National measures to counter tax avoidance under the Merger Directive

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1. Introduction

The Merger Directive (MD)[1] seeks to facilitate certain cross-border company reorganizations within the EU internal market by ensuring that such restructurings can be carried out in a tax neutral-fashion provided that certain criteria are met. It thus provides for a deviation from the realization principle that prevails in all Member States' corporation tax systems. It also contemplates further benefits intended to safeguard favourable tax regimes in case of a reorganizational operation. However, as shown by the fifth recital in the preamble, the Merger Directive seeks to balance these tax benefits with the financial interest of the Member States, and therefore contains several qualifications and conditions for the granting of the aforementioned benefits. Moreover, Art. 15 (1) (a) MD authorizes Member States to counter tax avoidance schemes in so far as the latter aim at tax benefits granted by national law in compliance with the Directive, so as to ensure that the benefits can be claimed only in conformity with their "spirit" and the considerations underlying their respective qualifications.

The provision of Art. 15 (1) (a) MD reads as follows: "A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1 has as its principal objective or as one of its principal objectives tax evasion or tax avoidance…" The Directive furthermore specifies, in the same Art. 15 (1) (a) MD, that "the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives."

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[1] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States; formerly Directive 90/434/EEC, as amended by Directive 2005/19/EC and Directive 2006/98/EC.

Art. 15 (1) (a) MD – more precisely, its predecessor of almost identical wording – has already been interpreted by the ECJ on four occasions[2], and its relationship to purposive construction has implicitly been dealt with in a fifth case[3]. Among the – few – explicit anti-avoidance rules in harmonized tax law, it is therefore the one that has so far most extensively been dealt with in the case law of the Court. By contrast, the provision has attracted relatively little attention in academic debate. Apart from case notes, only very few authors have so far offered a comprehensive analysis of Art. 15 (1) (a) MD in international publications[4]. A possible explanation for this discrepancy is that the first part of the provision is phrased as a "mini-GAAR"[5], i.e. as a general anti-avoidance rule whose scope is however limited to reorganizational operations covered by the Merger Directive. It is therefore generally presumed, and has indeed also occasionally been emphasized by the Court itself[6], that Art. 15 (1) (a) MD is a mere reflection of the unwritten Union law doctrine of prohibition of abuse of rights. This doctrine has been developed by the Court over several decades[7], and it has been intensively discussed by scholars especially since the *Emsland Stärke* ruling in 2000[8]. Most commentators as well as the ECJ now agree that the judicial developments in this area should also inform the interpretation of Art. 15 (1) (a) MD.

Art. 15 (1) (a) MD is a provision of a European directive; as a general rule, one would therefore expect it to have legal effect in the tax systems of the Member States only in so far

[2] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, paras. 35 et. seq.; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, paras. 37 et seq..;ECJ 11 December 2008, case C-285/07, A.T. [2008] ECR I-9329, paras. 30 et seq.; ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., paras. 42 et seq.

[3] Cf. ECJ 15 January 2002, case C-43/00, Andersen og Jensen [2002] ECR I-379.

[4] The most notable exceptions are Petrosovitch, K., "Abuse under the Merger Directive", 50 *European Taxation* (2010), pp. 558 et seq.; Terra, B.J.M. and Wattel, P.J., *European Tax Law*, 5th edn. (Alphen aan den Rijn: Kluwer Law International, 2008), pp. 548 et seq.; and Weber, D., "A closer look at the general anti-abuse clause in the Parent-Subsidiary Directive and the Merger Directive", 5 *EC Tax Review* (1996), pp. 64 et seq.

[5] Cf. Terra and Wattel, note 4, p. 548.

[6] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para 38.

[7] For a good overview, see Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, paras. 62 et seq.; de Broe, L., *International Tax Planning and Prevention of Abuse: A Study under Domestic Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies* (Amsterdam: IBFD, 2008), pp. 755 et seq. (non-tax cases) and pp. 800 et seq. (tax-related cases); de la Feria, R., "Prohibition of abuse of (Community) law: The creation of a new general principle of EC law through tax", 45 *Common Market Law Review* (2008), p. 395 (at pp. 398 et seq.); Kjellgren, A., "On the Border of Abuse: The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law", 11 *European Business Law Review* (2000), p. 179 (at pp. 180 et seq.); Lenaerts, A., "The General Principle of the Prohibition of Abuse of Rights: A Critical Position on its Role in a Codified European Contract Law", 18 *European Review of Private Law* (2010), p. 1121 (at pp. 1128 et seq.); O'Shea, T., "Tax Avoidance and Abuse of EU Law", *EC Tax Journal* (2011), p. 77 (at pp. 88 et seq.); Sørensen, K.E., "Abuse of rights in Community law: A principle of substance or merely rhetoric?", 43 *Common Market Law Review* (2006), p. 423 (at pp. 425 et seq.). See also the conference volume edited by de la Feria, R. and Vogenauer, S. (eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Oxford: Hart, 2011), contributions on pp. 49 et seq.

[8] ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569.

as it has been transposed into national law[9]. A recent survey for the Commission has shown that the Member States seem to have chosen rather divergent approaches in this regard[10]. While some have transplanted the provision literally into their national tax system[11], others have made modifications or have based presumptions of avoidance on this article[12], and some Member States have not transposed Art. 15 (1) (a) MD at all[13].

Against this background, the present paper has two main objectives: On the one hand, it scrutinizes whether Art. 15 (1) (a) MD and the unwritten anti-abuse doctrine of the ECJ really blend into one single concept of prohibition of tax avoidance. In this context, it is also indispensable to critically review the Court's case law and scholarly opinions regarding a possible "general Community law principle of prohibition of abuse". On the other hand, the paper attempts to highlight the practical significance and implications of Art. 15 (1) (a) MD with respect to national anti-avoidance rules or doctrines that affect reorganizational operations within the meaning of Art. 1 MD. A special focus is thus put on key aspects of the transposition of Art. 15 (1) (a) MD into the national tax systems of the Member States.

Considering the terminological imprecision that characterizes part of the Court's case-law and that is indeed also present in the wording of Art. 15 (1) (a) MD, it is useful to point out that this paper is concerned with tax avoidance *strictu sensu*. The ECJ often uses the expressions "abuse of (tax) law", "tax avoidance", and "tax evasion" as synonyms[14]. The same seems to be true for Art. 15 (1) (a) MD, as evidenced by the fact that a presumption of tax evasion *and* of tax avoidance may be based on identical criteria pursuant to the second part of this provision[15]. However, for the purpose of the present paper, the notion of tax avoidance will be distinguished from the concept of tax evasion. This distinction is made in conformity with

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[9] See Art. 288 (3) TFEU. For a more in-depth discussion, see infra at 6.1.

[10] Cf. country reports in Ernst & Young, "Survey of the Implementation of Council Directive 90/434/EEC", 2008, available at < http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/mergers_directive/study_impl_direct.pdf >, pp. 33 et seq. The report provides some detailed information about the transposition of Art. 15 MD (formerly Art. 11 MD) with respect to 18 of the 27 Member States.

[11] Finland, Greece, Slovenia, Spain.

[12] Belgium, France, Germany, Ireland, Latvia, Netherlands, Poland, United Kingdom.

[13] Austria, Denmark, Lithuania, Luxemburg, Slovakia, Sweden.

[14] See, for example, ECJ 22 December 2010, case C-277/09, RBS Deutschland, n.y.r., para. 48; for further references, see Bergmann, S., "Steuerhinterziehungs – und Mißbrauchsterminologie im europäischen Steuerrecht: Evasion and Abuse Terminology in European Tax Law", 20 *Steuer und Wirtschaft International* (2010), pp. 447 et seq.; Merks, P., "Tax Evasion, Tax Avoidance and Tax Planning", 34 *Intertax* (2006), p. 272 (at p. 280); Fischer, P., in: Hübschmann, W. and Hepp, E. and Spitaler, A. (eds.), *AO/FGO*, loose-leaf commentary (Köln: Schmidt, March 2008), § 42 AO, para. 156. Likewise Sørensen, note 7, p. 443. To some extent, though, it is only seemingly an interchangeable use of the above terms, since there also exist linguistic differences as between Member States' legal systems with respect to the relevant terminology for the phenomenon that will in the following be referred to as tax avoidance, cf. de Broe, note 7, p. 800; de la Feria, note 7, p. 396; Petrosovitch, note 4, p. 560; Vogenauer, S., "The Prohibition of Abuse of Law: An Emerging General Principle of EU Law", in: de la Feria and Vogenauer (eds.), note 7, p. 521 (at pp. 524 et seq.).

[15] This is – rightfully – criticized by Merks, note 14, pp. 280 et seq.

international tax law practice, and it is useful because it reflects different kinds of a taxpayer's attempt to reduce its tax burden: The concept of 'evasion' will be understood as a lack of disclosure or even misrepresentation of tax-relevant factual information vis-à-vis tax authorities. Tax evasion is usually regarded as a criminal offence in the legal systems of the EU Member States. By contrast, in case of an attempt of 'tax avoidance' the taxpayer seeks an application of the relevant tax statute that complies with the letter of the law, but fails to grasp the economic reality underlying (an often complex series of) tax-relevant transactions or events, and thus defeats the objectives underlying the legal provisions at issue[16]. To put it shortly: The legal concept of avoidance[17] refers to arrangements that seek to manipulate the tax base or other constituent factors of the tax liability, whereas evasion seeks to manipulate the assessment procedure[18]. As will be discussed in more detail below[19], avoidance is based on what certain civil law jurisdiction would consider specific – indeed the most significant – forms of abuse of law; *cum grano salis*, it can therefore be regarded as a manifestation of abusive behaviour[20].

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[16] For similar distinctions, see Bergmann, S., "Missbrauch im Anwendungsbereich der Mutter-Tochter-Richtlinie", Steuer und Wirtschaft (2010), p. 246 (at p. 248); Confédération Fiscale Européenne (CFE), "Opinion Statement of the CFE ECJ Task Force on the concept of abuse in European Law, based on the judgments of the European Court of Justice delivered in the field of tax law", 48 *European Taxation* (2008), p. 33; Freedman, J., "Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament", 123 Law Quarterly Review (2007), p. 53 (at p. 76); Lang, M., "The general anti-abuse rule of Article 80 of the draft proposal for a Council Directive on a Common Consolidated Corporate Tax Base", 51 *European Taxation* (2011), p. 223 (at pp. 225 et seq.); Prebble, Z. and Prebble, J., "Comparing the general anti-avoidance rule of income tax law with the civil law doctrine of abuse of law", 62 *Bulletin for International Taxation* (2008), p. 151; Zalasiński, A., "Some Basic Aspects of the Concept of Abuse in the Tax Case Law of the European Court of Justice", 36 *Intertax* (2008), p. 156 (at p. 159). See also Trombitas, E., "The Conceptual Approach to Tax Avoidance in the 21st Century: When the Statute Gives But the GAAR Can Take Away", 15 *New Zealand Journal of Taxation Law and Policy* (2009), p. 352 (at p. 353), regarding tax avoidance in particular; and Schön, W., "Gestaltungsmißbrauch im europäischen Steuerrecht", *Internationales Steuerrecht* (1996), Beihefter zu Heft 2, p. 4, regarding tax evasion. It is noteworthy that taxes can be avoided by either circumventing provisions that establish or increase a tax burden, or by seeking the application of a tax concession. Both categories are referred to as "tax avoidance" in this article; however, academic terminology is not uniform in this regard (see, e.g., Vogenauer, note 14, pp. 526 et seq., who distinguishes between "rule avoidance" and "rule appropriation" as the two possible categories of "abuse of law").

[17] Economists tend to define tax avoidance more broadly, and will normally use the notion of "aggressive tax planning" for the kind of arrangements discussed in this article, cf. Hanlon, M. and Heitzman, S., "A review of tax research", 50 *Journal of Accounting and Economics* (2010), p. 127 (at p. 137).

[18] Cf. Gammie, M., "The judicial approach to avoidance: some reflections on BMBF and SPI", in: Avery Jones, J.F. et al. (eds.), *Comparative Perspectives on Revenue Law* (Cambridge: Cambridge University Press, 2008), p. 25 (at p. 29) and the references cited there. See also, regarding tax avoidance in particular, Weisbach, D., "An Economic Analysis of Anti-Tax-Avoidance Doctrines", 4 *American Law and Economics Review* (2002), p. 88 (at p. 90).

[19] See infra in section 2.

[20] See, in this regard, also Opinion of AG *Léger* 2 May 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, paras. 88 et seq.; the country reports provided by de Monès, S. et al., "Abuse of tax law across Europe", 19 *EC Tax Review* (2010), pp. 85 et seq. (Part I) and pp. 123 et seq. (Part II); and Pistone, P., "Abuse of Law in the Context of Indirect Taxation: From (Before) Emsland Stärke 1 to Halifax (and Beyond)", in: de la Feria and Vogenauer (eds.), note 7, p. 381 (at p. 389). It is noteworthy, however, that such a view is alien to common law traditions, cf. Snell, J., "The Notion of and a General Test for Abuse of Rights: Some Normative Reflections",

Arguably, there is no need for a special provision such as Art. 15 (1) (a) MD in order to give Member States authorization to withhold the benefits of the Directive in cases of (attempted) tax evasion as defined here. Once the tax authorities have discovered all the relevant facts, it should normally be a straightforward exercise to apply the provisions of the Directive to these facts and, if applicable, conclude that the conditions for granting the benefits have actually not been met. It may only exceptionally be different if the taxpayer concealed parts of a tax avoidance scheme, but then again, Art. 15 (1) (a) MD is needed – if at all – only for the tax avoidance dimension. Therefore, this paper will only deal with tax avoidance as defined above.

The paper is organized as follows: The second section will examine the relationship between purposive construction and anti-avoidance rules or doctrines within the meaning of Art. 15 (1) (a) MD. It will furthermore also be dedicated to the related issue of delimitation of legitimate tax mitigation or tax arbitrage, on the one hand, and tax avoidance, on the other hand. These deliberations are necessarily general in nature, but apply in the context of the Merger Directive as well. The third section deals with the specific Union law principles that should have an impact on the interpretation of Art. 15 (1) (a) MD, in particular the presumed "general principle of prohibition of abuse of Union law". The fourth section analyses the tax avoidance concept of Art. 15 (1) (a) MD in more detail. Mirroring the Court's anti-avoidance doctrine and the wording of the provision, it elaborates upon both, objective and subjective criteria of tax avoidance within the context of the Merger Directive, including the concept of "valid commercial reasons" specifically referred to in Art. 15 (1) (a) MD. The limits of the substantive scope of Art. 15 (1) (a) MD are discussed in the fifth section. The subsequent sixth section is concerned with the transposition of this authorization of secondary Union law into the national tax systems of the Member States. A possible direct effect and a possible mandatory nature of Art. 15 (1) (a) MD will be discussed, as well questions of burden of proof and the admissibility of legal presumptions of tax avoidance. Finally, the seventh section concludes.

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in: de la Feria and Vogenauer (eds.), note 7, p. 219 (at pp. 220 et seq.); Venables, R., "Abuse of Rights in EC Law", *EC Tax Journal* (2002), p. 119 (at pp. 122 et seq.).

2. Legitimate tax arbitrage and purposive construction as possible alternatives

2.1. On the relevance of statutory purpose

One of the recurring themes of the Court's case law on the avoidance of VAT is the requirement that the allegedly abusive arrangement results in the accrual of a tax advantage "the grant of which would be *contrary to the purpose* of the [circumvented or "wrongfully" claimed] provisions" of the VAT Directive[21]. Similar language can be found in several judgments concerning the compatibility of national anti-abuse provisions with the fundamental freedoms[22]. Looking beyond tax law, this reflects an element of the first prong of the two-part abuse test developed in the landmark case *Emsland-Stärke*[23] and subsequently applied in a variety of cases. Considering the proclamation of a general principle of prohibition of abuse by the ECJ[24], this seemingly uniform criterion should also be relevant for assessing tax avoidance within the meaning of Art. 15 (1) (a) MD, in particular since the Court has made reference to its aforementioned jurisprudence in this context[25]. And even if such a "general principle" were to be rejected[26], the criterion of "purpose-adverse effects" must nevertheless be held to constitute a unifying theme that underlies all forms of abuse of

[21] ECJ, 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 74; ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 42; ECJ 22 December 2010, case C-103/09, Weald Leasing n.y.r.,para. 29; ECJ 22 December 2010, case C-277/09, RBS Deutschland, n.y.r., para. 49; emphasis added.

[22] Cf .ECJ 21 November 2002, case C-436/00, X and Y [2002] ECR I-10829, para. 42: Here, the Court stated that "the national courts may… take account… of abuse… on the part of the persons concerned in order… to deny them the benefit of the provisions of Community law on which they seek to rely, but they must nevertheless assess such conduct in the light of the objectives pursued by those provisions". Likewise ECJ 9 March 1999, case C-212/97, Centros [1999] ECR I-1459, para. 25; ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 42. This is convincing notwithstanding the fact that in case of a conflict of a national anti-abuse rule with fundamental freedoms, it is necessary to *also* take into account, at the justification level, the objectives pursued by national law, and a possible assessment of circumvention of national law, as will be discussed in detail in section 3. For further references, see Cerioni, L., "The "Abuse of Rights" in EU Company Law and EU Tax Law: A Re-reading of the ECJ Case Law and the Quest for a Unitary Notion", 21 *European Business Law Review* (2010), p. 783 (at pp. 785 et seq.); see also Communication from the Commission on the application of anti-abuse measures in the area of direct taxation, COM(2007) 785 final, 10 December 2007, p. 3.

[23] Cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 52; see also the preceding Opinion of AG *Alber* 16 May 2000, case C-110/99, Emsland Stärke [2000] ECR I-11569para. 69: "the yardstick for judging the lawfulness of individual import and export transactions is therefore the purpose of the rules in question". For a detailed analysis, see de Broe, note 7, pp. 755 et seq. and 771; Cerioni, note 22, pp. 787 et seq.; de la Feria, note 7, pp. 408 et seq.; Koutrakos, P., "The Emsland-Stärke Abuse of Law Test in the Law of Agriculture an Free Movement of Goods", in: de la Feria and Vogenauer (eds.), note 7, pp. 203 et seq.; Weber, D., "Abuse of Law – European Court of Justice, 14 December 2000, Case C-110/99, Emsland-Stärke", 31 *Legal Issues of Economic Integration* (2004), p. 43 (at pp. 50 et seq.).

[24] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38.

[25] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38.

[26] For further discussion, see infra in section 3.

(tax) law[27], considering the three guiding principles and objectives that legitimize and limit the essence of every anti-avoidance doctrine:

On the one hand, anti-avoidance provisions are or at least ought to be concerned with promoting tax equity, and more particular, equal application of the tax statutes[28]. The principle of equality, according to which similar situations should be treated (taxed) similarly[29], were impaired if a tax avoider could escape tax burdens that others in a similar situation must bear. The critical issue is, of course, when two situations can be considered similar before the law, since no two situations will ever be fully identical. As the ECJ itself has repeatedly and correctly held in the context of the equality principle, similarity will have to be established based on the objectives underlying the legislation or provision at issue[30]. Besides the tax equity aspect, anti-avoidance provisions obviously also serve to protect the revenue base[31]. But here, in a similar vein, the treasury can be entitled to revenue only to the extent which the legislator intended it to have.

On the other hand, anti-abuse rules or doctrines impair the principle of legal certainty, in so far as they lead to an application of the provision in dispute beyond its seemingly clear wording. This principle - that is also a general principle of Union law with quasi-constitutional rank[32] – is closely connected to the rule of law and must be adequately balanced

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[27] See, in this regard, also the Opinion of AG *Tizzano* 18 May 2004, case C-200/02, Zhu and Chen [2004] ECR I-9925, para. 114; Opinion of AG *Poiares Maduro* 7 May 2005, case C-255/02, Halifax [2006] ECR I-1609, paras. 68 et seq.; Amand, C., "Prohibition of Abusive Practices in European VAT: Court Aid to National Legislations Bugs?", 36 *Intertax* (2008), p. 189; Lenaerts, note 7, p. 1122; Schön, W., "Rechtsmissbrauch und Europäisches Steuerrecht", in: Kirchhof, P. (ed.), Festschrift für Wolfram Reiß zum 65. Geburtstag (Köln: Schmidt, 2008), p. 571 (at p. 576); Sørensen, note 7, p. 450; Tipke, K., *Die Steuerrechtsordnung*, Vol. III (Köln: Schmidt, 1993), p. 1331; Zalasiński, note 16, p. 159. See also Freedman, note 16, p. 54, and – with respect to the concept of tax avoidance in the New Zealand tax system – Trombitas, note 16, p. 355.

[28] Cf. Dourado, A.P., "A Single Principle of Abuse in European Union Law: A Methodological Approach to Rejecting a Different Concept of Abuse in Personal Taxation", in: de la Feria and Vogenauer (eds.), note 7, p. 469 (at p. 470); Ruiz Almendral, V., "Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?", 33 *Intertax* (2005), p. 562 (at p. 563); Tipke, note 27, pp. 1325 and 1330. See, in this regard, also Zimmer, F., "General Report", in: International Fiscal Association, *Form and substance in tax law*, CDFI Vol. LXXXVIIa (The Hague: Kluwer Law International, 2002), p. 19 (at p. 40): 'tax planning may be contrary to the principle of equality among taxpayers'.

[29] See, i.a., ECJ 10 April 2008, case C-309/06, Marks & Spencer [2008] ECR I-2283, para. 51; ECJ 16 December 2008, case C-127/07, Arcelor [2008] ECR I-9895, para. 23; settled case law.

[30] Cf. ECJ 27 October 1971, case 6/71, Rheinmühlen Düsseldorf [1971] ECR 823, para. 14, ECJ 19 October 1977, cases 117/76 and 16/77, Ruckdeschel [1977] ECR 1753, para. 8, ECJ 5 October 1994, case C-280/93, Germany / Council [1994] I-4973, para. 74; ECJ 10 March 1998, cases C-364/95 and C-365/95, T. Port [1998] ECR I-1023, para 83; ECJ 16 December 2008, case C-127/07, Arcelor [2008] ECR I-9895, para. 26.

[31] It should be noted that different from e.g. the 'step transaction doctrine' developed in the US case law – see, in this regard, McMahon, M., "Comparing the application of judicial interpretative doctrines to revenue statutes on opposite sides of the pond", in: Avery Jones, J.F. et al. (eds.), *Comparative Perspectives on Revenue Law* (Cambridge: Cambridge University Press, 2008), p. 40 (at p. 50) – the anti-avoidance provisions of secondary Union law will only be applied to the detriment of the taxpayer.

[32] See, e.g., ECJ 10 September 2009, case C-201/08, Plantanol [2009] ECR I-8343, para. 46; ECJ, case C-285/09, "R", n.y.r., para. 45; settled case law.

against the requirements of equal application of the law[33] and protection of the revenue base. Legal certainty must not be compromised to a degree that renders the application of the law unforeseeable. But the taxpayer can only reasonably foresee– at least as a real risk to be taken into account and priced into her transactions[34] – the denial of the tax advantage at issue (that should accrue to her based on a strict or literal construction of the statutory provision) if it can be inferred from the context of the provision that the granting of the desired advantage would contravene the purpose of the law[35].

