilst there is now significant literature on the design of specific general anti-avoidance mechanisms, such as GAARs, limited attention has been paid to how these mechanisms actually develop over time, and to how they interact with each other. The aim of this article is to start filing this gap, by considering the process of co-constitutive development of general anti-tax avoidance mechanisms within the EU: identifying the various stages of legal principle formation, and its manifestation within taxation as a jurisprudential GAAP; then tracing the natural process that led to the eventual approval of the GAAR; and finally considering the interaction between these different types of general anti-avoidance mechanisms.

The EU principle of prohibition of abuse of law has been developing within the jurisprudence of the CJEU, through a co-constitutive process of reverberation, since the mid-1970s. Despite its wider scope

[184] Lazarov and Govind (n 169) and Lazarov (n 172).
[185] R de la Feria, 'VAT and the EU Internal Market: The Paradoxes of Harmonisation' in D Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (Amsterdam, IBFD, 2010), 267; and R de la Feria and D Doukas, 'The Constitutional Role of the CJEU in Taxation Post-Harmonisation', *Workshop on Fiscal Federalism in the EU*, Cambridge University, July 2017.

of application, it is argued that within taxation the principle has assumed the role for the last 15 years as a *de facto* GAAP, with the characteristics of a general legal principle, rather than merely an interpretative one. It is further asserted that the approval of an EU GAAR constitutes a natural progression in the development of general anti-tax avoidance mechanisms within the EU, which is identical to that witnessed in order jurisdictions around the globe: from the jurisprudential creation of the EU GAAP, to the eventual approval of the EU GAAR. It is argued moreover that this progression is not only natural, but also a positive one, so long as the EU GAAR is conceptualised as a partial codification of the EU GAAP, and that its application follows the standard hierarchy of legal norms rules. If so, the importance of the EU general principle of prohibition of abuse of law does not decrease, either generally – as its scope of application continues to expand to new areas of law – or in its role as GAAP, as it will continue to fulfil its role as gap filler, and as a (potential) instrument of judicial review. The coexistence of an EU GAAR and a general principle GAAP thus present significant advantages, increasing legal certainty, whilst maintaining the flexibility that naturally results from jurisprudential constructs.

This article seeks to make a catalysing contribution to the development of a general theory of anti-avoidance mechanisms. Its ambition has been to stimulate much needed tracing of the global development and spread of anti-avoidance rules; identifying types, common patterns, and trends in their origin, design, function and scope; as well as, establishing principles for their interplay, both within and between jurisdictions; and examining legitimacy concerns. Only through such research will be able to truly understand this global trend in it full legal complexity.