All of the above aspects imply the relevance of both, the purpose (*ratio legis*) of the provision that is allegedly circumvented (or "wrongfully" claimed[36]), and the objectives underlying its broader regulatory context, for assessing tax avoidance. The legislative intent will have to be established by ordinary means of teleological interpretation[37], as accepted by courts and scholars – and sometimes also stated in statutory provisions – in the respective jurisdiction. In the case of secondary Union law, the ECJ has developed its own methodology, taking into account, in particular, the preamble, published legislative history, and the tax system as a whole into which the provision at issue is embedded[38]. Admittedly, it is not always a straightforward exercise to determine statutory purpose, but this is a general difficulty of modern legal methodology for which the taxpayer's advisors should have been trained, and which will ultimately be resolved on a case-by-case basis by the competent higher and supreme courts.

If it cannot be established that the attainment of a tax benefit, or the eschewal of a (higher) tax burden, run counter to the objective of the tax regime at issue, it can also not be assessed that the ensuing tax advantage is "wrongfully" obtained. Consequently, as will be examined in more detail below, Art. 15 (1) (a) MD should be understood as to permit denial or withdrawal of the benefits granted by the Merger Directive and the national legislation implementing it,

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[33] As regards the need to balance legal certainty and tax equity, see also Tiley, J., *Revenue Law*, 6th ed. (Portland: Hart, 2008), p. 110.

[34] As regards the relationship between risk and legal certainty in the context of anti-avoidance doctrines or standards, see Weisbach, D., "Formalism in the Tax Law", 66 *Chicago Law Review* (1999), p. 860 (at pp. 883 et seq.); Weisbach, note 18, p. 107.

[35] See also Lang, M. and Heidenbauer, S., "Wholly Artificial Arrangements", in: Hinnekens, L. (ed.), *A vision of taxes within and outside European borders: Liber Amicorum Frans Vanistendael* (Alphen aan den Rijn: Kluwer Law, 2008), p. 597 (at p. 609).

[36] Vogenauer, note 14, p. 526 refers to this phenomenon as "abusive rule appropriation".

[37] Cf. de Broe, note 7, p. 775.

[38] See, *pars pro toto*, Opinion of AG *Jääskinen* 20 May 2010, case C-582/08, Commission / United Kingdom, n.y.r., paras. 25 et seq.; Arnull, A., *The European Union and its Court of Justice*, 2nd ed. (Oxford: Oxford University Press, 2006), pp. 607 et seq.; Lasok, K.P.E. and Millet, T., *Judicial Control in the EU: procedures and principles* (Richmond: Richmond Law and Tax, 2004), pp. 661 et seq. As regards the relevance of legislative history in particular, see also ECJ 24 May 2011, case C-61/08, Commission / Greece, n.y.r., paras. 126 et seq.

by virtue of a general national anti-abuse rule or doctrine, only if and in so far as their concession would be contrary to the purpose of the allegedly abused provision.

2.2. On the precedence and inherent limits of "pure" purposive construction

The above deliberations show that a logical antecedent to applying an anti-abuse clause or doctrine within the meaning of Art. 15 (1) (a) MD consists in the purposive construction of the potentially abused or avoided provision. If and in so far as such a construction of the statute is sufficient to counter avoidance schemes that would contravene the purpose of the provision, there is no need to have recourse to the concept of abuse of law[39]. This nexus is particularly obvious in jurisdictions like the UK that do not have a general anti-avoidance doctrine and where courts therefore rely heavily on purposive construction to counter schemes not covered by targeted anti-avoidance rules[40].

This raises the question how the two approaches can be distinguished. Of course, one could wonder why it might be necessary at all to clarify the relationship between both concepts in the context of the Merger Directive which does provide for the possibility to counter avoidance schemes, if not by purposive construction, then based on a special authorization to do so. In the author's view, there are two general aspects and one added dimension related to the EU multi-level legal system that warrant such a discussion:

First, purposive construction of a provision should by definition not require an analysis of specific, extra-normative criteria to be met by the disputed arrangement, which cannot be inferred from the wording, context and teleology (objectives) of this provision. It is a method of interpretation concerned with the 'true', or most adequate, meaning of a statutory rule in order to characterize the facts of the case at hand in legally relevant terms; arguably, it is not a method concerned with establishing general standards for the legal assessment of complex transactions. This might be different in the case of anti-avoidance rules or doctrines, though,

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[39] Cf. ECJ 15 December 2005, case C-63/04, Centralan [2005] ECR I-11087, para. 81. See also Opinion of AG *Kokott* 17 March 2005, case C-63/04, Centralan [2005] ECR I-11087, para. 61; ECJ 8 February 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 42. See furthermore the Dutch jurisprudence on the application of the "*fraus legis*" concept, as cited by Ijzerman, R., "Country report Netherlands", in: International Fiscal Association, *Form and substance in tax law*, CDFI Vol. LXXXVIIa (The Hague: Kluwer Law International, 2002) , p. 451 (at p. 454); and by Pickup, D., "In Relation to General Anti-Avoidance Provisions: A Comparative Study of the Legal Frameworks Used by Different Countries to Protect their tax revenues", in: Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), p. 9 (at p. 20); see furthermore the German jurisprudence on the application of the GAAR stipulated in Sec. 42 Abgabenordnung (AO), cf. Bundesfinanzhof (BFH – Federal Fiscal Court), II R 92/91, 13 October 1993, *Bundessteuerblatt II* (1994), p. 128.

[40] Cf. Pickup, note 39, pp. 10 et seq.; Gammie, M., "Sham and reality: the taxation of composite transactions", *British Tax Review* (2006), pp. 294 et seq. (with further references in note 3); Tiley, J., "Barclays and Scottish Provident: avoidance and highest courts; less chaos but more uncertainty", *British Tax Review* (2005), pp. 273 et seq.; Prebble and Prebble, note 16, pp. 152 and 167.

as will be discussed in the following paragraphs. Second, there is a related aspect in that any rule or doctrine going beyond a mere interpretation of the specific provision at issue should have sufficient legal pedigree so as to comply with the constitutional requirements of legality and legal certainty[41]. The exact requirements will obviously vary depending on the relevant constitutional or – in case of the EU – quasi-constitutional framework[42]. Finally, the effect of purposive construction of a directive's provisions in the national legal systems of the Member States arguably varies from the effect of an authorization to counter avoidance based on special anti-avoidance rules or doctrines[43]: Purposive construction of a directive's provisions will have to inform the interpretation of the national rules transposing the benefits of the directive into the Member States' tax systems, pursuant to the established requirement to interpret harmonized national law consistent with the harmonizing secondary Union law[44]. By contrast, reliance on the authorization of Art. 15 (1) (a) MD might – and in the author's opinion, indeed does[45] – presuppose a sufficient legal basis in the national legal system, in addition to the transposition of Art. 1 to 14 MD.

Therefore, it is pertinent to discuss the question how exactly the line between purposive construction, on the one hand, and the application of an anti-abuse rule or doctrine within the meaning of Art. 15 (1) (a) MD, on the other hand, should be drawn.

A radical position advocated by some scholars and once also seemingly favoured by former Advocate Generals *Tesauro* and *Poiares Maduro* suggests that there is actually no conceptual difference, but instead "the notion of abuse operates as a *principle governing the interpretation of ... law*"[46]. This also seems to be the new mainstream approach in UK

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[41] See also, from a British viewpoint, Venables, note 20, p. 128.

[42] Within the institutional framework of the EU, it seems indeed defensible to accept judicial precedent as sufficient basis, considering the cumbersome lawmaking-process, cf. Faull, J., "'Prohibition of Abuse of Law': A New General Principle of EU Law", in: de la Feria and Vogenauer (eds.), note 7, p. 291; Snell, note 20, pp. 222 et seq. This may well be different in individual Member States, though.

[43] See also Dourado, note 28, p. 473.

[44] See, in this regard, the landmark ruling of the ECJ on 10 April 1984, case 14/83, Colson [1984] ECR 1891, para. 26; see furthermore ECJ 15 April 2008, case C-268/06, Impact [2008] ECR I-2483, para. 98, with further references; and as regards harmonized tax law in particular, ECJ 15 June 2000, case C-365/98, Brinkmann Tabakfabriken [2000] ECR I-4619, para. 40, with further references.

[45] See infra at 6.1.

[46] Cf. Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 69; in a similar vein, Opinion of AG *Tesauro* 4 February 1998, case C-367/96, Kefalas [1998] ECR I-2843, para. 25. Likewise Arnull, A., "What is a General Principle of EU Law?", in: de la Feria and Vogenauer (eds.), note 7, p. 7 (at p. 23); Bergmann, note 16, pp. 249 et seq.; Dourado, note 28, p. 470; Farmer, P., "Prohibition of Abuse of (European) Law: The Creation of a New General Principle of EC Law through Tax: A Response", in: de la Feria and Vogenauer (eds.), note 7, pp. 3 et seq.; Lang, M., "Cadbury Schweppes' Line of Case Law from the Member States' Perspective", in: de la Feria and Vogenauer (eds.), note 7, p. 435 (at p. 450); Lang, note 16, p. 228; Ruiz Almendral, note 28, p. 580. This opinion has also been endorsed by several German scholars, the most prominent being former Constitutional Court Justice Kirchhof, P., "Steuerumgehung und Auslegungsmethoden", *Steuer und Wirtschaft* (1983), pp. 173 et seq.; and former Supreme Tax Court Judge Fischer, note 14, § 42 AO, paras. 179 et seq. For further references, see de Monès et al., note 20, pp. 92 et seq.; Schön, W., "Statutory

jurisprudence regarding tax avoidance, which therefore considers the notion of abuse or avoidance to be legally irrelevant[47]; albeit arguably with stricter limits regarding the classification of avoidance schemes that lack 'economic substance' as contrary to statutory purpose[48]. The opposite extreme is adopted by the ECJ with respect to the tax advantages provided for in the Merger Directive, which, according to the Court, "apply without distinction to all mergers, divisions, transfers of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations"[49]. The ECJ thus declares its preference for a "technical" and rather literal interpretation of the Directive's concepts and provisions, whereas the effects and motives associated with the transaction should be addressed as a possible abuse of rights[50].

I would propose an intermediate concept. On the one hand, I do not agree that there is no – or that there should not be any – conceptual difference between purposive construction, on the one hand, and the application of an anti-avoidance rule or doctrine, on the other hand, in order

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Avoidance and Disclosure Rules in Germany", in: Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), p. 47 (at p. 48). See also, from a Canadian perspective, Arnold, B., "The Canadian Experience with a General Anti-Avoidance Rule", in Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), p. 29 (at p. 31). For a markedly different opinion, see Sørensen, K.E., "What is a General Principle of EU Law?: A Response", in: de la Feria and Vogenauer (eds.), note 7, pp. 25 et seq.

[47] Cf. UK House of Lords in the cases McNiven v Westmoreland Investments [2001] S.T.C. 237; Barclays Mercantile [2005] S.T.C. 1, at para. 33; Scottish Provident [2005] S.T.C. 15, at para. 19 ("wide practical meaning"…). See also the speech of Lord Walker of Gestingthorpe, in UK Supreme Court, case Tower MCashback [2011] 2 W.L.R. 1131, para. 43. For the approach prior to this series of rulings – endorsement of a specific anti-avoidance doctrine - see the speeches of their Lordships Fraser of Tullybelton, Bride of Harwich, and Brightman, in UK House of Lords, case Furniss v Dawson [1984] A.C. 474, at pp. 512, 517, and 527, respectively. See, in this regard, also Gammie, note 40, pp. 295 et seq.; Hoffmann, L., "Tax Avoidance", *British Tax Review* (2005), p. 197 (at p. 204); Simpson, E., "Is There a Role for a European Principle Prohibiting Abuse of Law in the Field of Personal Taxation?: A Comment", in: de la Feria and Vogenauer (eds.), note 7, p. 485 (at p. 489); Vella, J., "Departing from the Legal Substance of Transactions in the Corporate Field: The Ramsay Approach beyond the Tax Sphere", 7 *Journal of Corporate Law Studies* (2007), p. 243 (at p. 249); and also – with critical remarks – Freedman, note 16, pp. 55 et seq. Remarkably, this approach was also underlying the original decision of the London Tribunal Centre in *Halifax*, before the case reached the ECJ where AG Maduro endorsed this position, see Harris, P., "The Notion of Abus de Droit and Its Application in fiscal Matters within the EU Legal Order", *EC Tax Journal* (2001), pp. 187 et seq. Finally, see also Venables, note 20, p. 138, who argues that the seminal Emsland Stärke case (see supra at note 23) was decided by the ECJ based on purposive construction.

[48] See the speech of Lord Justice Mummery in the UK High Court case HMRC v David Mayes [2011] EWCA Civ 407, para. 78.

[49] ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para 36; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 30; ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para 41.

[50] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 36; and very outspoken in ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para 42: "By contrast, the reasons for the proposed transaction are important in the implementation of the option provided for in Article 11(1)" [now Art. 15 (1) MD]. For a similar approach under the VAT Directive, see ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 60; Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, paras. 40, 48, and 52, and the case-law cited there. See also Petrosovitch, note 4, p. 559; Daiber, C., "The ECJ's decision in A.T. v. Finanzamt Stuttgart-Körperschaftten", 49 *European Taxation* (2009), p. 364 (at p. 367).

to counter "abusive" schemes. Arguably, purposive construction does have inherent methodological limits[51]. As mentioned above, purposive construction arguably is not, or at least should not be, concerned with setting general standards of "substance over form" or "viewing the facts realistically" in so far as the criteria for such *fact-related* standards are not inherent to the *normative* concept and purpose of the provision to be applied. It therefore cannot be relied on to catch all forms of avoidance that should be caught in the light of the principle of equal treatment before the law, and that also may be caught notwithstanding the need to respect the principle of legal certainty. It therefore can be necessary for the legislator to enact anti-avoidance rules whose effect goes beyond what purposive construction arguably can achieve.

To substantiate, an anti-avoidance rule may be required for the sake of legal certainty and legality of taxation in order to tackle tax avoidance that is based on a series of preordained or preconceived transactions, that can be found to frustrate the purpose of the allegedly abused provision only if assessed as a whole with a view towards its ultimate economic outcome, rather than by assessing each individual transaction in isolation. The necessity for a distinct legal basis should be assumed at least when the legislator designed the provision at issue so as to link the imposition of the tax directly to specific acts, transactions, or events rather than to the final economic results of the taxpayer's arrangements. The legislator indeed often chooses to refer to specific legal concepts or certain activities in order to identify the typical causes of a particular economic outcome that in its view justifies taxation (or a tax concession), rather than to refer directly to that outcome itself[52], for the sake of legal clarity[53]. It is then usually neither feasible nor desirable that the legislator takes into account also all kinds of complex legal schemes that may lead to the same economic outcome[54]. In such a scenario, any

[51] See also Snell, note 20, p. 223.

[52] See also Freedman, J., "The Anatomy of Tax Avoidance Counteraction: Abuse of Law in a Tax Context at Member State and European Union Level", in: de la Feria and Vogenauer (eds.), note 7, p. 365 (at p. 372); Tipke, note 27, p. 1330; and see Zimmer, note 28, p. 42, with reference to the prevailing opinion in Austria and Switzerland.

[53] Such an approach therefore has its merits. Hence, the ensuing need for anti-avoidance rules or principles should not be dismissed as a breach of the rule of law, as suggested by Cooper, G., "The design and structure of general anti-tax avoidance regimes", 63 *Bulletin for International Taxation* (2009), pp. 26 et seq.; and by Snell, note 20, p. 230. For the reasons stated above, it is also too simplistic – although not entirely wrong, either – that "better drafting of tax statute" would make any kind of anti-avoidance rule or doctrine unnecessary, as stated by Brennan, P., "Why the ECJ should not follow Advocate General Maduro's opinion in Halifax", 83 *International VAT Monitor* (2005), p. 247. It is certainly true, though, that the legislator should strive to implement fundamental tax principles as consistently as possible to achieve a high degree of neutrality of taxation; moreover, popular tax avoidance schemes should be tackled by legal presumptions of avoidance to enhance legal certainty. See, in this regard, also infra at 6.3.

[54] Cf. Weisbach, note 34, pp. 861 et seq. See also McMahon, note 31, p. 73: 'To expect that the statute… could be crafted to foreclose abusive tax-motivated transactions with exacting specificity is to expect too much… most statutory provisions are designed to deal with common day-to-day business transactions.'

particular transaction or event that forms part of the more complex overall arrangement (sometimes also referred to as "composite transaction") does not, in itself, meet the requirements of a tax-imposing provision in dispute even when the latter is interpreted teleologically, i.e. construed purposively. But an overall approach that takes into account the ultimate economic results of the series of pre-arranged transactions, which might reveal that the taxpayer reached an economic outcome that should be taxed in the light of the purpose of the provision at issue, arguably needs a specific legal basis in form of an anti-avoidance rule or doctrine. Only the latter – rather than mere purposive construction – is apt to provide *general* criteria for determining whether it is admissible to assess a series of transactions or activities, possibly even involving different legal entities, as a whole or as one "composite transaction" in the light of the objectives of the circumvented norm[55].

An anti-abuse rule or doctrine will thus extend the analysis beyond the boundaries established not only by the wording of the norm at issue, but also by the legalistic approach underlying it[56], in so far as the latter consists in a "categorized" or "itemized" translation of its objectives into the letter of the law and is therefore prone to circumvention. But the same anti-avoidance approach may also be pertinent, albeit to a lesser extent, in case of provisions whose formulation is more oriented towards the economic outcome of certain transactions or events: While it may be feasible here to assess pre-*contracted* composite or complex transactions with a view towards their ultimate effects, general criteria that cannot be inferred through purposive construction alone are again needed in so far as the scheme at issue is merely pre-*ordained*, linking the individual steps in a legally non-binding fashion. A good example is the *Kofoed* judgment of the Court in which the latter held that "the concept of '[in exchange for a] cash payment' within the meaning of Article 2 (d) MD covers monetary payments having the characteristics of genuine consideration for the acquisition, namely payments agreed upon *in a binding manner* in addition to the allotment of securities representing the share capital of the acquiring company". By contrast, payments with a mere "temporal or other type of link to the acquisition" should be disregarded in the context of purposive construction[57].

All of the above also applies, by analogy, in the inverse situation of single transactions which, assessed in isolation, meet the formal requirements *and* the objective of a beneficial rule (e.g. a tax benefit), whereas an overall analysis of a broader scheme that they form part of reveals

[55] See, in a similar vein, Freedman, note 16, p. 57; Freedman, note 52, p. 376. See also Lang, J., in: Tipke, K. and Lang, J. (eds.), *Steuerrecht*, 20th ed. (Köln: Schmidt, 2010), § 5, para. 96. For a different opinion, see Gammie, note 40, pp. 297 et seq., and the consistent practice of the UK courts since the judgment of the House of Lords in the case McNiven v Westmoreland Investments, see the case law cited supra in note 47.
[56] See, in this regard, also ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 55.
[57] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, paras. 28 and 31.

that the objective of the legislation is frustrated[58]. This was, for example, the situation that the ECJ was confronted with in the *Emsland-Stärke* case that is widely and correctly cited as the case in which the foundations for the Court's present concept of abuse of law were laid[59]. Against the backdrop of the above deliberations, it is therefore not commendable to merge purposive construction of tax rules and the prevention of tax avoidance schemes relying on complex arrangements into one "general principle of interpretation", as has occasionally been suggested by former AG *Poiares Maduro*[60].

On the other hand, in so far as the *individual* transaction, operation, or activity to be assessed under a tax law provision lacks, *in itself*, the economic substance that is typically inherent to the legal concept to which this provision links legal consequences, and this typical economic substance is furthermore legally relevant in the light of the purpose and conception of the norm, the disputed transaction etc. can and should be excluded from the scope of application based on mere purposive construction[61]. In such a scenario, no general criteria to link a series of transactions are needed to allow for an adequate assessment of those facts that should be legally relevant to ensure tax equity and equality of taxation in the light of the provision's objective.

In the context of the Merger Directive, the ECJ has indeed adopted this approach once, although not outspokenly, in its judgment *Andersen og Jensen*[62]. In this case, the Court took into account economic reality when interpreting the term "independent business" within the meaning of Article 2 (d) MD, and has thus thwarted a scheme whereby the taxpayer tried to claim the benefits of the Directive for a transaction that was equivalent to a leveraged buy-

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[58] Cf. Opinion of AG *Kokott* 17 March 2005, case C-63/04, Centralan [2005] ECR I-11087, para. 61. See also Schön, note 27, p. 587.

[59] Cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569.

[60] Cf. Opinion of AG *Poiares Maduro* 21 June 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 17; and, in a similar vein, Opinion of AG *La Pergola* 16 July 1998, case C-212/97, Centros [1999] ECR I-1459, para. 20; in a similar vein, Kjellgren, note7, p. 192. The author's view is shared by AG *Mazàk*, cf. Opinion of 30 September 2010, case C-277/09, RBS Deutschland, n.y.r., paras. 28-31; and by Sørensen, note 7, p. 430. Furthermore, AG *Poiares Maduro*'s approach is inconsistent with the presumed need for a subjective element of the abuse analysis, i.e. of the intentions of the taxpayer, as correctly pointed out by the Advocate General himself, cf. Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 70; likewise Schammo, P., "Arbitrage and Abuse of Rights in the EC Legal System", 14 *European Law Journal* (2008), p. 351 (at p. 369); Snell, note 20, p. 227; Vogenauer, note 14, p. 559.

[61] See, in this regard, Opinion of AG Kokott 17 *March* 2005, case C-63/04, Centralan [2005] ECR I-11087, para. 61; Sørensen, note 7, pp. 427 et seq.; Schön, note 27, p. 587. It should be mentioned that in case of a *sham transaction* that is never put into effect contrary to what is pretended by the documents executed by the parties, the transaction should, in principle, be altogether ignored for tax purposes, without any need for discussion of the limits of purposive construction, cf. Vella, J., "Sham Transactions", *Lloyd's Maritime and Commercial Law Quarterly* (2008), p. 488 (at pp. 489 and 493 et seq.); Zimmer, note 28, pp. 29 et seq., with further references also to diverging practice in some countries. Such sham transactions can be observed, for example, in some instances of VAT carousel fraud where the "traded" goods are actually never supplied.

[62] ECJ 15 January 2002, case C-43/00, Andersen og Jensen [2002] ECR I-379.

out[63]. Besides, the ECJ has often proceeded as here suggested in the field of VAT, for instance when it had to interpret the term "place of business" for the purposes of Art. 1 (1) of the Thirtheenth VAT Directive. In this regard, the Court held that "a fictitious presence, such as that of a 'letter box' or 'brass plate' company, cannot be described as a place of business"[64]. The ECJ thus arrived at the same conclusion as in its *Cadbury Schweppes* judgment concerning the notion of "establishment of a company", but without any reference to the anti-abuse doctrine that it had – unnecessarily[65] – relied on in this latter context[66].

Contrary to the Court's rather literal approach in the great majority of cases involving allegedly abusive schemes under the Merger Directive[67], it is suggested here that the above approach of countering tax avoidance through mere purposive construction when the claim for the benefits of the Directive is based on transactions which *per se* lack the legally presupposed economic substance should be endorsed as a general approach. To give another example: If a shell company without any significant business assets that has been inactive for years is merged into an operational company so that the latter may benefit from a transfer of losses as provided for by Art. 6 MD[68], this operation should not qualify as a merger within the meaning of Art. 1 (a) MD eligible for the benefits of the Merger Directive. As the ECJ itself has stated, the objective of Directive 90/434 is to eliminate fiscal barriers to cross-border

[63] Cf. Terra and Wattel, note 4, p. 549.

[64] Cf. ECJ, 28 June 2007, case C-73/06, Planzer Luxembourg [2007] ECR I-5655, paras. 60 et seq., concerning the Thirteenth VAT Directive 86/560/EEC. For other examples of purposive interpretation that spared the Court the need to discuss the application of an anti-avoidance doctrine, see ECJ, 12 May 2005, case C-452/03, RAL [2005] ECR I-3947, in particular para. 33; ECJ 15 December 2005, case C-63/04, Centralan [2005] ECR I-11087, in particular para. 81; ECJ 21 February 2006, case C-419/02, BUPA Hospitals [2006] ECR I-1685; and comments by Swinkels, J., "Halifax day : abuse of law in European VAT", 17 *International VAT Monitor* (2006), p. 173 (at p. 176).

[65] See Lang, note 46, p. 435; Ghosh, J., "Cadbury Schweppes: Breach, Abuse Justification and Why They Are Different", in: de la Feria and Vogenauer (eds.), note 7, p. 459 (at pp. 464 et seq.); Lang and Heidenbauer, note 35, p. 607; Schammo, note 60, p. 365; Schön, W., "Hinzurechnungsbesteuerung und Europäisches Gemeinschaftsrecht", *Der Betrieb* (2001), p. 940 (at p. 942); Weber, D., *Tax Avoidance and the EC Treaty Freedoms* (The Hague: Kluwer Law International, 2005), p. 43. See also the Opinion of AG *Poiares Maduro* 21 June 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 18, who assumes that the Court was concerned with "the *genuine* exercise of the right to freedom of establishment" in its Cadbury Schweppes ruling (emphasis added). See, *in this regard*, also Cerioni, note 22, pp. 803 et seq. See also, by analogy, ECJ 6 November 2003, Case C-413/01, Ninni-Orasche [2003] ECR I-13187, para. 31: "any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope *ratione personae* of that Treaty because he satisfies the conditions for classification as a worker within the meaning of that article." In a similar vein, see ECJ, 21 June 1988, Case 39/86, Lair, para. 43. For a different opinion, see de Broe, L., "Some observations on the 2007 communication from the Commission: 'The application of anti–abuse measures in the area of direct taxation within the EU and in relation to third countries'", 17 *EC Tax Review* (2008), p. 142 (at p. 144).

[66] Cf. ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 68; remarkably, the Court nevertheless cites the conclusions it had drawn in Cadbury Schweppes to support its findings in Planzer Luxembourg, cf. ECJ 28 June 2007, case C-73/06, Planzer Luxembourg [2007] ECR I-5655 para. 62.

[67] See supra at note 49.

[68] The transfer of loss carry-forward is frequently the motive for the restructuring of inoperable business units; see, e.g., Canadian Supreme Court, case Mathew [2005] SCC 55.

restructuring of undertakings[69]. However, the aforementioned operation does not, in essence, constitute a cross-border restructuring of undertakings[70] that the Directive aims to facilitate in order to promote the internal market[71].

If a national court that applies domestic provisions implementing a directive were to address such a situation under a national anti-abuse clause rather than by purposive construction, the national law notion of abuse should indeed be considered, through the lens of Union law, to operate as a mere principle governing the interpretation of law, hence no additional criteria – and in particular no test of valid commercial reasons or intentions of abuse – should be made incumbent on the national court by the ECJ. As regards the Merger Directive in particular, the national anti-abuse clause should not have to meet the standards established in Art. 15 (1) (a) MD in such a case but rather, the result of its application should be regarded, from the vantage point of Union law, as being in line with a teleological interpretation of the Directive.

Admittedly, there will always remain grey areas of interpretation, where one could reasonably disagree as to whether mere purposive construction is still sufficient to counter the tax avoidance scheme at issue. In general, the principle of *legal certainty* calls for a restrained approach towards pure purposive construction in "hard cases", and preference should be given to an assessment under the relevant anti-avoidance rule or doctrine that provides for specific criteria to assess complex arrangements[72]. Of course, this implies that the (Union) legislator should not prevent the development of, and courts – the ECJ in particular – should not refuse to elaborate upon, clear doctrinal criteria of tax avoidance for the purposes of applying a statutory GAAR or a judge-made general anti-avoidance doctrine[73].

2.3. On the distinction between tax avoidance and tax mitigation

It is important to point out that not every tax advantage that possibly accrues to the taxpayer due to a complex scheme exploiting the gap between, on the one hand, the statutory rule, construed strictly, and, on the other hand, a consistent implementation of statutory purpose, can be denied based on tax avoidance allegations. It is furthermore necessary to distinguish

[69] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 32.
[70] Notably, this situation is different from the one discussed by the ECJ in ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para 42, regarding a restructuring involving a newly-created holding company, which does not therefore have any business, *as the receiving company;* such a restructuring may indeed make perfect commercial sense. The assessment may also be different if there are other advantages to the restructuring, such as e.g. a more efficient cost structure; this will probably be decided by the ECJ in the pending case C-126/10.
[71] As regards this objective of the Merger Directive, see the second recital in the preamble of the Merger Directive.
[72] See also Opinion of AG *Kokott* 8 February 2007, case C-321/05, Kofoed [2007] ECR I- 5795, paras. 48 et seq.
[73] See also the pointed remarks made by Trombitas, note 16, p. 387, in the context of the New Zealand GAAR.

tax avoidance from legitimate tax planning (also referred to as tax mitigation)[74]. This can also be derived from the principles that legitimize and limit the application of a general anti-avoidance doctrine or rule:

Equality *before* the law may be attained, through reliance on anti-avoidance provisions to be applied by the tax administration and the courts, only in so far as the principle of equality has not been deviated from or frustrated by the legislator itself. In so far as the latter has refrained from a consistent implementation of the objectives or tax policy principles underlying the tax regime at issue, or has otherwise created inequality in tax law, such inequality must not be remedied by judges or tax authorities. Equality *before* the law is thus not impaired by tax planning that exploits legislatively tolerated or wilfully created loopholes, rifts or options within the tax system, because the differently taxed situations have to be regarded as dissimilar in the light of the standards set by the legislator[75]. In a similar vein, judge-based rulemaking *contra legem* would hardly be foreseeable with reasonable certainty for the taxpayer.

This is different only in so far as the legislator has expressly provided for statutory authorization to thwart certain – usually the most egregious (e.g. "wholly artificial"[76]) – forms of tax-driven exploitation of loopholes, rifts, options, or of – sometimes necessarily[77] – arbitrary legal specifications or borderlines of certain tax concepts and principles. Strictly speaking, these kind of legislative patches are no longer *general* anti-avoidance rules, though, but rather *targeted* ones aiming at a particular type of scheme or arrangement. Obviously, they are not inhibited by the principles of equality and legal certainty, provided that the special authorization is, in itself, sufficiently clear.

Against this background, the following five categories of legitimate tax planning opportunities are particularly relevant:

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[74] As regards the distinction between these two mutually exclusive concepts, see also Tiley, note 33, p. 102.

[75] Instead, it is the law itself that may then violate the principle of tax equality and, more specifically, tax equity and tax fairness. However, such a deficit cannot be overcome by applying the law contrary to its conception, but only by way of a constitutional review procedure, in so far as the respective jurisdiction provides for such an instrument. See, in this regard, also the remarks made by Tiley, J., "The Avoidance Problem: Some UK Reflections", in: Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), p. 67 (at p. 73). Even if not constitutionally reinforced, any national legislator should consider it an utmost concern of tax policy to "focus on removing distortions from the tax system that make artificial behavior worthwhile", cf. Freedman, J., "Is tax avoidance 'fair'?", in: Wales, C. (ed.), *Fair Tax: toward a modern tax system* (London: The Smith Institute, 2008), p. 86 (at p. 89); see also Stiglitz, J., *Economics of the Public Sector*, 3rd ed. (New York: Norton, 2000), p. 690.

[76] For further discussion of this category of abusive schemes, see infra at 4.3.

[77] See Weisbach, note 34, p. 872: "No matter how nuanced a rule is, it will create a bright line between… two types of transactions."

(1) Lacuna consciously left or inserted in the tax legislation[78];

(2) exceptions construed as tax incentives that reward compliance with extra-fiscal policy objectives, in so far as the latter are also met "in substance"[79];

(3) inconsistencies within the system or special regime[80] that permit tax arbitrage[81];

(4) deliberately over-inclusive generalizations (usually for the sake of administrative simplicity and legal certainty) in the framing of certain categories or qualifications relevant for the imposition of a tax burden or the granting of tax benefits[82];

(5) options the only purpose of which is to allow the taxpayer to minimize its tax burden[83] (presumably in order to avoid disproportionate burdens).

In all of the above instances, government cannot legitimately claim that it needs to protect a revenue base which the legislator never intended it to have[84]. As the ECJ itself has repeatedly stated, a taxpayer cannot be censured for taking advantage of an option[85] or a lacuna in the legislation[86]. In general, a national anti-abuse rule or doctrine based on or covered by Art. 15

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[78] Cf. Tipke, note 27, p. 1329: "tax law vacuum". This is to be distinguished from inadvertent omissions from the tax base; see, in this regard, Weisbach, note 18, p. 93.

[79] Cf. Ruiz Almendral, note 28, p. 564. However, tax incentives only allow for legitimate tax planning opportunities in so far as the taxpayer's transactions or behavior genuinely accomplish, in economic substance, the extra-fiscal policy objective underlying the beneficial tax concession. See also the speech of *Lord Nolan* in UK House of Lords, case IRC v Willoughby [1997] STC 995, at para. 73: "The hall mark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability."

[80] Often, the legislator is aware of such inconsistencies when enacting statutory provisions, but accepts them because they are time-honored or because overcoming them is considered as technically too difficult; but sometimes, consistencies also arise due to a lack of guidance by and reflection of fundamental principles underlying the tax system. See, in this regard, also Freedman, note 75, p. 94; Freedman, note 16, p. 74; Gammie, note 40, p. 317. See also Tiley, J., "Judicial anti-avoidance doctrines: the US alternatives", *British Tax Review* (1987), p. 220 (at p. 234), regarding a situation of legal inconsistency: 'the choice of which of … two [alternative] routes to take is a matter for the taxpayer, an implied election which the system allows…'; and, in more general terms, Vogenauer, note 14, p. 534.

[81] As regards the notion of tax arbitrage to be distinguished from the concept of tax avoidance, see Schammo, note 60, p. 353; see also Stiglitz, note 75, pp. 682 et seq.

[82] See also Trombitas, note 16, p. 359: "If Parliament is very deliberate and it means what it (very specifically) says, then, at a conceptual level, there is no tax avoidance because the policy and the expression of that policy in the statute match."

[83] An example for this would be the option for taxpayers to have a normally VAT exempt supply taxed so as to be able to claim an input VAT deduction, cf. Art. 137 (1) of the Recast VAT Directive 2006/112/EC. See furthermore Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, paras. 85 and 88; Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., paras. 45 and 47; Weber, note 4, p. 65.

[84] Likewise Cerioni, note 22, p. 802.

[85] See also Bergmann, note 16, p. 255; Schön, W., "Abuse of Rights and European Tax Law", in: Avery Jones, J.F. et al. (eds.), *Comparative Perspectives on Revenue Law* (Cambridge: Cambridge University Press, 2008), p. 75 (at p. 94). This finding is limited, though, to options that the legislator intended the taxpayer to have, or at least implicitly approved him of having, with respect to the ultimate economic outcome aspired by the taxpayer, so that it must be concluded that the possibility for tax arbitrage was accepted by the legislator.

[86] Cf. ECJ 29 April 2004, case C-487/01 et al., Gemeente Leusden [2004] ECR I-5337, para. 79; ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 73; Amand, note 27, p. 189; de la Feria, note 7, p. 421; Schön, note 27, p. 592; Sørensen, note 7, p. 447; Vanistendael, F., "Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?", 15 *EC Tax Review* (2006), pp. 192 et seq. See also Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 85.

(1) (a) MD must therefore not be construed or applied in a way that would lead to such a result[87]. General anti-avoidance measures cannot be relied on in order to remedy the lack of a coherent policy rationale underlying the allegedly abused provision[88]. A caveat applies only in so far as Art. 15 (1) (a) MD can be understood as exceptionally and expressly authorizing Member States to withhold or withdraw the benefits of the Directive also with respect to certain schemes whereby the taxpayer seeks to 'excessively' benefit from inconsistencies etc. in the Merger Directive[89]. Arguably, this is the case – only – if the reorganizational operation at issue is not carried out for (any) valid commercial reasons, as will be discussed in greater detail below[90].

Hence, one essential step when relying on the general authorization to combat tax avoidance enshrined in the first part of Art. 15 (1) (a) MD – just as in case of the application of any general anti-avoidance rule or doctrine – consists in determining any explicit or implicit options, inconsistencies, lacuna, deliberate generalizations etc. that visibly compromise the attainment of certain tax policy principles or objectives underlying the specific benefit of the Directive at issue or, in so far as relevant, its conditions and qualifications. It must then be determined in the light of such an analysis whether it is admissible – considering the principles of equality and legal certainty that must inform the application of a general anti-avoidance rule or doctrine – to apply the disputed provision to the allegedly abusive "composite" transaction rather than at one of its constituent single transactions (i.e. at the final economic outcome desired by the taxpayer) on grounds that a similar economic outcome achieved through a more straightforward arrangement would be taxed – or would not be eligible for the tax benefit at issue – according to the text and the purpose of the disputed provision. If this cannot be established, because the Union legislator itself was visibly not concerned with tax equality or clearly willing to compromise it for certain reasons, a general anti-avoidance rule or doctrine such as the one enshrined in the first part of Art. 15 (1) (a) MD – and any national anti-avoidance clause or doctrine based on this provision – must not be relied on to counter a scheme that sails through the most 'tax-efficient' passage provided by the Directive[91]. The national legislator, and in the wake of its decisions national tax

[87] Likewise Lang, note 16, p. 228. For a more negative assessment of the possibility to distinguish between these situations and tax avoidance contrary to the purpose underlying the law, see Cooper, note 53, p. 29.
[88] See, in general terms, Freedman, note 16, p. 55; Gammie, note 18, p. 39: '… judicial intervention cannot supply a clear principle where none exists.'
[89] This is what Weisbach, note 34, p. 876, refers to – in more general terms – as the effect of anti-tax avoidance rules to "reduce arbitrage around the discontinuities".
[90] See infra at 4.3.
[91] See also see also Freedman, note 16, pp. 79 et seq.: "attempting to override a specific statutory purpose through the GAAR, that is gap-filling, … is not permitted"; likewise Trombitas, note 16, p. 358.

administrations and courts, may then only have recourse to the second part of Art. 15 (1) (a) MD to deny the benefits of the Directive, to the extent that such schemes are not carried out for (any) valid commercial reasons.

Some examples will be useful to illustrate the above deliberations. First, a very basic statement can be made based on the different legal options that any undertaking or group has with respect to company reorganizations: Usually, a restructuring can be carried out by way of a reorganizational operation covered by Art. 1 MD, or through a taxable transfer of individual assets and liabilities, possibly followed by a company liquidation. The mere fact that the taxpayer chooses the former option, whether for commercial reasons or so as to obtain a tax advantage, must not be held to constitute tax avoidance: The two alternatives were clearly visible as such to the Union legislator who nevertheless privileged (only) one of them[92]. For example, if a company served as a special purpose vehicle (SPV) in order to carry out a joint venture project of two firms, it could go into liquidation after the termination of the project and eventually distribute all of its assets and profits to its shareholders. However, the shareholding companies could also decide to carry out an upstream division of the SPV, which thereby transfers all of its assets and, indirectly, all of its profits to the shareholders. This division will have to be regarded as a commercially reasonable restructuring operation, provided that it involves the transfer of assets which are still useful for the continued business of the shareholders, and notwithstanding the fact that liquidation would have been an alternative. Therefore, the possible fact that the tax-neutral division avoids a dividend taxation – cf. Art. 4 (1), 7 (1) MD – that would otherwise have occurred had the profits been distributed in the course of a liquidation does not render the reorganization abusive.

Consider then the example of a company incorporated in Member State A that desires to change its legal form acquired under the company law of A into the legal form provided for by the company law of another Member State B. From the point of view of company law, such a reorganization might be possible: Some Member States do allow for an 'inbound' incorporation of an already existing foreign company by way of a change in legal form, and the ECJ has stated in an *obiter dictum* that the Member State where this company was previously established may then not obstruct such a trans-jurisdictional incorporation[93]. But it is as yet far from clear whether the ECJ would furthermore hold that the freedom of establishment also prevents the latter Member State of departure from levying an exit tax on

[92] This is not sufficiently taken into consideration by Petrosovitch, note 4, p. 562.
[93] Cf. ECJ, 16 December 2008, case C-210/06, Cartesio [2008] ECR I-9641, paras 111 et seq. For further details, see Szydło, M., "The right of companies to cross-border conversion under the TFEU Rules on Freedom of Establishment", 7 *European Company and Financial Law Review* (2010), pp. 414 et seq.

this occasion. The company could not rely on the Merger Directive, either, because the cross-border company conversion does not fall under the Directive's substantial scope as defined in Art. 1 MD. Arguably, this exclusion is inconsistent in that it fails to privilege a restructuring operation that may entail similar efficiency gains in the internal market as a merger and the other qualifying reorganizations, and different from these would not even interfere with the realization principle underlying the corporation tax systems of the Member States. Since there is no policy rationale discernible for the exclusion of cross-border conversions, it must not be qualified as tax avoidance within the meaning of Art. 15 MD if the company instead chooses to merge into a newly established company in the target Member State to attain the same economic effect as in case of a more straightforward trans-jurisdictional conversion. Finally, a similar reasoning would apply for a company incorporated under national company law that first converts into an SE before transferring its registered office to another Member State, in order to benefit from the benefits available (only) for SEs that realize such a transfer pursuant to Art. 12 et seq. MD.

3. The position of Art. 15 (1) (a) MD within the EU tax avoidance matrix

In the judgment handed down in 2007 in the *Kofoed* case, the ECJ declared that "Article 11 (1) (a) of Directive 90/434[94] reflects the general Community law principle that abuse of rights is prohibited."[95] In support of this far-reaching statement[96], the Court cited case-law in which it had dealt with presumably abusive behaviour in a variety of different scenarios within the ambit of EU law: both tax-related and non-tax-related cases, and moreover cases concerning the alleged abuse of regulations, of directives, and of the Treaty's fundamental freedoms, respectively[97]. The Court thereby has stated that the standard for assessing "abuse" of rights

[94] The predecessor version of Art. 15 (1) (a) of the current Merger Directive.

[95] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38. A similar "general principle" was already formulated in the Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 64; see, however, also the qualifications made in para. 83.

[96] A general principle of Community (now: "Union") law is regarded as having, at least potentially, a quasi-constitutional status of equal rank as primary Union law, cf. ECJ 15 October 2009, case C-101/08, Audiolux [2009] ECR I-9823, para. 63; ECJ 29 October 2009, case C-174/08, NCC Construction [2009] ECR I-10567, para. 42; Arnull, note 46, p. 12; de Broe, note 7, pp. 830 et seq.; Dougan, M., "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 (eds.), note 7, pp. 355 et seq.; Farmer, note 46, pp. 3 et seq.; de la Feria, note 7, p. 438; Lenaerts, K. and Van Nuffel, P., *European Union Law*, 3rd ed. (London: Sweet and Maxwell, 2011), at pp. 851 et seq.; Metzger, A., *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Tübingen: Mohr Siebeck, 2009), pp. 404 et seq.; Raitio, J., "The Principle of Legal Certainty as a General Principle of EU Law", in: Bernitz, U. and Nergelius, J. (eds.), *General Principles of EC Law in a Process of Development* (Alphen aan den Riijn: Kluwer Law International, 2000), p. 47 (at p. 48); Tridimas, T., *The General Principles of EU Law*, 2nd ed. (Oxford: Oxford University Press, 2006), p. 31.

[97] The Court cited the judgments ECJ 9 March 1999, case C-212/97, Centros [1999] ECR I-1459, para. 24 (freedom of extablishment and national company law); ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, paras. 68 and 69 (VAT directive); ECJ 6 April 2006, case C-456/04, Agip Petroli [2006] ECR I-

or benefits conferred by EU law would be a genuinely European one, and has furthermore implied that the relevant behaviour should be assessed on the basis of uniform criteria in all instances of possible abuse[98]. However, this position is met with considerable scepticism by some scholars who favour a more nuanced approach[99]. I admit that I am one of the sceptics, too[100]. In my view, it is necessary to distinguish between different types of abuse, and between different settings in which abuse can occur within the ambit of EU law:

A first fundamental distinction has to be drawn between abuse of *rights*, on the one hand, and abuse of *law*, on the other hand[101]. The former category, as understood for the purposes of this paper, is concerned with the excessive exercise of an individual right that causes harm to another person without good reason[102]. By contrast, abuse of law is associated with the circumvention of statutory or other legal provisions by a person who arranges his or other persons' affairs in a manner that technically avoids or mitigates the application of the provision at issue even though the arrangement ultimately yields the same substantive results as a more "adequate", "straightforward" or "direct" transaction or behaviour that is covered by the scope of the respective norm. A frequent variation of abuse of law are "artificial" or "complex" schemes that formally meet the requirements for certain benefits granted by virtue of statutory or other legal provisions, but ultimately fail to attain the underlying objectives of the respective provision and thus lack the substance that is legally presumed to justify their

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3395, paras. 19 and 20 (regulation on maritime cabotage); and ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 35 (freedom of establishment and national CFC legislation).

[98] This impression had already been conveyed before in the Cadbury Schweppes ruling of the ECJ (see supra note 97), cf. Lang and Heidenbauer, note 35, p. 600.

[99] Cf. Arnull, note 46, pp. 20 et seq.; Harris, note 47, p. 194; Lang and Heidenbauer, note 35, pp. 612 et seq.; Rousselle, O. and Liebman, H.M., "The doctrine of abuse of Community law: the sword of Damocles hanging over the head of EC corporate tax law?", 46 *European Taxation* (2006), pp. 559 et seq.; Simpson, note 47, p. 486. Some scholars are also in support of Court's proclamation of one "general principle of prohibition of abuse" or at least seemingly accept it as legitimate exercise of judicial law-making, cf. Bergmann, note 16, p. 250; de la Feria, note 7, pp. 436 et seq.; Lenaerts, note 7, p. 1139; Pistone, P., "The Need for Tax Clarity and the Application of the Acte Clair Doctrine to Direct Taxes", 35 *Intertax* (2007), p. 534 (at p. 535); Vogenauer, note 14, pp. 564 et seq.; Weber, note 23, p. 54. See also CFE, note 16, p. 35; Ernst & Young, note10, p. 19; and Vanistendael, note 86, p. 195, who advocated one single anti-avoidance rule based on identical criteria. For further references, see de Broe, note 7, p. 829.

[100] Cf. Englisch, J., "Verbot des Rechtsmissbrauchs – Ein allgemeiner Rechtsgrundsatz des Gemeinschaftsrechts", *Steuer und Wirtschaft* (2009), pp. 3 et seq.

[101] Cf. CFE, note 16, p. 35; Schammo, note 60, p. 355; Pistone, note 20, p. 381. See also de Broe, note 7, pp.752 et seq. For a different opinion, see Vogenauer, note 14, pp. 554 et seq.

[102] See, for example, ECJ 12 May 1998, case C-367/96, Kefalas [1998] ECR I-2843, para. 20, ECJ 23 March 2000, case C-373/97, Diamantis [2000], ECR I-1705, para. 33. See also the overview of the respective concepts of abuse of rights in Member State's private law systems provided by Lenaerts, note 7, p. 1127, who subsequently does not distinguish these concepts from the concept of abuse of law that dominates the Court's case-law, though. See furthermore Brown, N., "Is there a General Principle of Abuse of Rights in European Community Law?", in: Curtin, D. and Heukels, T. (eds.), *Institutional Dynamics of European Integration* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 511 (at p. 521); Voyame, J., Cottier, B. and Rocha, B., "Abuse of Right in Comparative Law", in: Aliprantis, N. (ed.), *Abuse of rights and equivalent concepts: the principle and its present day application* (Strasbourg: Council of Europe, 1990), pp. 23 et seq.

beneficial treatment. In the field of taxation, and regarding Art. 15 (1) (a) MD in particular, the relevant category is abuse of law, or, more precisely, tax avoidance by either circumventing the imposition of tax burdens[103] or "wrongfully"[104] obtaining tax benefits[105].

Second, within the category of abuse of law it is necessary, in a Union law context, to distinguish further between the abuse of harmonized law, on the one hand, and abuse in non-harmonized areas of law, on the other hand. In the latter scenario, the compatibility of autonomous national anti-avoidance rules with primary Union law will be at issue. As regards non-harmonized (primarily: direct) tax law in particular, the national anti-avoidance provisions will come under EU fundamental freedom scrutiny (only) if they discriminate against cross-border transactions or movement, as compared to purely internal situations[106]. A violation of the relevant free movement provision might then be ruled out for either one of the following two reasons, to be assessed subsequently[107]:

If, taking into account the allegedly abusive arrangement as a whole, the cross-border movement at issue does not constitute a genuine economic activity seeking to make use of the benefits of the internal market, it should not enjoy any protection under the fundamental freedoms. Consequently, the (discriminatory) national anti-abuse clause should then be considered to not constitute an infringement of primary Union law in the first place[108]. Such

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[103] See, in this regard, Opinion of AG *Léger* 2 May 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 88.

[104] Cf. ECJ 3 March 1993, case C-8/92, General Milk Products [1993] ECR I-779, para. 21; ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 51; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38.

[105] Cf. CFE, note 16, p. 35.

[106] In the field of direct taxation, the ECJ has (almost) consistently construed the fundamental freedoms as proscribing only a discrimination of cross-border market activities, rather than any form of restriction, cf. Barreiro Carril, M.C., "National Tax Sovereignty and EC Fundamental Freedoms: The Impact of Tax Obstacles on the Internal Market", 38 *Intertax* (2010), p. 105 (at p. 107); Cordewener, A., "The Prohibitions of Discriminations and Restrictions within the Framework of the Fully Integrated Internal Market", in: Vanistendael, F. (ed.), *EU Freedoms and Taxation* (Amsterdam: IBFD, 2006), p. 1 (at pp. 27 et seq.); Farmer, P., "The Court's case law on taxation: a castle built on shifting sands?", 12 *EC Tax Review* (2003), p. 75 (at pp. 80 et seq.); Lyal, R., "Non-discrimination and direct tax in Community law", 12 *EC Tax Review* (2003), p. 68 (at p. 74); Lang, M., "Recent Case Law of the ECJ in Direct Taxation: Trends, Tensions, and Contradictions", 18 *EC Tax Review* (2009), p. 98 (at p. 99); Schön, W., "Grundprobleme der Besteuerung und Rechnungslegung – Unternehmensbesteuerung und Europäisches Gemeinschaftsrecht", *Steuerberater-Jahrbuch* (2003/2004), p. 27 (at p. 31); O'Shea, T., "Freedom of establishment tax jurisprudence: Avoir Fiscal re–visited", 17 *EC Tax Review* (2008), p. 259 (at pp. 269 et seq.); van Thiel, S., "Direct Income Tax Case Law of the European Court of Justice: Past Trends and Future Developments", 62 *Tax Law Review* (2008/2009), p. 143 (at pp. 149 et seq.); Wattel, P.J., "Judicial Restraint and Three Trends in the ECJ's Direct Tax Case Law", 62 *Tax Law Review* (2008/2009), p. 205 (at pp. 208 et seq.); see also ECJ, 25 October 2007, Case C-240/06, Fortum Project Finance, para. 27; Graetz, M. and Warren, A., "Income Tax Discrimination and the Political and Economic Integration of Europe", 115 *The Yale Law Journal* (2005/2006), p. 1186 (at p. 1199); Hellerstein, W., Kofler, G. and Mason, R., "Constitutional Restraints on Corporate Tax Integration", 62 *Tax Law Review* (2008/2009), p. 1 (at pp. 24 et seq.).

[107] Cf. Schammo, note 60, pp. 358 and 363.

[108] Cf. de Broe, note 7, p. 808 (but see also the qualifications made at pp. 898 et seq.); Kiekebeld, B., "Anti-abuse in the Field of Taxation: Is There One Overall Concept?", 18 *EC Tax Review* (2009), p. 144 (at p. 145);

finding would arguably be one of an abuse of (primary) *Union law* as assessed under a *Union law doctrine* of prohibition of abuse, since it is abusive to invoke the protection of the fundamental freedoms in such a scenario; notwithstanding the fact that the *national* anti-avoidance norm that gives rise to the dispute is not aimed at preventing abuse of Union law, but rather of national (tax) law[109].

Otherwise, it still has to be examined whether this national anti-abuse rule can be justified by overriding reasons of safeguarding the national interest at stake – represented by the provision that is being circumvented or the benefits of which are being wrongfully sought – to be balanced against the internal market objective[110]. Here, the focus shifts as to whether the national anti-avoidance rule or doctrine is a proportional measure in order to protect legitimate national interests that are in threat of being undermined by the "free mover"[111]. It is thus not Union law – and the fundamental freedoms in particular – that is being abusively relied on. Instead, it is necessary to establish Union law limits for national anti-avoidance rules that specifically address cross-border transactions which are "genuine" from the vantage point of the relevant Union law provision, i.e. that do not frustrate the purpose of the fundamental freedom at issue (e.g. a "genuine" establishment in another Member State), but nevertheless constitute or imply an element of a scheme with respect to which the national legislator sees the potential for circumvention of its domestic (tax) law provisions. Unfortunately, the ECJ does not differentiate sufficiently between an abuse of a *prima facie* relevant fundamental freedom, on the one hand, and a justification of an infringement of a substantially impaired freedom right based on considerations of countering avoidance of

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Schön, W., "Der "Rechtsmissbrauch" im Europäischen Gesellschaftsrecht", in: Wank, R. (ed.), *Festschrift für Herbert Wiedemann zum 70. Geburtstag* (München: Beck, 2002), p. 1271 (at pp. 1291 et seq.); Terra and Wattel, note 4, p. 42; van Thiel, S., *Free movement of Persons and Income Tax Law* (Amsterdam: IBFD, 2002), p. 183. For diverging opinions on this issue, see also Freedman, note 52, p. 368.

[109] For a different opinion, see de la Feria, note 7, p. 429.

[110] Likewise Ghosh, note 65, pp. 464 et seq.; Schön, note 85, pp. 76 et seq.; van Thiel, note 108, p. 605. And for a seemingly different opinion, see Zalasiński, note 16, p. 161: "Those [U-turn] arrangements are not prohibited if the free movement right is genuinely exercised", who, however, unduly generalizes the peculiar situation of company law shopping. For similar reasoning, see also de Broe, note 7, pp. 789 et seq. and 828: "In the end, the ECJ accepts national anti-avoidance measures… provided that they prevent abuse of Community law not that they protect national tax systems or revenues. Member States that are dissatisfied with this outcome should harmonize their tax laws…". Apart from other objections related to achieving a fair balance between Union and national interests (cf. Englisch, J., *Wettbewerbsgleichheit im grenzüberschreitenden Handel* (Tübingen: Mohr Siebeck, 2008), pp. 340 et seq.), this reasoning suppresses the fact that usually some Member States – in particular low-tax jurisdictions or jurisdictions with special tax regimes – do *benefit* from tax jurisdiction shopping and therefore have no interest in tax law harmonization, and the latter requires unanimous agreement; see also Faulhaber, L.V., "Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance", 48 *Columbia Journal of Transnational Law* (2009/2010), p. 177 (at p. 219).

[111] See also Faulhaber, note 110, pp. 238 et seq.

national law, on the other hand[112]. Initially, the Court had even effectively ruled out the second step[113], and only subsequently did it refine its case law[114].

If the allegedly abusive arrangement affects taxes that are subject to fragmentary – rather than comprehensive – harmonization, the conflict of interests to be resolved proportionally by an anti-abuse rule or doctrine is modified due to the existence of secondary Union law. Admittedly, fragmentary harmonization of selected cross-border aspects of a certain field of law will often seek to overcome specific obstacles to the implementation of the internal market, as is particularly true for the three[115] corporate tax directives[116]. Hence, anti-abuse provisions aimed at protecting the broader – non-harmonized – national regulatory or fiscal objectives of the respective field of law will still be in potential conflict with the internal market objective[117]. Conceptually, there is thus often no difference as compared to an analysis of abuse of law in the context of a fundamental freedom scrutiny. And indeed, in so far as the anti-abuse rule or doctrine is relied on in order to assess whether the internal market objective is substantially impaired at all, because allegedly the scheme at issue ultimately lacks sufficient economic substance, the criteria and standard of review should be identical in both scenarios. However, in so far as the efficient allocation of resources within the internal market is *genuinely* affected, an adequate balance between the internal market objective and national avoidance concerns might have to be struck differently in the field of harmonized law: As a general rule, the application of an anti-abuse clause will here not result in discrimination but rather in a non-discriminatory restriction of cross-border movement. Arguably, the latter kind of interference tends to be of lesser severity, as implicitly acknowledged also in the Court's case-law[118].

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[112] Cf. ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, paras. 34 et seq. and 48 et seq. See also the critical comments made by van Thiel, note 108, p. 628. For a different approach – according to which the fundamental freedoms rather than merely national law are abused (only) if the structure of transactions is not based on "sound commercial motives" – see de Broe, note 7, pp. 811 and 827. This approach is in certain contradiction, though, with the acknowledgement that tax jurisdiction hopping does not, in itself, constitute an abuse of a fundamental freedom, cf. de Broe, note 7, pp. 805 et seq., 812 et seq. and 826.

[113] Cf. ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 65. This position is seemingly still endorsed by Vogenauer, note 14, pp. 530, 550 and 553 et seq. For a different interpretation of the Cadbury Schweppes decision ("exact overlap" between the analysis whether there was a genuine establishment covered by the substantive scope of the freedom of establishment, on the one hand, and the proportionality constraints of the justification analysis, on the other hand), see Farmer, note 46, p. 5.

[114] Cf. ECJ, 13 March 2007, case C-524/04, Thin Cap GL [2007] ECR I-2107, paras. 74 et seq.; ECJ 17 January 2008, case C-105/07, Lammers & Van Cleeff [2008] ECR I-173, paras. 28 et seq.; ECJ 21 January 2010, case C-311/08, SGI, n.y.r., paras. 65 et seq.

[115] The Merger Directive 2009/133/EC, the Parent-Subsidiary Directive 90/435/EEC, and the Interest and Royalties Directive 2003/49/EC.

[116] Cf. Rousselle and Liebman, note 99, p. 563; Schön, note 85, pp. 82 et seq.

[117] This aspect is also hinted at by Rousselle and Liebman, note 99, p. 563.

[118] See, for example, the non-discrimination qualification of the *Keck*-Doctrine established in the landmark ruling ECJ, 24 November 1993, Joined Cases C-267/91 and C-268/91, Keck and Mithouard [1993] ECR I-6097, para.

Moreover, in the area of harmonized law the assessment of avoidance will have to be carried out based on a doctrine or (targeted) rule of abuse of *Union* law[119]. In particular, this is also applicable when harmonization is carried out in the form of directives, where the directly relevant anti-abuse provisions will arguably still be those of national law: Different from the fundamental freedoms that unilaterally promote the internal market objective and therefore still need to be balanced against national interests of the Member States (in the justification analysis), secondary legislation typically reflects the outcome of a prior weighing and balancing of such potentially conflicting interests. Hence, while a deviation from the non-discrimination and market access standards inherent to the fundamental freedoms might eventually be justified, i.a. on grounds of the need to counter abusive schemes, Member States must strictly adhere to secondary Union law unless its provisions authorize a deviation, or are successfully challenged before the ECJ as incompatible with primary Union law. Therefore, Member States may rely on a national anti-avoidance rule or doctrine in the ambit of harmonized law only to the extent that the result of applying such a rule is compatible with the relevant secondary Union law. This will be the case to the extent that the Union law at issue is subject to explicit rules, or an unwritten doctrine, of prohibition of abuse of Union law that covers the legal consequences of applying the national rule or doctrine.

In principle, the above conclusions apply also if harmonization is meant to be comprehensive, as it can arguably be affirmed e.g. for the EU VAT legislation, or if it sets minimum standards to be complied with Union-wide, such as the EU excise legislation. However, in such a scenario the underlying conflict is frequently not one between the internal market objective and *national* policy objectives. Instead, the regulatory or fiscal concept and possibly also the resources of the *Union* legislator are at stake[120] and in danger of being undermined by an avoidance scheme, notwithstanding the acknowledgement that the respective regulation(s) or directive(s) may also serve national interests of the Member States. Consequently, there is no general need to protect Union law objectives, and the internal market objective in particular,

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16: "the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder … trade between Member States …, *so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States*" (emphasis added). In a similar vein, the "rule of reason" first established in "*Cassis-de-Dijon*" (ECJ 10 February 1979, Case 120/78, Rewe-Zentral [1979] ECR 649, para. 7) and subsequently refined in ECJ 30 November 1995, Case C-55/94, Gebhard [1995] ECR I-4165, para. 37, is generally formulated as follows: "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: *they must be applied in a non-discriminatory manner*; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it" (emphasis added).

[119] See also Harris, note 47, pp. 197 et seq.

[120] See, in this regard, also Cerioni, note 22, p. 803. For a possibly different opinion, see Lyons, T., "State Aid, Taxation and Abuse of Law", in: de la Feria and Vogenauer (eds.), note 7, p. 493 (at p. 497).

against an excessive application of national anti-abuse measures[121]; quite the contrary, measures intended to curb circumvention and illegitimate benefit seeking will most often tend to enhance those very Union law objectives[122]. The balancing exercise must then essentially focus on the principle of legal certainty, which will have to decisively inform the criteria that determine "abusive" arrangements to be disregarded for the purposes of applying the harmonized rules[123], whereas in the aforementioned scenarios of abuse of law characterized primarily by a (genuine) conflict with the internal market objective, legal certainty is only an *additional* aspect[124].

As shown by the above deliberations, the attribution of the avoidance scheme at issue to the relevant facet within the spectrum of "prohibition of abuse" under EU law should at least *tend* to have an impact on the extent to which it is admissible to transcend the letter and the legalistic concept of the norm under a general anti-avoidance rule or doctrine in order to counter such arrangements. It should also have at least a gradual impact on the admissibility of targeted anti-avoidance rules based on irrefutable presumptions. The Court's paradigm of one "general Union law principle of prohibition of abuse" therefore goes a step too far. While the jurisprudence of the Court is arguably based on one single *notion* of abuse of law[125], it may well be that different criteria should be considered as adequate, or alike criteria should be interpreted more or less strictly, in order to assess the admissibility of anti-avoidance rules under Union law in different scenarios[126].

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[121] Likewise de Broe, note 7, p. 793; Lang and Heidenbauer, note 35, p. 612.

[122] For similar reasoning, see Schön, note 85, p. 96. However, it goes a step too far to frame tax avoidance in this context as "an abuse of an Internal Market permitting fair competition" (cf. Lyons, note 120, p. 497, concerning the entitlement to an input VAT deduction). One should not reduce the objective of equal application of (harmonized) tax law within the internal market to the internal market objective itself. Admittedly, an internal market should ideally be characterized by a uniform legal framework for all market activities. However, the aforementioned reasoning distracts from the requirement to align comprehensive tax harmonization not only to internal market requirements, but also to specific principles of tax law design and drafting such as arguably, tax equity and / or principles of optimal taxation.

[123] See, in this regard, Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] I-1609, para. 84.

[124] See also Prebble and Prebble, note 16, p. 162, who refer to the need to balance national tax principles or tax policy objectives, on the one hand, and the internal market objective as enhanced by the EU fundamental freedoms, on the other hand, as "extra dimension" to be considered by Member States.

[125] Cf. Kiekebeld, note 108, pp. 144 et seq.; see also Freedman, note 52, p. 370; van Thiel, note 108, pp. 604 et seq.

[126] Likewise Kofler, G., "Steuergestaltung im Europäischen und Internationalen Recht", in: Hüttemann, R. (ed.), *Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht* (Köln: Schmidt, 2010), pp. 213 et seq.; Pistone, note 20, p. 388; Vanistendael, F., "Cadbury Schweppes and Abuse from an EU Tax Law Perspective", in: de la Feria and Vogenauer (eds.), note 7, p. 407 (at pp. 422 et seq.); and also Dourado, note 28, p. 469 ("one single principle of abuse of law…, [but] different guiding criteria") and p. 476. For a different opinion, see Lyal, R., "Cadbury Schweppes and Abuse: Comments", in: de la Feria and Vogenauer (eds.), note 7, p. 427 (at p. 434). This does not imply, though, that the same approach towards countering avoidance schemes could be held to constitute a rule of statutory interpretation in one context (e.g. VAT), whereas it would constitute a separate

This is underlined by the above finding that in non-harmonized areas of law, the Court may have to deal with the relevant national rule from two different perspectives: Abuse of (primary) Union law, on the one hand, and justification of national anti-avoidance rules which genuinely affect (primary) Union law, on the other hand. As explained above, there is also a need for differentiation, depending on the degree and objectives of harmonization, regarding the application of express anti-abuse provisions stipulated in secondary Union law. The same is true for the assessment of their compatibility with the fundamental rights and general principles enshrined in primary Union law, and for the development and application of an unwritten doctrine of prohibition of abuse of Union law by the ECJ in the context of EU legislation.

Against that background, one should not even assume that there is one monolithic doctrine of prohibition of abuse of *Union* law. Moreover, there is neither a need nor a justification for elevating anti-avoidance rules or doctrines addressed at combating the abuse of Union law to the level of a quasi-constitutional general principle[127] in its own right[128]. In reality, anti-avoidance provisions and doctrines of Union law merely reflect how a balance is to be struck, in different scenarios, between (genuine) general principles such as equal protection and treatment before the law, on the one hand, and legal certainty, on the other hand, in applying Union law. From the vantage point of legal theory, they should thus be regarded as rules rather than as principles.

Generally speaking and with caveat to review of the interests at stake in the individual case, one would expect that criteria for admissible anti-abuse rules targeted at or applied to situations of tax circumvention or "wrongful" claims of tax benefits should be tightened in the following ascending order: (1) activities that altogether lack genuine economic substance; (2) avoidance (other than type [1]) of comprehensively harmonized taxes; (3) tax avoidance through abuse (other than type [1]) of fragmentary EU tax legislation intended to overcome specific obstacles to the internal market beyond the non-discrimination standard of the fundamental freedoms; (4) avoidance countered by discriminatory anti-avoidance measures in the area of non-harmonized tax law.

Where is Art. 15 (1) (a) MD to be placed in this tax avoidance matrix? The Merger Directive establishes a harmonized tax system for cross-border mergers and other reorganizational

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doctrine in another context (e.g. fundamental freedoms). For a different opinion, see Freedman, note 52, pp. 369 and 377.

[127] See supra at note 96.

[128] Likewise Dougan, note 96, p.356. For a different opinion, see Sørensen, note 46, pp. 25 et seq.

operations that proscribes the imposition of otherwise non-harmonized direct taxes[129] on companies and their shareholders in connection with such a reorganization. The second recital in the preamble of the restated Merger Directive emphasizes that this is considered necessary in order to ensure the effective functioning of the internal market. Within this legislative framework, the anti-abuse clause laid down in what is now Art. 15 (1) (a) MD allows Member States to exceptionally deny the benefits of the Directive in order to protect their financial interests against tax avoidance[130]. Against this backdrop it is obvious that, in principle, Art. 15 (1) (a) MD is a "type 3" anti-avoidance provision. As a general rule, it should thus be construed rather strictly, but not necessarily as strict as the anti-avoidance doctrine in the field of non-harmonized direct taxes[131]. However, in so far as an operation that seems to fall under the scope of Art. 1 MD is "wholly artificial", because it ultimately lacks economic substance, the requirements for withholding or withdrawing the benefits of the directive under Art. 15 (1) (a) MD should be relaxed. This is indeed reflected in the design of the provision itself, since it explicitly allows for a presumption of tax avoidance in case of a lack of "valid commercial reasons" for the reorganizational operation.

4. The concept of tax avoidance under Art. 15 (1) (a) MD

With the above theoretical underpinnings, we can now have a closer look at the specific criteria that should be applied in order to establish a situation of tax avoidance within the meaning of Art. 15 (1) (a) MD. In this context, it has to be acknowledged that a concept of an operation that "has as one of its principal objectives tax avoidance" is not defined in Art. 15 (1) (a) MD[132]. The legislative history of the Merger Directive is also inconclusive, because the anti-avoidance clause had not been contemplated in the original Commission proposal of the draft Merger Directive that was submitted to the Council in 1969[133], nor in the amended

[129] See, in this regard, Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 52.
[130] Cf. Opinion of AG *Sharpston* 6 November 2008, case C-285/07, A.T. [2008] ECR I-9329, para. 42; Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 53.
[131] It should furthermore be noted that this does not necessarily imply that the criteria for assessing tax avoidance within the meaning of Art. 15 (1) (a) MD must not be construed less strict than the general anti-avoidance doctrine of the ECJ in the field of VAT as a comprehensively harmonized tax, in so far as this doctrine is, arguably, conceptually flawed, especially regarding the presumed need for a subjective test of the taxpayer's intentions. For further discussion, see infra at 4.2.
[132] For a different opinion, see Böing, C., *Steuerlicher Gestaltungsmissbrauch in Europa* (Hamburg: Kovac, 2006), pp. 233 et seq., who assumes that the second part of Art. 15 (1) (a) MD ["…the fact that the operation is not carried out for valid commercial reasons…"] operates as an (exhaustive) definition for tax avoidance. However, such a conclusion is clearly not covered by the wording of this provision ["may constitute *a* presumption"; emphasis added].
[133] Cf. Proposition de Directive concernant le régime fiscal commun applicable aux fusions, scissions et apports d'actif intervenant entre sociétés d'Etáts membres differents, COM(69) 5 final, of 15 January 1969.

proposal of 1980[134]. Since the provision deals with avoidance within the legal framework of harmonized tax benefits, it is clear, though, that the notion of tax avoidance has to be interpreted as an autonomous concept of Union law[135]; otherwise, the Member States could undermine the effectiveness of the Directive by denying its benefits through excessive reliance on domestic anti-avoidance doctrines or rules[136]. This position can now also be clearly inferred from the Court's case law[137].

The interpretation of Art. 15 (1) (a) MD will therefore have to be based on the legislative context of the Merger Directive and the conflicting principles underlying this anti-avoidance authorization and its constitutive elements, with due consideration to the fundamental aspects discussed in sections 2 and 3 of this paper. Moreover, the precedents developed in the Court's case-law with respect to abuse of Union law, both in the framework of Art. 15 (1) (a) MD and beyond, shall also be considered. For pragmatic reasons, the relevant case-law will indeed be the starting point of the following analysis, without prejudice to the need for critical reflection of the positions adopted by the ECJ.

4.1. The approach of the ECJ

So far, four ECJ cases have dealt with the authorization of Member States, by virtue of what is now Art. 15 (1) (a) MD, to deny the benefits of the Merger Directive in order to counter schemes that the national legislator or national tax administrations perceived as abusive[138]; at least one more case is currently pending[139]. Remarkably, the ECJ never formulated a definition or a comprehensive test of tax avoidance within the meaning of Art. 15 (1) (a) MD. Essentially, the Court most often confined itself to the statement that Art. 15 (1) (a) MD constitutes an exception for "specific cases"[140], and must therefore be subject to strict

[134] Cf. Proposal for a Council Directive on the common system of taxation applicable to mergers, divisions and contributions of assets occurring between companies of different Member States, COM(80) 203 final, of 29 April 1980. Weber, note 4, p. 63, states that the anti-avoidance provision was agreed upon in Council deliberations based upon a joint Dutch and German proposal.

[135] Likewise Weber, note 4, p. 64; Schön, note 16, pp. 6 et seq., with references also to the controversy in the debate of this issue in the early Nineties.

[136] Cf. Bergmann, note 16, p. 247; see also, by analogy, ECJ, 12 July 1988, joined cases 138/86 and 139/86, Direct Cosmetics [1988] ECR 3937, para. 20.

[137] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38: Art. 11 is regarded as a mere reflection of the "general Community law principle that abuse of rights is prohibited", which is a Union law doctrine; see also ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 46.

[138] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795; ECJ 11 December 2008, case C-285/07, A.T. [2008] ECR I-9329; ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r.,

[139] Case C-126/10.

[140] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 37; ECJ 11 December 2008, case C-285/07, A.T. [2008] ECR I-9329, para. 31; ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 45.

interpretation[141]. It was only in its *Kofoed* decision that the Court hinted at its understanding of the "abusive practices" addressed in this provision[142], but still without proper analysis of each constitutive element of the particular legal concept of tax avoidance stipulated in Art. 15 (1) (a) MD. Instead, the ECJ referred to the alleged "principle of prohibition of abuse of Community law" and specified that "transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law" must not benefit from an application of the latter[143]. The Court then referred to the case-law established in, inter alia, its judgments in the cases *Halifax*[144] and *Cadbury Schweppes*[145].

It is respectfully submitted that the Court's approach is not entirely convincing. First, it is questionable whether a strict interpretation of Art. 15 (1) (a) MD can be justified based on its seemingly exceptional character. By the same token, it could be argued that the Merger Directive introduces an exceptional (tax expenditure) regime into the general (corporate / capital gains) tax systems of the Member States and should therefore be construed restrictively, thus interpreting any of its qualifications and exceptions broadly. Apart from this objection, it should also be noted that pursuant to the fifth recital in the preamble of the Merger Directive, the common tax system established by the Directive aims at a balanced compromise between two main objectives: allowing for a tax neutral restructuring by way of certain intra-Union reorganizations, on the one hand, and safeguarding the financial interests of the Member States, on the other hand. It is obvious that the admission of national anti-abuse clauses or doctrines by Art. 15 (1) (a) MD serves to protect tax revenues[146] and thus one of the core objectives of the Directive[147]. It is therefore far from obvious that this provision should be interpreted strictly. If at all, such a conclusion can only be drawn based on the principle of legal certainty.

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[141] Cf. ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 46. Likewise Petrosovitch, note 4, p. 564.
[142] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38; see also *R. de la Feria*, CMLRev 2008, p. 395 (at p. 433).
[143] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38.
[144] ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609.
[145] ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995.
[146] Cf. Opinion of AG *Sharpston* 6 November 2008, case C-285/07, A.T. [2008] ECR I-9329, para. 42; Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 53; Cerioni, note 22, p. 803.
[147] The relevance of national revenue interests is thus made more explicit than in the context of the Parent-Subsidiary Directive, where it has been argued that the authorization of anti-avoidance measures provided for in Art. 1 (2) PSD should be construed strictly so as to ensure the implementation of the internal market objective underlying the benefits of that Directive, see Bergmann, note 16, pp. 256 et seq. Considering the ninth recital in the preamble of the Amending Directive 2003/123/EC, as well as the qualifications of Art. 3 PSD, that the financial interests of the Member States may be disregarded to a higher degree under the Parent-Subsidiary Directive.

Second, the ECJ should not have been content, in the context of the Merger Directive, with referring to its unwritten doctrine of "prohibition of abuse of Union law" and the relevant case law in which this doctrine or "principle" was developed and refined. The precedents to which the Court made reference in this regard were all concerned with areas of primary or secondary Union law – such as the freedom of establishment, or VAT – that do not provide, relative to the respective cases, for any specific provisions on abuse or avoidance. This is markedly different within the framework of the Merger Directive, though, where Art. 15 (1) (a) MD contains the most detailed provision on tax avoidance among all the tax directives of the Union. It is therefore plainly wrong to indicate that a national anti-abuse clause might only be acceptable, with respect to the benefits of the Merger Directive, if the allegedly abusive operation is carried out "solely", i.e. *exclusively* for the purpose of tax avoidance, even though Art. 15 (1) (a) MD explicitly states that it is sufficient to assess whether *one of its principal objectives* is tax avoidance[148]. Along the same lines, it would also be irrelevant to discuss the shifting sands of the Court's case law regarding the degree of predominance of tax avoidance motives required for an affirmation of abuse under the unwritten "general principle"[149]; the Directive indeed provides us with a less ambiguous answer[150].

It could be that the ECJ itself has now become aware of the shortcomings of its *Kofoed* ruling, since the recent *Zwijnenburg* judgment emphasizes that the provision of Art. 15 (1) (a) MD must be interpreted taking into account "its wording, purpose and context"[151]. This is also the approach to be followed in this paper, with the important addendum that the analysis should also be informed by the two underlying fundamental principles of Union law that any anti-avoidance rule has to balance: legal certainty, on the one hand, and equal application of the law, on the other hand[152]. As has furthermore already been elaborated upon above[153], the

[148] See also Dahlberg, M., *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (The Hague: Kluwer Law International, 2005), p. 242; Vanistendael, note 126, p. 421.
[149] See, in particular, ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, paras. 69 and 82 ("sole purpose"); ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I -897, paras. 42 et seq. ("essential aim / principal aim"); ECJ 8 November 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 42 ("sole aim"); ECJ 22 May 2008, case C-162/07, Ampliscientifica and Amplifin [2008] ECR I-4019, paras. 27 et seq. ("sole aim"); and the contorted language used in ECJ 22 December 2010, case C-277/09, RBS Deutschland, n.y.r., , para. 49: "… it is apparent from a number of objective factors that the *essential aim* of the transactions concerned is *solely* to obtain that tax advantage" (emphasis added). For further references, see also de Broe, note 7, pp. 773 et seq. and 827*;* Lang, note 16, p. 225; Petrosovitch, note 4, pp. 561 et seq. Lyal, note 126, p. 429, tries to point out that the problem is not one of conceptual confusion on part of the Court, but rather one of linguistic confusion in the translation procedure. However, it is respectfully submitted that even in the French version of the aforementioned judgements (the working language of the Court), it is quite clear that the Court's reasoning in several of its judgments is not consistent; see also Vogenauer, note 14, pp. 539 et seq.
[150] For a different opinion, see Petrosovitch, note 4, p. 562.
[151] ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., , para. 46.
[152] See supra at 2.1.
[153] See supra in section 3.

internal market objective underlying the Merger Directive suggests that it would be defendable, albeit not compelling, to construe the provision of Art. 15 (1) (a) MD less generously than an anti-avoidance doctrine in a VAT context, but possibly also less strictly than in the context of a fundamental freedom justification analysis. Its criteria could furthermore be relaxed if the disputed reorganizational operation lacks genuine economic substance. It will therefore also be necessary to distinguish between the latter kind and other manifestations of avoidance.

Finally, a harmonious or reconciliatory interpretation of Art. 15 (1) (a) MD and the general anti-abuse doctrine developed by the Court can only play a subordinate role. It must not be ignored that Art. 15 (1) (a) MD constitutes an explicit and specific statutory norm that should therefore inspire the case law on the unwritten "principle" of prohibition of abuse, rather than vice-versa[154]. Against the backdrop of significant inconsistencies in the Court's case law, in particular with respect to the presumed "subjective element" of abuse, it is therefore not necessarily true that Art. 15 (1) (a) MD is redundant[155]. In any event, reconciliatory interpretation should be rejected – at least from an academic perspective – in so far as the Court's unwritten concept of abuse or, more specifically, tax avoidance, is unconvincing in the light of more fundamental principles like the ones mentioned above.

4.2. An alternative approach

The alternative approach proposed here shall therefore take the wording of Art. 15 (1) (a) MD as a starting point. It is obvious that the provision requires national anti-abuse clauses or doctrines to include both, an objective test of potential tax avoidance, and a subjective test of the taxpayer's corresponding intentions which must constitute a principal motive for the operation in dispute. With some good will, this twofold structure can indeed also be inferred from the *Kofoed* judgment of the ECJ[156], as the Court made reference to case law where its established two part abuse test[157] was relied on. The crucial question is, of course, how to substantiate those two elements of tax avoidance in the context of Art. 15 (1) (a) MD.

4.2.1. The objective test of tax avoidance

As regards, first, the objective test, it can be regarded as a blend of teleological interpretation, on the one hand, and an assessment as to what extent a composite transaction rather than individual transactions may be tested against the purpose of the relevant provision, on the

[154] For a different opinion, see Sørensen, note 7, p. 437; and possibly also Petrosovitch, note 4, p. 559.
[155] For a different opinion, see Terra and Wattel, note 4, pp. 557 et seq.
[156] Cf. Petrosovitch, note 4, p. 560.
[157] Cf. Freedman, note 52, p. 367.

other hand. As has already been pointed out above, the interpretive aspect implies an analysis as to whether the concession of a tax deferral or other tax advantage to the operation in dispute would be contrary to the requirement of equal taxation in the light of the purpose of the provision or normative element that is being 'abused', taking into due account any legislatively tolerated limits or inconsistencies in the implementation of said purpose. In case of tax benefits such as those granted by the Merger Directive, this is equivalent to analyzing whether the tax benefit would be contrary to the objective of the relevant provision or its conditions and qualifications, considering any possible inconsistencies etc. that cannot be remedied by a general anti-avoidance rule or doctrine.

As has also been clarified, the accompanying 'economic substance' analysis will quintessentially have to determine in how far the aforementioned purpose-oriented legal assessment can be based on the ultimate economic effects of the transactions, operations, and other relevant activities that together form part of an overall arrangement[158]. In essence, the 'economic substance' analysis explores to what extent a composite transaction *may* be assessed in its entirety with a view towards the ultimate economic outcome, and the interpretive analysis is concerned with the question whether it *should* be assessed based on this final outcome due to its normative equivalence with similar situations that would not qualify for the tax advantage at issue. Both aspects are interrelated and will thus mutually inform each other's analysis.

As regards the analysis of the relevant purpose of the allegedly avoided tax burden or tax benefit qualification, the fundamentals have already been stated[159]. In the specific context of the Merger Directive, it is useful to moreover point out the need to distinguish between the objective of the Directive as such and the purpose of the qualifications and conditions for its respective benefits[160]. In general, it can be stated that the benefits of the Directive – tax neutrality of the categories of reorganization covered by Art. 1 MD – are meant to facilitate

[158] See also ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 52; ECJ 29 April 2004, cases C-487/01 et. al., Gemeente Leusden [2004] ECR I-5337, para 78; ECJ 21 July 2005, case C-515/03, Eichsfelder Schlachtbetrieb [2005] ECR I-7355, para. 39; ECJ 11 January 2007, case C-279/05, Vonk Dairy Products [2007] ECR I-239, para. 33"…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…" (emphasis added). See also the French understanding of "fraude à la loi" in taxation, as described by Leclercq, L., "Interacting principles: the French abuse of law concept and the EU notion of abusive practices", 61 *Bulletin for International Taxation* (2007), p. 235 (at p. 241). This concept of tax avoidance that is not captured by mere purposive construction is also underlying the New Zealand GAAR, as is evidenced by the deliberations of the majority in the New Zealand Supreme Court case Ben Nevis Forestry Ventures [2008] NZSC 115, at paras. 108-110; see also Pickup, note 39, p. 15. See also the articles that are forthcoming in the September, 2011, special edition of the New Zealand Journal of Taxation Law and Policy.

[159] See supra at 2.

[160] See also Bergmann, note 16, p. 255, and Kofler, note 126, p. 221, with respect to the anti-avoidance clause of Art. 1 (2) PSD.

cross-border restructuring and rationalization of business, as can be inferred from the examples given for "valid economic reasons" in Art. 15 (1) (a) MD. As evidenced by the second recital in the preamble, the Directive thereby pursues the objective to promote the internal market and its inherent goal of an efficient allocation of resources within the Union[161].

It seems therefore safe to conclude that a particular reorganization will not pass a tax avoidance test, regarding its objective element, when the operation at issue does not effectively contribute to an efficient allocation of resources within the internal market. This becomes relevant especially when the reorganization as such is considered to be 'abusive'. The analysis is less straightforward in so far as the purpose of qualifications, conditions and limitations of benefits stipulated in the Merger Directive is relevant, i.e. in situations where the allegation of tax avoidance is based on *their* presumed circumvention. It is thus not the lack of economic relevance of the reorganization itself, but its surrounding circumstances or concomitants that are considered to make the claim of a tax deferral abusive. Here, a case-by-case analysis in the light of the objectives underlying the qualification etc. is required; no general statements can be made in this regard.

What so far has not been discussed in detail are the criteria that permit to have a look at the "overall arrangement" or "composite transaction" for the purposes of applying Art. 15 (1) (a) MD[162]. The ECJ provides little guidance on this aspect and has so far only occasionally and vaguely referred to the relevance of a temporal dimension and of personal or economic relationships between the parties involved in an arrangement[163]. However, the requirements for assessing a series of transactions as a whole rather than based on its individual components can – and should – be derived from the fundamental principles that carry and limit the application of an anti-avoidance rule or doctrine: First and foremost, it must not be

[161] As can be inferred from Art. 120 TFEU, the achievement of the economic objectives of the Union, as defined in Article 3 TEU – among them the establishment of an internal market, pursuant to Art. 3 (3) TEU – is intrinsically linked to the principle of an open market economy with free competition, favouring an efficient allocation of resources.

[162] See also Zimmer, note 28, p. 46: 'The crucial question … is the conditions for regarding two or more transactions as integrated rather than separate'.

[163] Cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569 paras. 58 et seq.; ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 81; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 39, with reference to para. 59 of the related Opinion of AG *Kokott* 8 February 2007. The author does not share the view that this lack of guidance is to be viewed positive so as to allow for more flexibility in the application of the anti-avoidance doctrine; see also Freedman, note 52, p. 380. As regards academic discussion of this problem in the context of the New Zealand GAAR, see Keating, M. and Keating, K., "Tax Avoidance in New Zealand: The Camel's Back That Refuses to Break", 17 *New Zealnd Journal of Taxation Law and Policy* (2011), p. 115 (at pp. 134 et seq.) with further references. For the reasons to be discussed above, it is assumed that the principle of legal certainty requires to substantiate the Court's vague criteria, without thereby putting an effective application of the doctrine in jeopardy.

construed so broadly as to infringe the principle of legal certainty; the taxpayer must, in principle, be able to foresee the tax consequences of her actions at the time when these actions are being put into effect. However, a taxpayer can only be aware that a sequence of subsequent events may be deemed relevant, under an anti-avoidance rule or doctrine, for the imposition of a tax or for the concession of a tax advantage with respect to a particular transaction about to be realized, in so far as this taxpayer can be aware of the subsequent events themselves at that time.

Moreover, if the taxpayer were to consider the occurrence of such events to be a mere possibility, but does not intend to actively influence their occurrence, or if she intends to make a serious attempt to avoid the occurrence of such events should their manifestation otherwise be highly likely, it can usually not be established that the allegedly abusive operation contravenes the purpose of the norm at issue[164]. Instead, it will then have to be assumed that the taxpayer accepted or even desired as a possible final result of her initial operation the typical economic effects that according to the law's underlying purpose justify the tax advantage. As regards the internal market objective underlying the benefits of the Merger Directive in particular, it arguably seeks to extend the geographical choices available for an efficient business (re)organisation, and "the acknowledgement of these choices should not depend on the fact whether they are successful or not"[165].

Therefore, only those subsequent transactions and events that are *carried out*, *controlled*[166], *or embraced as highly likely*[167] *by the taxpayer or by somebody acting on her behalf*[168], *according to a preconceived (preordained) plan*[169] made by the time the merger (or another one of the operations referred to in Art. 1 MD) became legally binding, may be taken into account when assessing tax avoidance under Art. 15 (1) (a) MD. The existence of such a plan and the influence of the taxpayer regarding its realization will have to be determined based on available documentation or circumstantial evidence[170], or, in so far as admissible[171], based on legal presumptions. In this regard, a close temporal nexus between a series of transactions

[164] See, for example, ECJ 11 December 2003, case C-322/01, Doc Morris [2003] ECR I-14887, paras. 129 et seq.
[165] See Schön, note 85, p. 93.
[166] See, in this regard, also Weber, note 65, p. 192.
[167] See, in a similar vein, the decision of the UK House of Lords in the case Scottish Provident [2005] STC 15, at para 23; see also Gammie, note 40, p. 310.
[168] As regards the necessity to take into account also agents who master-mind and execute the scheme for the taxpayer (usually on a contractual basis), as well as initiators of tax-saving schemes to be sold to interested taxpayers, see Gammie, note 40, p. 308, with further references.
[169] See, in this regard, also Schön, note 108, p. 1286.
[170] See, in this regard, also Opinion of AG *Lenz* 16 June 1994, case C-23/93, TV10 [1994] ECR I-4795, paras. 61 and 65 et seq., who limited his remarks to legal persons, though, and does not expressly base his deliberations on the need for a preconceived plan.
[171] See infra at 4.3.

under scrutiny may also be indicative[172]. The US step transaction doctrine also provides for useful criteria that can be relied on to establish the existence of a preordained plan[173]. The approach suggested here is indeed also the approach that the ECJ has favoured in non-tax cases to determine the range of events to be considered for the assessment whether certain behaviour was abusive[174]. In particular, the Court has indicated to consider a preconceived plan of that kind as relevant also in the context of assessing tax avoidance within the meaning of Art. 15 (1) (a) MD[175].

4.2.2. The subjective test of tax avoidance

A national anti-avoidance rule or doctrine will only fulfil the conditions laid down in Art. 15 (1) (a) MD if it does not only rely on an objective assessment of tax avoidance, but also includes a subjective test related to the corresponding intentions of the taxpayer. More specifically, Art. 15 (1) (a) MD requires that tax avoidance must constitute "[the] principal objective or… one of [the] principal objectives" of the reorganizational operation at issue. This subjective element of Art. 15 (1) (a) MD as such is hardly surprising, considering that traditionally and also at the time of the adoption of the Merger Directive, almost all general anti-avoidance rules or doctrines to be found in the national tax systems of the Member States provided for some kind of motive test, as well[176]. It is also firmly established in the case law of the ECJ regarding the unwritten "principle of prohibition of abuse" ever since the landmark ruling *Emsland Stärke*[177], as applied with respect to both, abuse of primary[178] and secondary[179] Union law.

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[172] Cf. Opinion of AG *Kokott* 8 February 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 59; Fischer, note 14, § 42 AO, para. 162. Likewise the German Federal Tax Court; see, e.g., Bundesfinanzhof (BFH), I R 8/05, 14 March 2006, *Bundessteuerblatt II* (2007), p. 602.

[173] For further details, see McMahon, note 31, pp. 49 et seq.

[174] See, for example, ECJ 6 November 2003, case C-413/01, Ninni-Orasche [2003] ECR I-13187, paras. 45-47.

[175] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 39, with reference to para. 59 of the related Opinion of AG *Kokott* 8 February 2007.

[176] Cf. Uckmar, V., "General Report", in: International Fiscal Association, *Evasion Fiscal, Fraud Fiscal*, CDFI Vol. LXVIIIa (Deventer: Kluwer, 1983), p. 15 (at pp. 26 et seq.); Rädler, A., "General Report", *National and international tax consequences of demergers*, CDFI Vol. LXXIXb (Deventer: Kluwer, 1994), p. 553 (at p. 573). This has not changed since; see, in this regard, the country reports in Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), pp. 9 et seq.; de Monès et al., note 20; Prebble and Prebble, note 16, pp. 152 et seq.; Zimmer, note 28, p. 45. See also Böing, note 132, pp. 193 et seq.

[177] Cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 53*:* "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." See also Lenaerts, note 7, pp. 1135 et seq.

[178] See, for example, ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, paras. 51 and 55, ECJ 13 March 2007, case C-524/04, Thin Cap GL [2007] ECR I-2107, para. 74; ECJ 4 December 2008, case C-330/07, Jobra [2008] ECR I-9099, para. 35.

[179] See, for example, ECJ 29 April 2004, case C-487/01 et. al., Gemeente Leusden [2004] ECR I-5337, para 78; ECJ 21 July 2005, case C-515/03, Eichsfelder Schlachtbetrieb [2005], ECR I-7355, para. 39; ECJ 11 January 2007, case C-279/05, Vonk Dairy Products [2007] ECR I-239 para. 33; ECJ 21 February 2006, case C-255/02,

It is nevertheless suggested here that *de lege ferenda*, the subjective element should be abandoned[180]. Remarkably enough, the Court itself had once acknowledged in very general terms, albeit in the specific context of Community VAT legislation, the "inherently objective nature of tax avoidance; intention on the part of the taxpayer, which constitutes an essential element of evasion, is not required as a condition for the existence of avoidance."[181] The ECJ then added that "the system of value-added tax is concerned principally with objective effects, whatever the intentions of the taxable person may be"[182]; which is indeed what the Court has also repeatedly stated with respect to the Merger Directive[183]. In his groundbreaking Opinion on the *Halifax* case, Advocate General *Poiares Maduro* also argued that "it is consideration of the objective purpose of the Community rules and of the activities carried out, and not the subjective intentions of individuals, which… lies at the heart of the Community law doctrine of abuse."[184]

There is very little to add to these insights of earlier jurisprudence; it is just worth stressing three main points: First, the consequence of applying an anti-avoidance rule – as envisaged by Art. 15 (1) (a) MD – is not a sanction or punishment as it would normally be imposed in case of fraudulent tax evasion[185], which usually requires evidence of *malafide* behaviour or *mens*

Halifax [2006] ECR I-1609, para. 75; ECJ 8 November 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 45; ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 42, ECJ 22 December 2010, case C-103/09, Weald Leasing, n.y.r., para. 30; ECJ 22 December 2010, case C-277/09, RBS Deutschland, n.y.r., para. 49.

[180] Likewise Lang, M., "Rechtsmissbrauch und Gemeinschaftsrecht im Lichte von Halifax und Cadbury Schweppes", *Steuer und Wirtschaft International* (2006), p. 273 (at p. 276); Ruiz Almendral, note 28, p. 567; and – regarding harmonized indirect taxes – Böing, note 132, pp. 219 et seq. For a different opinion, see de Broe, note 65, pp. 142 et seq.; Schammo, note 60, p. 356; Schön, note 46, p. 50; Schön, note 85, p. 98; O'Shea, note7, p. 114; Weber, note 23, p. 52; Weisbach, note 34, pp. 880 et seq. A sceptical position is adopted by Sørensen, note 7, pp. 456 et seq.

[181] Cf. ECJ 12 July 1988, case C-138/86 et. al., Direct Cosmetics [1988] ECR I-3937, para. 22.

[182] Cf. ECJ 12 July 1988, case C-138/86 et. al., Direct Cosmetics [1988] ECR I-3937, para. 23.

[183] See the references cited supra at note 49.

[184] Cf. Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 71; likewise Communication from the Commission on the application of anti-abuse measures in the area of direct taxation, COM(2007) 785 final, 10 December 2007, p. 4. To the author, it is therefore not quite conceivable why the Advocate General (and also the Commission, op. cit., at p. 5) nevertheless found it necessary, in paras. 87 and 89, to exclude from the scope of an anti-avoidance principle – as quintessential criterion detailing the "subjective element" of abuse – "activities which clearly deserve protection… [because they have] *some* economic justification [and are]… *at least to some extent*, accounted for by ordinary business aims" (emphasis added). Not any kind of marginal economic substance of the transactions at issue should matter, but instead only the economic substance that is relevant in the light of the objective purpose of the allegedly abused Union law rule; see also Gammie, note 40, p. 304. Arguably, as shall be discussed in the following, the principle of legal certainty cannot be invoked to support the position of the Advocate General, either. To put it differently: What should matter is the *objective purpose of the* allegedly abused *rule* and the *objective effect of the* disputed *arrangement*, the latter assessed in the light of the former and in so far as it was foreseeable and controlled by the taxpayer or his agent.

[185] This has also been stressed by the ECJ itself, cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 56: "… the obligation to repay refunds received in the event that the two constituent elements of an abuse are established… is not a penalty…, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the Community rules were created artificially, thereby

rea[186]. Rather, it consists in the equal application of the (purpose of) ordinary tax law, which should not depend on the taxpayer's attitude towards the relevant tax law provisions[187]. Second, a subjective test can also not be defended on grounds of legal certainty and protection of legitimate expectations[188]. The taxpayer is already sufficiently protected against an unexpected application of the law when an application of the anti-avoidance rule may only be based on transactions and events that form part of a preconceived plan whose execution was controlled by the taxpayer[189]. This was also implicitly acknowledged in the *Halifax* ruling of the Court[190]. Admittedly, the "interpretive element" inherent to the application of an anti-avoidance rule or doctrine may also – seemingly[191] – impair legal certainty because it relies on purposive rather than literal construction of the law. However, this does not justify a limitation of the personal scope of anti-avoidance rules or doctrines to "abusers" who are (primarily) *intent* on circumventing or wrongfully claiming legal consequences. Were it otherwise, then the same restriction would have to apply to purposive construction in general. Finally, "subjective criteria and thus in particular the aim of those concerned may readily be

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rendering the refunds granted undue payments…" See also ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 93. For a more nuanced approach that distinguishes between "obvious" tax avoidance and not so obvious avoidance, see Gutmann, D., "Towards a 'criminalization' of tax law: the French approach", 51 *European Taxation* (2011), p. 271 (at p. 273). A similar distinction is underlying the New Zealand system of "abusive tax position penalties"; see Griffiths, S., "The 'Abusive Tax Position' in the Tax Administration Act 1994: An Unstable Standard for a 'Penal' Provision?", 15 *New Zealand Journal of Taxation Law and Policy* (2009), pp. 159 et seq., and see also Keating and Keating, note 163, pp. 132 et seq. Even if one were to adopt such a position – which in the author's view one should not as long as the tax authorities are provided with all the relevant facts to assess the "obvious" scheme in the light of the relevant anti-avoidance rule or doctrine – a subjective element should then, arguably, only be required for the possible criminal law consequences of the avoidance scheme, but not for its rejection for the purposes of determining the tax liability.

[186] See Bergmann, note 16, p. 248. It should be noted that although Art. 15 (1) (a) MD provides no legal basis for administrative sanctions, it is arguably also without prejudice to national measures to that effect, because the aggravation of the risk that a taxpayer takes when having resort to abusive schemes is, by definition, not contrary to the internal market objective of the merger directive. There is such no rationale inherent to the Directive that the taxpayer could claim to be shielded from administrative sanctions. For a different opinion regarding Union law anti-abuse doctrine in general, see Terra and Wattel, note 4, p. 758. For further – but ultimately inconclusive – discussion, see Petrosovitch, note 4, pp. 565 et seq.

[187] Likewise Lang and Heidenbauer, note 35, p. 608. See also Freedman, note 52, p. 374.

[188] For a different opinion, see Weber, D., "Abuse of Law in the Context of Indirect Taxation: Why We Need the Subjective Intention Test, When is Combating Abuse an Obligation and Other Comments", in:de la Feria and Vogenauer (eds.), note 7, p. 395 (at pp. 398 et seq.); and possibly also Vogenauer, note 14, p. 546.

[189] Likewise seemingly Sørensen, note 7, p. 457.

[190] Cf. ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 81. The Court observed that "as regards the second element [of the abuse test], whereby the transactions concerned must essentially seek to obtain a tax advantage, … the national court … may take account of … the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden." This reasoning was confirmed in ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 62. See also the similar line of reasoning in ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 53. However, such links will actually support the finding that the taxpayer based her operations on a preconceived plan and controlled all of its pertinent elements.

[191] See, however, the important qualifications made by Lang and Heidenbauer, note 35, p. 609, regarding the frequent ambiguity of the wording of legal provisions. This is especially true concerning the outer boundaries of normative concepts whose semantic core may be quite clear; see Hart, H.L.A., *The Concept of Law*, 2nd Edition (Oxford: Clarendon Press, 1997), pp. 126 et seq.

subject to manipulation"[192]; a well-advised taxpayer will usually be able to demonstrate that a tax avoidance operation was also carried out for some additional, non-fiscal reasons[193]. At the very least, subjective criteria will often provoke litigation.

Notwithstanding the above, it has to be accepted *de lege lata* that Art. 15 (1) (a) MD requires that Member State's anti-abuse legislation or unwritten anti-abuse doctrines provide for an additional subjective test of intentions of tax avoidance[194]. However, in the light of the fundamental objections against this test, this requirement must be interpreted generously, especially when determining whether the intention to avoid taxes, once established, is "one of the principal objectives" of the operation in dispute. This should be affirmed, beyond the legal presumption in case of a lack of valid commercial reasons to be discussed below, when it can be shown that the desire to obtain the tax deferral granted by the Directive (and the national law transposing it) played a significant – but not necessarily an "essential"[195] – role in the deliberations of the taxpayer and her advisors when organizing the restructuring. By contrast, it is not a feasible approach to have tax authorities "weigh" the relative importance of fiscal motives and commercial reasons[196].

Indeed, the Court itself has already had resort to broad interpretation of similarly vague language when this was required in order to reach conformity with fundamental principles underlying the respective tax regime[197] – in the context of Art. 15 (1) (a) MD, the principle of equal tax consequences in substantially equal situations. Moreover, the Court has also held with respect to the application of the "general principle" of prohibition of abuse that "the possible existence… of economic objectives arising from, for example, marketing, organisation or guarantee considerations" do not hinder a finding that the accrual of a tax advantage constitutes "*the* principal aim" pursued by the transaction at issue[198]; this should then be even more true within the framework of Art. 15 (1) (a) MD, since this provision

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[192] Cf. Opinion of AG *Geelhoed* 27 February 2003, case C-109/01, Akrich [2003] ECR I-9607, para. 174, in a plea for a strictly objective test of abuse of law; likewise Freedman, note 16, p. 82.

[193] See also Cooper, note 53, p. 30; Freedman, note 52, p. 375; Lang, note 16, p. 225; Pickup, note 39, p. 14. For a seemingly different opinion, see Weber, note 23, p. 52, who argues that an assessment of "objective intentions" could overcome this problem.

[194] See also Bergmann, note 16, p. 258.

[195] This is demanded, however, by Cerioni, note 22, pp. 805 et seq. See also Terra and Wattel, note 4, p. 556, who hold the view that "if genuine (non-incidental) business reasons are present, there is no abuse to be found…" For a similar opinion, see furthermore de Broe, note 7, pp. 765 et seq.; Claes, S. and van Gils, N., "(Further) Implementation of the EU Merger Directive in Belgian Domestic Tax Legislation Opens New Opportunities for Tax Neutral Cross-Border Corporate Reorganizations", 37 *Intertax* (2009), p. 553 (at p. 558).

[196] Likewise Claes and van Gils, note 195, p. 558. For a possibly contrary viewpoint, see Tailby, C., "Some reflections on tax avoidance", *Private Client Business* (2011), p. 43 (at p. 44): "… it should be the commercial dog which wags the tax tail. If it is the other way round, then we may be heading into the area of tax avoidance."

[197] Cf. ECJ, 16 September 2008, case C-288/07, Isle of Wight [2008] ECR I-7203, paras. 72 et seq., regarding the treatment of public sector entities as taxable persons for the purposes of VAT.

[198] Cf. ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 62; emphasis added.

merely presupposes that tax avoidance is "one of the principal objectives" of the reorganizational operation.

Contrary to the stricter – indeed ill-founded – notion of abuse established in some other judgments of the ECJ[199] in the context of the unwritten "general principle of prohibition of abuse", tax avoidance within the meaning of the first (general) part of Art. 15 (1) (a) MD therefore cannot be ruled out merely because the reorganizational operation "may have some explanation other than the mere attainment of tax advantages"[200]. This is already suggested by the wording of Art. 15 (1) (a) MD, which does not require tax avoidance to be "the" sole or principal motive for the transaction. Instead, this aspect can become relevant only under the presumption for tax avoidance stipulated in the second part of Art. 15 (1) (a) MD regarding transactions that lack any valid commercial reasons.

Within the conceptual framework set up above, the possible intentions and deliberations of the taxpayer will have to be determined based on documentary or circumstantial evidence. As the ECJ has repeatedly phrased it, the tax avoidance objective "must be apparent from a number of objective factors"[201]. This requires either legal presumptions[202] or a comprehensive analysis of all the relevant circumstances of the individual case at hand.

4.3. Lack of valid commercial reasons / "artificiality" of the operation

Pursuant to the second part of Art. 15 (1) (a) MD, Member States may design and apply their national anti-avoidance rules or doctrines based on the presumption that a reorganizational operation has tax avoidance as its principal objective or as one of its principal objectives (so that the benefits of the Directive may be denied) if "the operation is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation". In a similar vein, the ECJ considered – albeit with inappropriate reference to the presumed "general principle of prohibition of abuse"[203] – that the benefits of the Merger Directive are potentially abused when transactions are carried out

[199] Cf. ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609 para. 75; ECJ 22 December 2010, case C-103/09, Weald Leasing n.y.r., para. 30. See also Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 89, where this doctrine was seemingly established.

[200] For a critical appraisal of such reasoning, see also Petrosovitch, note 4, p. 563; Ruiz Almendral, note 28, p. 577. By contrast, it is considered to be adequate by de Broe, note 7, p. 775.

[201] Cf. ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609; ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897 para. 42; ECJ 22 December 2010, case C-103/09, Weald Leasing n.y.r., para. 30; ECJ 22 December 2010, case C-277/09, RBS Deutschland, n.y.r., , para. 49

[202] See, however, infra at 5.3.

[203] As regards the criterion of „lack of normal commercial operations" within this context, see ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 51; ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, para. 69 with further references; ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38; ECJ 8 November 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 41.

"not in the context of normal commercial operations"[204]. Essentially, two questions arise in this regard: First, under which circumstances can a complete lack of valid ("normal") commercial reasons be assumed? And second, does this presumption that addresses a specific – extreme – form of tax avoidance operate only within the inherent limits of a general anti-avoidance rule[205] such as the one formulated in the first part of Art. 15 (1) (a) MD, or does it go beyond?

As regards the first question, one may find inspiration in some rulings of the ECJ on avoidance that are not directly related to the Merger Directive. The ECJ has occasionally had recourse to the notion of "wholly artificial arrangements which do not reflect economic reality" in order to substantiate the scenarios which should be considered devoid of normal commercial substance[206]; and it has frequently relied on this criterion to assess abusive behaviour in general[207]. This concept fits well into the "economic substance" assessment that forms part of the objective test of tax avoidance discussed above, since "wholly artificial arrangements" should be understood[208] to lack virtually *any* economically relevant substance and effect (at least[209]) under the overall approach inherent to the avoidance test. This will apply mostly for self-cancelling schemes (so-called "U-turn" or more complex "circular"

[204] ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 38.
[205] See supra at 2.3.
[206] Cf. ECJ 8 November 2007, case C-251/06, ING. Auer [2007] ECR I-9689, para. 44; ECJ 22 May 2008, case C-162/07, Ampliscientifica and Amplifin [2008] ECR I-4019, paras. 27 et seq.
[207] See, for example, ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 58; ECJ 29 April 2004, case C-487/01 et. al., Gemeente Leusden[2004] ECR I-5337, para. 78; ECJ 21 February 2006, case C-255/02, Halifax [2006] ECR I-1609, paras. 80 et seq.; ECJ 12 September 2006, Case C-196/04 Cadbury Schweppes [2006] ECR I-7995, paras. 51 and 55; ECJ 13 March 2007, case C-524/04, Thin Cap GL [2007] ECR I-2107, para. 74; ECJ 28 June 2007, case C-73/06, Planzer Luxembourg [2007] ECR I-5655, paras. 44 et seq.; ECJ 4 December 2008, case C-330/07, Jobra [2008] ECR I-9099, para. 35; ECJ 9 July 2009, case C-397/07, Commission / Spain [2009] ECR I-6029, para. 30; ECJ 17 September 2009, case C-182/08, Glaxo Wellcome [2009] ECR I-8591, para. 89; ECJ 22 December 2010, case C-287/10, Tankreederei, n.y.r., para. 28; ECJ 10 February 2011, case C-436/08, Haribo Lakritzen, n.y.r., para. 165. See also Faulhaber, note 110, pp. 194 et seq.; Sørensen, note 7, p. 447.
[208] Likewise de la Feria, note 7, pp. 428 et seq.; Lang, note 16, p. 227; Self, H., "Acceptable Tax Avoidance?", in: Freedman, J. (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford: Oxford University Centre for Business Taxation, 2008), p. 151 (at p. 152); Terra, B., "The European Court of Justice and the Principle of Prohibiting Abusive Practices in VAT", in: Krever, R. and White, D. (eds.), *GST in Retrospect and Prospect* (Wellington: Thomson Brookers, 2007), p. 495 (at p. 512). It should be noted, though, that some scholars have a broader understanding of artificiality; see, e.g., Cerioni, note 22, p. 804; and possibly also Schön, note 85, p. 88. In so far as the ECJ, too, had a possibly less stringent understanding of "wholly artificial" in the Part service case – cf. ECJ 21 February 2008, case C-425/06, Part Service [2008] ECR I-897, para. 62 – it cannot be followed in the present context. If the reorganizational operation at issue does imply some economic effects that are not subsequently undone, it is less obvious that one of the principle objectives of the operation was tax avoidance, hence a legal presumption to that effect would arguably go a step too far.
[209] It has already been pointed out above at 2.2 that in the author's view, there is no need to apply an anti-avoidance rule or principle in order to negate the tax effects of a transaction that is devoid of any significant substance already by itself, assessed in isolation. Such transactions should be excluded from the scope of a beneficial norm or normative element by way of purposive construction.

arrangements), where two or more combined transactions ultimately neutralize all of their respective individual economic effects[210].

The only real "economic" effect of the aforementioned kind of arrangements would be the attainment of the tax advantage at issue, such as e.g. a loss compensation like the one envisaged in Art. 6 MD. However, as the Court has convincingly clarified in *Leur-Bloem*, "valid commercial reasons" within the meaning of Art. 15 (1) (a) MD is "a concept involving more than the attainment of a purely fiscal advantage. [A reorganizational operation] having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that article."[211] It is pertinent to point out, though, that whether a specific arrangement is indeed "wholly artificial" will have to be determined, according to the Court, on the basis of a comprehensive analysis that takes into account all relevant aspects of the individual scheme, rather than by categorizing certain operations as *per se* artificial because the restructuring is not maintained for certain minimum periods etc.[212]

It seems therefore reasonable to conclude that as a general rule, the concept of "wholly artificial arrangement" as defined above also adequately characterizes the lack of "valid commercial reasons" within the meaning of Art. 15 (1) (a) MD, even though it should not be excluded *a priori* that the latter concept may go beyond the former in very specific circumstances[213]. The "valid commercial reason"-test does thus resemble the "business purpose doctrine"[214] developed in US case law, in so far as the latter is applied to reorganizational operations[215].

This brings us to our second question: Does the presumption of Art. 15 (1) (a) MD operate only within the framework established by the general concept of tax avoidance, as distinguished from tax mitigation, or does it modify the ordinary two part test of tax

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[210] Cf. de Broe, note 7, p. 764; Schön, note 85, pp. 88 et seq. See also the judgment of the German Federal Tax Court, Bundesfinanzhof (BFH), IX R 76/03, 27 October 2005, *Bundessteuerblatt II* (2006), p. 359. For an example of a reorganization in form of a conversion of legal form (not covered by the Merger Directive due to an obvious lack of cross-border element), see Leclercq, L., "Interacting principles: the French abuse of law concept and the EU notion of abusive practices", 61 *Bulletin for International Taxation* (2007), p. 235 (at p. 236). It should be noted, though, that this example is not sufficiently clear as regards a possible – and necessary – collusive behavior of all parties involved.

[211] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 47. See also Ruiz Almendral, note 28, p. 566, who distinguishes between a commercial and a tax-specific perspective. For a different opinion, see Hoenjet, F., "The Leur-Bloem judgment: the jurisdiction of the European Court of Justice and the interpretation of the anti-abuse clause in the Merger Directive", 6 *EC Tax Review* (1997), p. 206 (at p. 214).

[212] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 42; for further discussion, see infra at 6.3.1.

[213] Such as, for example, situations in which a reorganizational operation is actually not, ultimately, without economic effect, but indeed entails detrimental commercial effects, which are however outweighed by the intended tax advantage.

[214] Likewise – if I understand her correctly – also Dourado, note 28, p. 472.

[215] See, in this regard, McMahon, note 31, pp. 56 et seq.

avoidance? More specifically: Can tax avoidance be presumed even if the "wholly artificial arrangement" merely exploits generally tolerated lacuna, inconsistencies or arbitrary distinctions in tax legislation, or tests the boundaries of tax concepts that rely on (overly) schematic generalizing assumptions? Such a presumption would then work as a caveat to the general rule that the taxpayer may legitimately take advantage of imperfections in the implementation of tax policy principles or legislative objectives that were considered as acceptable by the legislator itself, or of tax arbitrage opportunities resulting from a total lack of any (discernible) legitimate rationale underlying the tax regimes or statutory provision at issue. The wording of the presumption as formulated in Art. 15 (1) (a) MD is inconclusive in this regard. In the author's view, an argument in favour of this "caveat effect" of the presumption is that it would otherwise be a merely declaratory provision, since Member States may arguably have resort to legal presumptions regarding certain elements of the tax avoidance test also without express authorization[216]. As has already been pointed out, the principle of legal certainty would also not impede such an interpretation[217].

However that may be, in the context of the Merger Directive, the above question is mostly an academic one. U-turn or circular arrangements, assessed as such, will usually defeat the internal market objective that is clearly underlying all of the Directive's benefits. Moreover, it also stands to reason to presume, in such a case, that tax avoidance is – at least – one of the principal objectives of the arrangement[218]. Hence, an analysis based on the general part of Art. 15 (1) (a) MD will usually not come to different conclusions than one based on the presumption regarding operations that lack valid commercial reasons. Arguably, the primary function of this presumption is therefore *de facto* a confirmation that Member States need not require their tax authorities to furnish proof that tax avoidance was 'the principal objective or one of the principal objectives' of such a wholly artificial arrangement[219]. Only exceptionally

[216] For further discussion, see infra at 6.3.
[217] See supra at 2.3.
[218] As regards the strong indication of an "intention to abuse" in case of artificial arrangements, see also Snell, note 20, p. 226.
[219] See also Freedman, note 52, p. 374: 'The level of artificiality is simply one way of judging taxpayer purpose in relation to the objectives of the legislation'. It should be noted that there is widespread disagreement regarding the question whether such a presumption in national law based on the second part of Art. 15 (1) (a) MD may be irrefutable. According to Hoenjet, note 211, p. 214, and Weber, note 4, p. 67, Art. 15 (1) (a) MD authorizes only refutable presumptions also regarding situations characterized by a lack of valid commercial reasons. By contrast, Rädler, A., "Do national anti-abuse clauses distort the Internal Market?", 34 *European Taxation* (1994), p. 311 (at p. 313) concludes that this presumption *should* be understood as an irrefutable one. For further discussion regarding the admissibility of irrefutable presumptions, see infra at 6.3.1.

will a series of transactions that altogether lack economic substance not have been motivated by tax avoidance[220].

By contrast, so-called "step transaction" or "stepping stone" arrangements that involve a reorganizational operation, or that structure such an operation, so as to achieve a determined economic outcome in the most "tax-efficient" manner instead of choosing a less complex, more direct path to achieve the same outcome, should not normally be considered to be devoid of any valid commercial reasons: As a general rule, the disputed operation will then contribute to a restructuring or a rationalization of the activities of the companies involved; the operation or the way that it is carried out will merely be less efficient than an alternative that would not benefit from the tax deferral granted by the Directive. According to its wording, the presumption of the second part of Art. 15 (1) (a) MD is thus not applicable in those scenarios. Instead, it will have to be positively affirmed – or established by a separate kind of presumption, in so far as admissible[221] – that the extension of the Directive's benefits to the operation at issue would frustrate its purpose or that of its qualifications (objective test), and that this kind of avoidance was at least "one of the principal objectives" of the taxpayer (subjective test). This also implies that there can be forms of tax avoidance covered by Art. 15 (1) (a) MD beyond scenarios of a lack of "valid commercial reasons"[222].

5. Limits to the scope of Art. 15 (1) (a) MD

One might wonder whether it could also be relevant, for an assessment of tax avoidance under Art. 15 (1) (a) MD, that a particular restructuring operation covered by Art. 1 MD frustrates the purpose of a provision of genuinely (i.e. non-harmonized) *national* tax law that goes beyond the mere transposition of the Merger Directive. A priori, this might seem possible, because the Merger Directive does not fully harmonize the taxation of the reorganizational operations that fall under its substantive scope. In particular, transfer taxes levied on the

[220] It could have been arranged by the shareholders for private or other reasons. Shareholder motivation should be taken into account in the analysis of the subjective element of abuse; for a different opinion, see Petrosovitch, note 4, p. 562.

[221] See infra at 6.3.

[222] Likewise Rädler, note 219, p. 313. See, by analogy, the decision by the Australian High Court in Commissioner of Taxation v Hart [2004] A.T.C. 4599; and the speech of Lord Brightman in UK House of Lords, case Furniss v Dawson [1984] A.C. 474, at p. 526. See furthermore Tipke, note 27, p. 1339; and also Freedman, note 16, p. 84: "If the presence of a commercial end result were to validate a tax scheme it would be much too easy for tax planners to escape the GAAR". For a different opinion, see Ernst & Young, note10, p. 17; and – in more general terms – Vogenauer, note 14, p. 536. See also Brennan, note 53, p. 247; and Lyal, note 126, p. 431, who argue that the scope of an EU anti-avoidance rule or doctrine *should* not reach beyond cases of a total lack of valid commercial reasons; an opinion that is not shared by the author for the reasons given above and supra at 2. See also Weber, note 4, pp. 65 and 66, who considers abuse to be "out of the question" in the presence of valid commercial reasons, but interprets the latter concept narrower than here (and, thus, a lack of such reasons broader) and argues that "some minimal economic motives for the transaction" should not be regarded as sufficient or "valid".

occasion of such reorganizations are, in principle, still a domain of the Member States. Moreover, the wording of Art. 15 (1) (a) MD is not expressly limited to the avoidance of taxes that have been harmonized under the Merger Directive. However, upon closer analysis it becomes clear that such a proposition would undermine the delicate balance struck by the Directive between the internal market objective, on the one hand, and the financial interests of Member States, on the other hand[223]:

The Directive includes several requirements, authorizations, and qualifications that act as "safety valves" and ensure that the benefits of the Directive are granted only in instances where the taxation of the operation would seriously hamper cross-border restructuring of undertakings whereas granting tax neutrality would only imply a tax deferral rather than a final revenue loss. Such safety valves include maximum cash payment thresholds, minimum requirements regarding the organizational unit to be transferred[224], residence conditions, book value carry-over requirements, recapture authorizations, etc. Therefore, if all of these conditions for tax neutrality stipulated in the Directive are met, and no avoidance within the meaning of Art. 15 (1) (a) MD can be established *in this regard*, there cannot remain any tax avoidance concern that could be regarded as relevant *with respect to the taxes that come under the scope of the Merger Directive*, according to the inherent logic of the Directive itself. To put it differently, Member States themselves, by agreeing upon the Directive, have acknowledged that they are under an unconditional obligation to defer taxation arising from company mergers and other reorganizational operations in so far as these operations and the respective taxes are within the scope of the Directive and in so far as the operation at issue fulfils all of the requirements laid down in the Directive, both in form *and in substance*.

Very convincingly, the ECJ therefore rejected an attempt of the Dutch tax administration to justify its refusal to apply the benefits of the Directive to a planned merger even though the latter met all the criteria established in the Directive for a tax neutral reorganization, merely on grounds that the merger was aimed at the avoidance of the national real estate transfer tax[225]. This aspect is irrelevant for the application of the Merger Directive, because the planned restructuring nevertheless involved sufficient economic substance so that according to the objectives and prioritizations underlying the directive, it should have qualified for a tax

[223] See, in this regard, the fifth recital in the preamble; see also Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., paras. 51 et seq.
[224] The benefits of the directive extend, as a general rule, only to the transfer of enterprises as a whole, "branches of activity" within the meaning of Art. 2 (a) MD, and securities that confer or consolidate a majority of voting rights in a company, cf. Art. 2 MD.
[225] Cf. ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r.

deferral with respect to the direct taxes covered by the Directive[226]. The Court also correctly pointed out that the benefits of the Merger Directive are, correspondingly, limited to the taxes expressly referred to therein[227], i.e. taxes on income, profits or capital gains[228]. Consequently, Member States are not prevented by the Directive to levy any other taxes such as transfer taxes on occasion of the reorganization, and they may therefore also rely on national anti-avoidance rules to counter any avoidance of *this* kind of taxes, without being confined to the anti-avoidance concept laid down in Art. 15 (1) (a) MD[229]. However, any consequences of such presumed avoidance regarding taxes unaffected by the Merger Directive must then also be limited to this non-harmonized field of taxation[230].

In a similar vein, the Merger Directive, and Art. 15 (1) (a) MD in particular, is without prejudice to the right of Member States to invoke national anti-avoidance clauses in order to deny tax advantages that are not *directly* related to the reorganizational operation at issue, but merely arise as a corollary due to the changes in ownership and shareholding structure that the operation entails. Even though the taxes as such are addressed by the Merger Directive, the situation that gives rise to their imposition falls then out of the substantive scope of the Directive. It is also not covered by the unwritten doctrine of prohibition of abuse of Union law, because it is no longer Union legislation that is being avoided.

For example, German company tax law is not neutral with respect to the legal form of a business; in particular, only corporations are treated as fiscally non-transparent. As a consequence, the disposal of shares that form part of the business assets will trigger taxation of 60 % of the capital gain in case of a partnership or individual business, but the capital gain will be (almost) tax exempt in case of corporations[231]. When shares are held by partnerships or sole traders, tax arbitrage is therefore possible by realizing a tax-neutral merger or transfer of assets within the meaning of Art. 2 MD whereby the shares become business assets of the receiving corporation. They can then subsequently be sold tax exempt. The German Reorganization Tax Act (G-RTA) contains a special anti-avoidance clause pursuant to which

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[226] For a different opinion, see Petrosovitch, note 4, p. 561.
[227] ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., paras. 47 et seq.
[228] As can be inferred from, e.g., Art. 4 (1), (3); 6; 7 (1); 8 (1), (2) MD.
[229] Cf. ECJ 20 May 2010, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 50; Petrosovitch, note 4, p. 561; Zalasiński, note 16, p. 158. See also, in more general terms, Schön, note 85, p. 77: '… when it comes to the application of domestic anti-abuse provisions which do not fall under the control of the fundamental freedoms and which do not affect an area of taxation which has been harmonized so far, the Member States are free to employ anti-avoidance concepts which reach beyond the concept of anti-abuse under EC law.'
[230] See also Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 66.
[231] The exemption of Sec. 8b (2) Körperschaftsteuergesetz (KStG - German Corporate Income Tax Act) has been granted in order to avoid tax cascading that would otherwise occur in a classical system of corporate income taxation; however, it necessarily implies a beneficial tax deferral.

the original transfer of the shares – as part of the merger or transfer of assets – will be taxed retroactively (in full or partially[232]) if such a share disposal occurs within 7 years after the reorganization, thus effectively reversing the original tax deferral in so far as it corresponds to those shares. This anti-avoidance rule must therefore conform to the requirements of the authorization under Art. 15 (1) (a) MD, and it is indeed highly questionable whether it meets the anti-avoidance standard stipulated therein[233]. However, no objections could be raised under Art. 15 (1) (a) MD had the German legislator decided to withhold the benefits of the participation exemption upon the disposal of the shares by the receiving corporation[234], or to attribute the capital gain (wholly or partially) directly to the person or partnership that held the shares before the reorganizational operation, but with *ex nunc* effect only.

6. Transposition into national law

6.1. No direct effect

In its *Kofoed* judgment, the ECJ has made it clear that Member States are precluded from relying directly on Art. 15 (1) (a) MD in order to withhold or withdraw the benefits of the Merger Directive in a case of tax avoidance[235]. Rather, the Court considered it indispensible that there exist "a provision or general principle prohibiting abuse of rights or other provisions on… tax avoidance which might be interpreted in accordance with Article 11 (1) (a) of Directive 90/434 [now Art. 15 (1) (a) MD]."[236] In its reasoning to that effect, the ECJ referred to its consistent case law pursuant to which the principle of legal certainty precludes directives from being able, by themselves, to create obligations for individuals; therefore, they cannot be relied upon *per se* by the Member State as against individuals[237]. However, the ECJ also held that a transposition of Art. 15 (1) (a) MD into national law does not necessarily require legislative action[238]. In so far as there exists a general anti-abuse rule or doctrine in the national tax system of a Member State, whose scope can clearly be understood to extend also to the statutory provisions that transpose Art. 1 to 14 MD into national tax law, there is no

[232] For every year following the reorganization, the retroactively taxable capital gain is reduced by one seventh to reflect the reduced potential for abuse. For further details, see Englisch, J., "Reform and Reorganization Tax Act and related changes", 47 *European Taxation* (2007), p. 339 (at p. 344).
[233] For further discussion, see infra at 6.3.1.
[234] Although, admittedly, this might be technically more complex, since it requires to keep track of the capital gain and compensatory mechanism at shareholder level, so as to avoid economic double taxation upon a subsequent distribution of the profits arising from the disposal of the shares.
[235] This is also the conclusion drawn by Zalasiński, note 16, p. 158.
[236] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 46.
[237] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 42, and the case law cited there. In a similar vein, regarding VAT, Harris, note 47, p. 196.
[238] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 44. See also, by analogy, ECJ 30 November 2006, case C-32/05, Commission / Luxembourg [2006] ECR I-11323, para. 34.

need for a formal and express re-enactment of an anti-abuse rule as authorized under Art. 15 (1) (a) MD[239]. Instead, the existing rule or doctrine will then have to be interpreted, with respect to its application in the field of harmonized taxation of reorganizational operations, in the light of the requirements stipulated in Art. 15 (1) (a) MD[240].

I find the Court's arguments and conclusions – and the corresponding deliberations of its Advocate General[241] – fully convincing[242]. There is only one aspect that the Court did not mention directly, even though it can obviously be inferred from its reasoning and was indeed addressed by AG *Kokott*. A Member State that has not explicitly transposed Art. 15 (1) (a) MD into national law and that also cannot have recourse to a general anti-avoidance rule or doctrine, because such a general norm is non-existent in its tax system, may not invoke the "general principle of prohibition of abuse of Union law" in order to nevertheless deny the benefits of the Merger Directive and the national tax law provisions transposing it[243]:

First, Art. 15 (1) (a) MD establishes specific conditions which must be fulfilled if a national legislator, tax administration or court considers withholding or withdrawing the benefits of the Merger Directive; these criteria must not be undermined or modified by having recourse to a more general principle[244]. Admittedly, this argument is, by itself, not entirely compelling, because it could be argued that Art. 15 (1) (a) MD gives Member States greater discretion regarding the design of their national anti-avoidance rules than the general doctrine developed in the case law of the ECJ, at least regarding the subjective avoidance test.

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[239] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 44; see also, in more general terms, ECJ 30 November 2006, case C-32/05, Commission / Ireland [2006] ECR I-11323, para. 34. From a Union law perspective, the national anti-abuse principle need not have a statutory basis; it is sufficient when it is firmly established in settled case-law. Likewise Zalasiński, A., "Case-law-based anti-avoidance measures in conflict with proportionality test: comment on the ECJ decision in Kofoed", 47 *European Taxation* (2007), p. 571 (at pp. 574 et seq.), who raises – in my view: unfounded – concerns with respect to the conformity with the ECHR, though.

[240] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 45; likewise Zalasiński, note 239, p. 574. Freedman, note 52, p. 370; Vogenauer, note 14, p. 563; and Lewicki, T., "Exchanges and shares under Polish corporate income tax legislation: inconsistencies in implementation of the EC Merger Directive", 49 *European Taxation* (2009), p. 527 (at p. 533), who examines the situation in Poland based on the Court's case-law.

[241] Cf. Opinion of AG *Kokott* 8 February 2007, case C-321/05, Kofoed [2007] ECR I-5795, paras. 61 et seq.

[242] Likewise Kofler, note 126, p. 226; Schön, note 85, p. 78; Zalasiński, note 239, p. 573; Zalasiński, note 16, p. 164; see also – already before the Court handed down its judgment – Hoenjet, note 211, p. 213. For a contrary opinion, see Bergmann, note 16, pp. 250 and 253.

[243] Cf. Opinion of AG *Kokott* 8 February 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 67; see also the subsequent Opinion of AG *Kokott* 16 July 2009, case C-352/08, Modehuis A. Zwijnenburg, n.y.r., para. 62. For a different opinion, see Pistone, note 20, pp. 383 and 391; Rousselle and Liebman, note 99, p. 562.

[244] See also, by analogy, ECJ, 17 October 1996, Denkavit International [1996] I-5063, para. 31, where the Court held that it is not appropriate to refer to Art. 1 (2) of the Parent-Subsidiary-Directive 90/435/EEC (PSD), which states a general "principle" of admissibility of counteracting abuse, in the context of the more specific provision of Art. 3 (2) PSD dealing with a particular category of potentially abusive arrangements.

However, there is also a second and more fundamental objection based on an argumentum *a fortiori*: When even the explicit authorization of Art. 15 (1) (a) MD to deny the benefits of the Directive in a case of tax avoidance must not be relied on directly for reasons of legal certainty, then an *unwritten* "principle of prohibition of abuse" must even less be applied directly as against individual taxpayers[245]. *Notabene*, this conclusion is not limited to the ambit of the Merger Directive[246]; this is precisely one of the reasons (but not the only one[247]) why the case law-based general anti-avoidance doctrine of the Court should not be regarded as a "general principle of Union law" within the traditional meaning of a quasi-constitutional principle that partakes in the supremacy of Union law over national law[248].

It should also be noted that the constitutional framework of most Member States will not permit national judges to "develop" or introduce into their domestic legal system a general anti-abuse doctrine merely based on the case law of the ECJ concerning the "general principle of prohibition of abuse", which could then subsequently be extended to transactions covered by the Merger Directive even absent a transposition of Art. 15 (1) (a) MD. Instead, tax administrations and courts will have to rely on a statutory basis – either a GAAR applicable in the entire tax system or a rule that specifically transposes Art. 15 (1) (a) MD – or on an accepted canon of statutory "interpretation" that is construed so broadly as to cover also the application of tax law provisions to a composite arrangement beyond their wording and legalistic concept[249]. This applies for both, Member States with a civil law or continental law

[245] For a similar conclusion, see Sørensen, note 46, pp. 30 et seq.

[246] For a different opinion regarding VAT, see Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 76; de Broe, note 7, p. 833; Cerioni, note 22, p. 807; Sørensen, note 7, pp. 438 et seq.; Weber, note 188, p. 399; and probably also Freedman, note 52, p. 370; Swinkels, note 64, p. 179; Weber, note 23, p. 55. In favour of a direct effect of the Court's general anti-avoidance doctrine also Bergmann, note 16, p. 250. Like here – also regarding VAT – Brennan, note 53, pp. 250 et seq.; Zalasiński, note 16, p. 166. It should be noted that the position of AG *Poiares Maduro*, Bergmann, de Broe, and Freedman is self-consistent, since they all regard the concept of prohibition of abuse of law as a mere "principle of interpretation" (at least) in the context of VAT, cf. Opinion of AG *Poiares Maduro* 7 April 2005, case C-255/02, Halifax [2006] ECR I-1609, para. 79; Bergmann, note 16,, pp. 249-250 and 252-253; de Broe, note 7, p. 791; Freedman, note 52, p. 369. It has already been pointed out, though, that this is not entirely convincing; see supra at 2.2.

[247] See also supra at 3.

[248] For inverse reasoning, see Bergmann, note 16, pp. 251 et seq.: Since the "general principle" of prohibition of abuse has direct effect in the legal systems of the Member States – a premise that is not justified any further but presumed with a view towards the Court's (in particular: VAT) jurisprudence – a provision like Art. 15 (1) (a) MD which according to Bergmann is to be understood as a mere reflection of this principle must also have such direct effect.

[249] In the authors view, the latter approach is an inferior one, though, because it sidesteps the constitutional issue by denying the conceptual difference between purposive construction, on the one hand, and assessing composite transactions on an aggregate basis, on the other hand; see also Freedman, note 16, pp. 65 et seq. It would therefore not be desirable should national jurisdictions or the ECJ come to view anti-avoidance doctrines as really nothing more than a principle of interpretation; as regards such prospects, see see Vogenauer, note 14, p. 559.

tradition[250], and Member States with a common law tradition[251]. The UK example in particular is thus different from the tradition of the US common law system, which is characterized by a large set of judge-made anti-abuse doctrines[252].

6.2. Duty or option?

Acknowledging the need to transpose Art. 15 (1) (a) MD into national tax law, either explicitly or by incorporation into a more general anti-avoidance rule or doctrine, one could wonder whether Member States are under an obligation to do so. The wording of the provision ("a Member State *may* refuse") and also the expression chosen in the thirteenth recital in the preamble ("it is necessary to *allow* Member States"), however, are a clear indication to the contrary[253]. It could also not be convincingly argued that pursuant to the fourth recital in the preamble, the Directive aims at a "common tax system" to be enacted alike – possibly also with respect to anti-avoidance provisions – in all Member States, so as to avoid distortions in the internal market: It is obvious from other provisions of the Directive, like e.g. the reference made to national rules regarding transfer of losses in Art. 6 MD or the optional minimum holding percentage established in Art. 7 (2) MD, that the objective of uniform application has its inherent limits where Member States made reservations of competence, such as in Art. 15 (1) (a) MD.

Nevertheless, the ECJ made some remarks in the *Kofoed* decision that convey the idea that it is incumbent on Member States to implement an anti-avoidance rule within the meaning of Art. 15 (1) (a) MD in their national reorganization tax regimes[254]. The Court stated, first: "In that regard [absence of a specific provision transposing Art. 15 (1) (a) MD], it should be borne in mind that, according to Articles 10 EC and 249 EC, each … Member State … is *obliged to adopt*, within the framework of its national legal system, all the measures necessary

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[250] See, e.g., Cordeiro Guerra, R. and Mastellone, P., "The judicial creation of a general anti-avoidance rule rooted in the Constitution", 49 *European Taxation* (2009), p. 511 (at pp. 513 et seq.) and Pistone, P., "The impact of ECJ case law on national taxation", 64 *Bulletin for International Taxation* (2010), p. 412 (at p. 424) regarding the Italian tax system and the diverging Italian Supreme Court jurisprudence; the latter is also analyzed by de Monès et al., note 20, p. 125 and – with approval – by Garbarino, C., "The development of a judicial anti-abuse principle in Italy", *British Tax Review* (2009), pp. 186 et seq.

[251] Cf. Vella, note 47, pp. 247 et seq., and Venables, note 20, pp. 126 et seq., regarding the English legal system: judicial anti-tax avoidance rules without proper statutory basis are unconstitutional; these statements are made against the backdrop of a very broad notion of purposive construction.

[252] Cf. McMahon, note 31, pp. 44 et seq.; Pickup, note 39, p. 18; Prebble and Prebble, note 16, pp. 164 et seq. (see, however, the qualifications made at p. 170: a statutory provision would be preferable in order to provide a constitutional foundation and parliamentary legitimation upon which the courts can build to address avoidance activity); Tiley, note 80, pp. 180 et seq. (Part I) and pp. 220 et seq. (Part II). See also Faulhaber, note 110, pp. 201 et seq.

[253] See, *in this regard*, also de Broe, note 7, pp. 833 et seq.; Cerioni, note 22, p. 809.

[254] This is also the interpretation of the judgment by Petrosovitch, note 4, p. 563; for a contrary interpretation, see Lang, note 46, p. 456.

to ensure that the directive is fully effective, *in accordance with the objective that it pursues*."[255] As discussed above, tax avoidance is characterized by the fact that the granting of the tax advantage in dispute is not in conformity with its underlying purpose; this might explain the Court's reasoning. The ECJ noted, second, with respect to the extension of general anti-avoidance rules of a Member State to the benefits of the Merger Directive "that all authorities of a Member State, in applying national law, *are required* to interpret it as far as possible in the light of the wording *and purpose* of the Community directives in order to achieve the result pursued by those directives."[256] This finding points in the same direction; if Art. 15 (1) (a) MD were to be understood as to grant a mere option to Member States, they should indeed not be under an *obligation* to interpret the scope of their anti-avoidance rules broadly so as to cover also tax avoidance in the field of harmonized taxation of restructuring operations. Against the background of this jurisprudence, some argue that it is mandatory for Member States to transpose Art. 15 (1) (a) MD[257].

It is respectfully submitted, though, that the Court were better advised to adhere to the wording of Art. 15 (1) (a) MD. Not only is this wording unambiguous, especially if analyzed in the light of the corresponding deliberations in the preamble. Any incumbent obligation to provide for an anti-avoidance clause would also not adequately reflect the fact that the Merger Directive brings about only a selective and fragmentary harmonization of company taxation, as opposed to more comprehensively harmonized taxes such as VAT[258]. In particular, Union law does not force Member States to levy corporation tax at all, or to levy it whenever profits are realized; hence, the Merger Directive can only set *minimum standards* regarding operations that must not give rise to taxation. A Member State may choose to go beyond these standards as a matter of sovereign national tax policy and may waive its taxing rights also when not required to do so under the Directive[259]; it can therefore not be under an obligation to charge on all reorganizational operations taxes that are not covered, in form *or in substance*, by the Merger Directive[260].

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[255] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 41; emphasis added.
[256] Cf. ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 45.
[257] Cf. Petrosovitch, note 4, p. 563; see also – in more general terms and not specifically addressing Art. 15 (1) (a) MD – Sørensen, note 7, p. 440.
[258] Likewise Weber, note 188, p. 400. But even in the area of VAT, some oppose an obligation for Member States to ensure compliance of national law with the Court's doctrine on the prohibition of abuse of Union law, cf. the opinion of Harris, note 47, pp. 192 and 195, before the Halifax judgment of the ECJ; for a different opinion, see the more convincing arguments of Weber, note 188, pp. 399 et seq.; see also Lang, note 46, pp. 452 et seq.
[259] Provided that such waiver is in conformity with the prohibition of State aid stipulated in Art. 107 TFEU and does also not infringe any fundamental freedom, i.e. is granted in a non-discriminatory manner to both, cross-border and purely domestic transactions. See also Bergmann, note 16, pp. 253 et seq.
[260] Likewise Lang, note 46, pp. 456 et seq.

6.3. Burden of proof and admissibility of legal presumptions

In the practical application of any anti-avoidance rule or doctrine, the burden of proof for the constitutive elements of abuse is of eminent importance. In order to facilitate the task of the tax administration, national tax systems frequently establish – or reverse – the burden of proof to the detriment of the taxpayer. In a similar vein, the national tax law will often stipulate legal presumptions that categorize certain arrangements as abusive, or that qualify certain facts or schemes as an indication of tax avoidance. It is therefore crucial to determine the extent to which such legal practices may or may not be compatible with Art. 15 (1) (a) MD.

6.3.1. Irrefutable presumptions of tax avoidance

The ECJ clearly favours a very strict approach at least with respect to irrefutable legal presumptions, effectively ruling out the conformity of any such provision with Art. 15 (1) (a) MD[261]. As early as in its *Leur-Bloem* ruling, the Court held that "the laying down of a general rule automatically excluding certain categories of operations from the tax advantage…, whether or not there is actually… tax avoidance, would go further than is necessary for preventing such… tax avoidance and would undermine the aim pursued by the Directive."[262] The Court furthermore commented that it would also constitute a disproportionate interference with Union law "if a rule of this kind were to be made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority."[263] In all its subsequent judgments dealing with Art. 15 (1) (a) MD, the ECJ confirmed its position according to which "the competent national authorities cannot confine themselves to applying predetermined general criteria but must carry out a general examination of each particular case" in order to determine whether a particular reorganizational operation has tax avoidance as one of its principal objectives[264]. The same position is also adopted with respect to the exemption of reorganizations from capital duties under Directive 69/335/EEC[265]. It is furthermore consistent with the Court's settled case-law regarding autonomous national anti-avoidance measures that are in potential conflict with the EU fundamental freedoms. In this context, too, the Court is strictly opposed to any general presumption of tax avoidance and will – if at all – accept as proportional only measures that *specifically* target "wholly artificial

[261] Cf. Hoenjet, note 211, pp. 212 et seq.
[262] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 44.
[263] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, paras. 43 et seq.
[264] Cf. ECJ 11 December 2008, case C-285/07, A.T. [2008] ECR I-9329, para. 31; ECJ 20 May 2010, case C-352/08, Modehuus A. Zwijnenburg, n.y.r., para. 44; and similarly also ECJ 5 July 2007, case C-321/05, Kofoed [2007] ECR I-5795, para. 31.
[265] Cf. ECJ 9 July 2009, case C-397/07, Commission / Spain [2009] ECR I-6029, paras. 29 et seq.

arrangements"[266]. A 'sniper' or 'shot gun' approach through anti-avoidance provisions that categorize – more or less generally – certain situations as *per se* abusive[267] is thus ruled out by the Court[268].

While not without arguable alternatives, the stance taken by the Court with respect to Art. 15 (1) (a) MD could, in principle, be accepted as a manifestation of its *de facto* law-making role in grey areas of Union law that require a (provisional) judicial balancing exercise in the absence of more specific Union legislation[269]. By ruling out irrefutable presumptions, the ECJ gives priority to the attainment of the internal market objective underlying the benefits of the Merger Directive over other legitimate concerns that would point towards the (limited) admissibility of such presumptions, e.g. concerning minimum holding periods for transferred assets. Such concerns are, in particular, administrative efficiency and legal certainty[270] that would both be enhanced if no investigation and litigation were necessary with respect to the questions whether the granting of the tax advantage would really not be in line any more with the purpose of the Directive, and what exactly the taxpayer's plans and intentions were.

The balance that the Court strikes with respect to Art. 15 (1) (a) MD is also not called into question by its seemingly more generous approach in the field of VAT[271], where the ECJ has accepted as proportional the very same kind of categorization of tax avoidance based on certain temporal links or time limits[272] that it has rejected as disproportionate in the context of Art. 15 (1) (a) MD[273]. It has already been pointed out above[274] that different from the legal

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[266] See, for example, ECJ 26 September 2000, case C-478/98, Commission v Belgium [2000] ECR I-7587, para. 45; ECJ 4 March 2004, case C-334/02, Commission v France [2004] ECR I-2229, para. 27; ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, paras. 50 et seq.; ECJ 13 March 2007, case C-524/04, Thin Cap GL [2007] ECR I-2107, para. 74; ECJ 11 October 2007, case C-451/05, Elisa [2007] I-8251, para. 91; ECJ 4 December 2008, case C-330/07, Jobra [2008] ECR I-9099, para. 35. See also Communication from the Commission on the application of anti-abuse measures in the area of direct taxation, COM(2007) 785 final, 10 December 2007, p. 5; de Broe, note 7, pp. 905 et seq.

[267] Cf. Tiley, note 33, p. 104.

[268] de Broe, note 7, pp. 909 et seq., sees some potential for "irrebuttable pre-selected criteria" in establishing abuse in non-harmonized areas of tax law, but concedes that "the ECJ's case law in income tax matters shows that it may be very difficult to design such a rule."

[269] A majority of scholars therefore agree with the Court's approach, cf. Daiber, note 50, p. 367; Kofler, note 126, p. 225; Petrosovitch, note 4, p. 564; Rønfeldt, T., "Anti-abuse Clause or Harmonization?", 39 *Intertax* (2011), p. 12 (at p. 17); Terra and Wattel, note 4, p. 550; Vogenauer, note 14, p. 549; Weber, note 4, p. 67. For a more nuanced opinion regarding the EU case-law on prohibition of abuse in general, see Sørensen, note 7, pp. 453 et seq.

[270] Likewise Dourado, note 28, p. 478; Sørensen, note 7, pp. 453 et seq.

[271] For a different opinion ("the Court is not consistent"), see Weber, note 188, pp. 404 et seq.

[272] Cf. ECJ 22 May 2008, case C-162/07, Ampliscientifica and Amplifin [2008] ECR I-4019, para. 24 and paras. 30 et seq. See, however, also ECJ 9 December 2010, case C-163/09, Repertoire Culinaire, n.y.r., paras. 43 et seq., regarding Directive 92/83/EEC harmonizing the structures of excise duties on alcohol and alcoholic beverages: The adoption of measures to combat tax avoidance "must be based on concrete, objective and verifiable evidence."

[273] See, in this regard, ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 31.

[274] See supra in section 3.

framework into which the Merger Directive is embedded, VAT is a comprehensively harmonized tax where the reliance on anti-avoidance provisions will tend to enhance rather than frustrate the objectives of secondary Union law. It can therefore be defended that the Court is more open to concerns of legal certainty and administrative efficiency, and thus more inclined to uphold generalizing rules on tax avoidance, in a VAT context. This is especially obvious when the corresponding targeted anti-avoidance provision limits the scope of application of an optional regime that constitutes an exception within the general system of VAT[275]. In such a scenario, the admission of generalizing presumptions does not even impair the harmonization objective of the Directive and its corollary of uniform application in all Member States.

However, it is at least questionable whether the Court's strict stance in *Leur-Bloem* and subsequent judgments is also consistent with the appreciation of administrative efficiency and legal certainty displayed by the *Union legislator* in a similar context of fragmentary harmonization of company taxation[276]. More specifically, both the Parent-Subsidiary Directive (PSD) and the Interest-Royalty Directive (IRD) provide Member States with an option of not applying the respective Directive to groups of companies that do not maintain a minimum holding period of up to two years[277]. The ECJ itself has expressly held that this kind of proviso "is aimed in particular at counteracting abuse whereby holdings are taken in the capital of companies for the sole purpose of benefiting from the tax advantages available and which are not intended to be lasting."[278] Obviously, such an anti-abuse clause is based on a fairly generous presumption, because it is perfectly conceivable that in individual cases the acquisition of a strategic shareholding was realized for valid commercial reasons even though ultimately, the holding was only maintained for a period of less than two years[279]. Arguably, at least some of the provisions laid down in Art. 4 (1) IRD also establish – irrefutable – presumptions of tax avoidance.

The legislative preferences that have materialized in the aforementioned provisions cannot be ignored when interpreting Art. 15 (1) (a) MD merely because they cannot be found in the Merger Directive itself[280]. As is evident from the case law of the ECJ, the Court itself considers that its interpretation of certain concepts of Union law should, in principle, be

[275] As was the case in the main proceedings that gave rise to the judgment ECJ 22 May 2008, case C-162/07, Ampliscientifica and Amplifin [2008] ECR I-4019 (cf. note 272).
[276] As regards this double standard, see also Schön, note 85, pp. 81 et seq.
[277] Cf. Art. 3 (2) second indent PSD and Art. 1 (10) IRD.
[278] Cf. ECJ 17 October 1996, Denkavit International [1996] I-5063, para. 31.
[279] See, by analogy, ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 42.
[280] See also Schön, note 16, pp. 14 and 15 et seq.

guided by more detailed EU legislation that pursues the same objective and therefore constitutes a useful point of reference for the purposes of interpreting the former concepts[281]. This consistency requirement is indeed a reflection of the equality principle, provided that there are no significant differences between the two situations to be compared. The only relevant difference between the irrefutable presumptions authorized by Art. Art. 3 (2) second indent PSD, Art. 1 (10) IRD, and like provisions, on the one hand, and a possible irrefutable presumption of a similar kind and scope based on Art. 15 (1) (a) MD, on the other hand, is that the latter would be enacted by virtue of an autonomous decision of individual Member States, whereas the former type of presumption would have the explicit approval of the Union legislator and might therefore also be applied more uniformly within the internal market.

However, in the author's view this difference is not significant enough to distinguish the two situations. First, there is no guarantee that Art. 3 (2) PSD, Art. 1 (10) IRD, and other authorizations for special anti-avoidance clauses based on irrefutable presumptions are applied in a more homogeneous manner as between Member States, because they are mere options which furthermore give Member States considerable leeway as to the details of their transposition[282]. Second, there is no good reason conceivable why a "cartel" of Member States, the latter acting in Council and with approval of the Commission, should be entitled to impair the internal market objective to a greater degree than individual Member States. It is therefore suggested that the ECJ, in interpreting Art. 15 (1) (a) MD, should acknowledge the Union legislator's apparent preference for anti-avoidance solutions that champion administrative efficiency and legal certainty over a pure implementation of the internal market objective. The Court should thus admit the categorizing of certain types or circumstances of reorganizations as "abusive" in so far as the degree of inaccuracy or "over-inclusiveness" of such rules is clearly not beyond the degree sanctioned by the Union legislator in the aforementioned special anti-abuse rules. If the Court wished to maintain its stricter approach towards Art. 15 (1) (a) MD, it should feel compelled to question also the proportionality of irrefutable presumptions provided for by the other corporate tax directives[283]. A double

[281] See, for example, ECJ 12 December 2006, case C-374/04, ACT GL [2006] ECR I-11673,para. 60, regarding the question of a balanced allocation of the right to tax dividends, to be assessed, in the Court's view, in the light of the specific provisions of the PSD also in so far as the latter is not applicable; or ECJ 23 April 2009, case C-357/07, TNT Post [2009] I-3025, paras. 34 et seq., regarding the interpretation of the notion "public postal services" stipulated in Art. 132 (a) VAT-Directive by having recourse to the concept of "universal postal service" as detailed in Directive 97/67/EC.

[282] See, in this regard, ECJ 17 October 1996, Denkavit International [1996] I-5063, para. 23.

[283] This has been the suggested by Weber, note 4, p. 68.

standard for the Union legislator and national parliaments is not acceptable. As is well-known, the Court is in general very hesitant in this regard, though[284].

De lege ferenda, it is suggested here that Art. 15 (1) (a) MD should be amended and should explicitly grant Member States discretion to have resort also to irrefutable presumptions of tax avoidance in so far as these presumptions are proportional. This would overcome the aforementioned inconsistencies through a compromise that is more reasonable than the Court's current position: In the author's view, it is necessary to permit Member States to strike an adequate balance between the (perceived) internal market requirement to provide tax concessions for "genuine" cross-border reorganizations that meet all the Directive's qualifications in form and in substance, on the one hand, and the need for legal certainty as well as an efficient use of limited administrative and judicial resources, on the other hand. According to the anti-avoidance policy preferences of most Member States, such a balance will include both, general "standards" such as a GAAR or avoidance doctrine, and targeted anti-avoidance rules[285]; there is also theoretical support for such a mix of instruments[286].

However, in order to establish a sufficient degree of centralized *ex-ante* control of such irrefutable presumptions and prevent individual Member States from enacting excessive rules that they claim to still be proportional, an element of comitology could be introduced: It could be specified that the proportionality of presumptions of avoidance will be determined based on a list of categories and criteria to be elaborated by the Commission in an implementing directive based on Art. 291 TFEU[287]. Ultimately, the ECJ would still be competent to scrutinize this catalogue and its implementation by Member States as to its compatibility with the proportionality qualification to be stipulated in the amendment of Art. 15 (1) (a) MD, but

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[284] An exemplary statement can be found in ECJ, 7 June 2007, case C-156/04, Commission / Greece [2007] I-4129, para. 55: "Lastly, the Commission alleges that the Greek authorities force the individuals concerned to produce stronger evidence in order to prove … [the relevant criterion] and that they thus reverse the burden of proof, whereas responsibility for that burden normally lies with the national authorities. It suffices to point out in that regard that, pursuant to Article … of the Directive, proof of [the relevant criterion] is in principle the responsibility of the individuals concerned." The Court does not even discuss the question whether the reversal of the burden of proof stipulated in the Union legislation is proportional or not.

[285] See also the comparative tax law study of de Monès et al., note 20, p. 85, that analyses the anti-avoidance provisions and doctrines in the tax systems of France, Germany, Italy, Spain, and the UK.

[286] See Weisbach, note 18, pp. 93 et seq.

[287] It would probably be advisable to make that empowerment of the Commission subject to the new examination procedure introduced by Art. 5 of Regulation 182/2011/EU (laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, of 16 February 2011), so as to ensure sufficient involvement of the representatives of Member States in this sensitive political area (see also Art. 2 (2) (b) (v) of Regulation 182/2011/EU). Besides, the implementing act should take the form of a directive, rather than a regulation, because the system of anti-avoidance provisions would continue to be an optional one for Member States regarding the decision whether they want to introduce at all any anti-avoidance measures in general, or targeted rules in particular; EU law constraints thus become binding for a Member State only if it has opted for an anti-avoidance policy.

it could no longer categorically rule out the proportionality of irrefutable presumptions as such.

6.3.2. Burden of proof and rebuttable presumptions

As regards the burden of proof for tax avoidance in general, and for anti-avoidance rules or doctrines within the meaning of Art. 15 (1) (a) MD in particular, the Court's case-law is not entirely consistent, but by and large well-conceived.

The principal position of the Court is still to be found in its landmark ruling *Emsland-Stärke*. In its statements preceding the decision of the Court, the Commission had pleaded for a "third element" pertaining to the Union law concept of abuse, namely "a procedural law element relating to the burden of proof." In the Commission's view, that burden should "fall on the relevant national administration. However, in the case of the most serious abuses, even *prima facie* evidence which might reverse the burden of proof [should be] admissible."[288] Advocate General *Alber* had supported this position in his opinion on the case[289]. Remarkably, the Court adopted a far more restraint position in its judgment: The ECJ held that as a general rule, evidence for the objective element as well as for the assumed subjective element of abuse "must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined."[290] For details as to the latter qualification, the Court referred to precedents[291] that emphasized the now well-established principles of procedural equivalence and effectiveness[292].

This implies that contrary to the stricter approach favoured by the Commission and the Advocate General, the statutory law and the case-law of Member States may put the onus of proof on the taxpayer[293], especially regarding her conceptions, motives and intentions[294] in so far as these are relevant for the objective or for the subjective test of tax avoidance. The requirement to furnish proof must only not be more burdensome than in similar but purely

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[288] Cf. ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 39.
[289] Cf. Opinion of AG *Alber* 16 May 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 83.
[290] ECJ 14 December 2000, case C-110/99, Emsland-Stärke [2000] ECR I-11569, para. 54 ; for subsequent case-law, see de Broe, note 7, pp. 794 et seq.
[291] ECJ, 21 September 1983, joined cases C-205/82 to 215/82, Deutsche Milchkontor [1983] ECR I-2633, paras. 17-25 and 35-39; ECJ 15 May 1986, case C-228/84, Johnston [1986] ECR I-1651, paras. 17-21; [ECJ 8 February 1996, case C-212/94, FMC [1996] ECR I-389, paras. 49-51; and ECJ 15 July 2000, joined cases C-418/97 and C-419/97, ARCO Chemie Nederland [2000] ECR I-2000, para. 41.
[292] For an explanation in a nutshell, see ECJ 8 March 2011, case C-240/09, Lesoochranárske zoskupenie, n.y.r., para. 48, and infra at note 295; for further details, see Arnull, note 38, pp. 330 et seq.; Tridimas, note 96, pp. 423 et seq.
[293] For a different opinion, see de Broe, note 7, p. 903; Cerioni, note 22, p. 806.
[294] See, *in this regard*, also Weber, note 188, p. 399.

domestic situations not subject to harmonization by Union law (equivalence), and it must not be excessively difficult for the taxpayer to procure evidence[295] (effectiveness).

This principal approach of the Court reflects the principle of procedural autonomy of the Member States[296]. Admittedly, this principle implies some degree of heterogeneity in the application of harmonized law. However, as the ECJ itself has acknowledged, this effect is "inevitable" as long as and in so far as the Union legislator, and in particular the entirety of Member States acting in Council, have not agreed to harmonize procedural aspects as well[297]. This will even more have to be accepted when the provision to be applied is a merely optional one, such as in case of Art. 15 (1) (a) MD, hence uniform application within the Union is not attainable, anyways.

But notwithstanding the above, a recent judgment of the Court in the context of the Directive concerning indirect taxes on the raising of capital[298] has cast some doubt on the continuing relevance of the Court's settled case-law. After stating that Member States can withhold the benefits of that Directive only in specific circumstances entailing an abusive practice, the Court went on to note "it being understood that, in such cases, the competent national authorities bear the burden of proving the … artificial nature of the transaction in question."[299] The Court did not provide any further explanation for this far-reaching statement, which is all the more surprising taking into account that the Advocate General did not even address the topic in her opinion[300].

Against the background of the still undisputed principle of procedural autonomy, the Court's rather incidental remarks should not be endorsed (at least) for the purpose of examining national anti-avoidance practice under Art. 15 (1) (a) MD. A more restraint approach in the latter context is also supported by the wording and the context of Art. 15 (1) (a) MD that do

[295] See, in this regard, also ECJ 9 December 2003, case C-129/00, Commission / Italy [2003] ECR I-14637, para. 38; ECJ 13 March 2007, case C-524/04, Thin Cap GL [2007] ECR I-2107, paras. 82 and 86; ECJ 22 December 2008, case C-161/07, Commission / Austria [2008] ECR I-10671, paras. 18 et seq. and paras. 38 et seq., ECJ 1 July 2010, case C-35/09, Speranza, n.y.r., para. 41; Fischer, note 14, § 42 AO, para. 185; Lang and Heidenbauer, note 35, pp. 614 et seq.

[296] Cf. ECJ, 15 March 2007, case C-35/05, Reemtsma Cigarettenfabriken [2007] ECR I-2425, para. 40; ECJ 6 October 2009, case C-40/08, Asturcom [2009] I-9579, para. 38. See also van Eijsden, A. et al., "General Part", in: Lang, M. et al. (eds.), *Procedural Rules in Tax Law in the Context of European Union and Domestic Law* (Alphen aan den Rijn: Kluwer Law International, 2010), p. 3 (at pp. 16 et seq.); Harris, note 47, p. 188; Terra and Wattel, note 4, p. 88; Vogenauer, note 14, p. 544.

[297] Cf. ECJ 21 September 1983, joined cases C-205/82 to 215/82, Deutsche Milchkontor [1983] ECR I-2633, paras. 21 and 24.

[298] Council Directive 2008/7/EC of 12 February 2008 (recast directive).

[299] Cf. ECJ 9 July 2009, case C-397/07, Commission / Spain [2009] ECR I-6029, paras. 29 et seq.

[300] Cf. Opinion of AG *Kokott* 5 March 2009, case C-397/07, Commission / Spain [2009] ECR I-6029.

not establish any explicit or implicit standards for the burden of proof. As for the wording[301], it does not give any indication in this regard. The context of the provision does also not allow for any such clue: Even though the Merger Directive aims at a uniform direct tax framework for cross-border reorganizational operations within the internal market, as evidenced by the fourth recital in its preamble, this objective does obviously not extend to Art. 15 (1) (a) MD considering its optional character. It can therefore also not be inferred from contextual interpretation, nor is there any explicit statement to that effect to be found in the Directive, that an identical protection of taxpayers under the national legal systems is so fundamental an objective that it would exceptionally entitle the Court itself to determine the question of the onus of proof[302].

The only (at least *prima facie*) valid argument that could be put forward is that Art. 15 (1) (a) MD authorizes a derogation from the rules of the Merger Directive, thereby impairing its full effectiveness and its underlying internal market objective, and must therefore be construed strictly also regarding the burden of proof. Such has been the reasoning, for example, in the Court's consistent case-law regarding exemptions from the obligation to make a call for competition under the Public Procurement Directives[303]. However, a closer analysis shows that the two scenarios are not quite comparable, and that this reasoning should therefore not be applied by analogy to the anti-avoidance clause of Art. 15 (1) (a) MD. It has to be noted that different from other exemptions, the authorization to apply anti-avoidance rules or doctrines is by definition not contravening the objective of the Merger Directive, but rather ensures that the benefits of the Directive need not be granted beyond the purpose of the latter and its qualifications. Admittedly, excessive burdens of proof to the detriment of the taxpayer might still give the authorization an unduly broad coverage that would then be contrary to the internal market objective; but likewise, to put the onus entirely on the tax administration might unduly narrow down the effective scope of application and might thus allow some abusive schemes to still benefit from the Directive contrary to its purpose. In this regard, it is furthermore important that the Merger Directive *also* has the *pari passu* objective to safeguard the financial interests of the Member States, as evidenced by the fifth recital in the preamble. The solution of *Emsland-Stärke* to declare questions of burden of proof as a matter of national

[301] Regarding the relevance of the wording of the respective anti-avoidance provision, see ECJ 15 November 2007, case C-162/06, International Mail Spain [2007] ECR I-9911, para. 49.
[302] See, in this regard, ECJ 26 April 2006, case C-348/04, Boehringer Ingelheim [2007] ECR I-3391, para. 51.
[303] Cf. ECJ, 10 March 1987, case 199/85, Commission v Italy [1987] ECR I-1039, para. 14; ECJ 18 May 1995, case C-57/94, Commission v Italy [1995] ECR I-1249, para. 23; ECJ 14 September 2004, case C-385/02, Commission v Italy [2004] ECR I-8121, para. 19; ECJ 2 June 2005, case C-394/02, Commission / Greece [2005] ECR I-4713, para. 33; ECJ 4 June 2009, case C-250/07, Commission / Greece [2009] ECR I-4369, para. 17.

procedural autonomy, but within the limits imposed by the principle of effectiveness[304], therefore is a very reasonable one also with respect to Art. 15 (1) (a) MD.

The above deliberations must also have a bearing on the admissibility of rebuttable legal presumptions regarding the existence of abusive operations within the meaning of Art. 15 (1) (a) MD, in so far as Member States may not or will not have recourse to irrefutable presumptions[305]. Art. 15 (1) (a) MD clearly authorizes a presumption of tax avoidance if the respective operation is not carried out for valid commercial reasons, as already discussed above[306]. However, for the above reasons, this should not be understood so as to prejudice all other forms of (rebuttable) presumptions[307], but rather as an explicit acknowledgement that a presumption based on this kind of situation will never impair the aforementioned Union principle of effectiveness. Other presumptions, especially regarding the taxpayer's plans, motives and intentions, may still be useful and indeed desirable in order to enhance legal certainty and administrative efficiency[308]. It can also not be excluded *a priori* that they may be proportionate, because it is often the taxpayer who is best placed to shed light on these circumstances[309]. They should therefore not be held to be incompatible with Art. 15 (1) (a) MD, provided that they respect the principles of equivalence and effectiveness[310], and do not discriminate against cross-border operations as compared to purely domestic ones[311]. Moreover, rebuttable presumptions must not be so broad as to affect too many cases that will not involve any tax avoidance, because this would place a disproportionate compliance burden and risk on taxpayers[312].

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[304] In the above context, the principle of effectiveness can also be regarded as a reflection of the proportionality principle, cf. Communication from the Commission on the application of anti-abuse measures in the area of direct taxation, COM(2007) 785 final, 10 December 2007, p. 5.
[305] As regards the different opinions in this regard, see supra at 6.3.1.
[306] See supra at 4.2.
[307] See also Hoenjet, note 211, p. 214.
[308] See, by analogy, ECJ 27 September 2007, case C-409/04, Teleos [2007] I-7797, paras. 48 et seq. Likewise Opinion of AG *Geelhoed* 29 June 2006, case C-524/04, Thin Cap GL [2007] ECR I-2107, para. 66; Communication from the Commission on the application of anti-abuse measures in the area of direct taxation, COM(2007) 785 final, 10 December 2007, p. 5; Petrosovitch, note 4, pp. 564 et seq.; Sørensen, note 7, p. 454; Weisbach, note 34, pp. 876 et seq.
[309] Cf. Terra and Wattel, note 4, pp. 553 et seq. See, by analogy, ECJ 12 September 2006, case C-196/04, Cadbury Schweppes [2006] ECR I-7995, para. 70; Opinion of AG Mazák 26 April 2007, case C-451/05, Elisa [2007] ECR I-8251, para. 103. See also the principle of "proximity to the evidence" underlying the Court's reasoning in, e.g., ECJ 21 October 1999, case C-44/97, Germany / Commission [1999] ECR I-7177, para. 28; ECJ 19 September 2002, case C-377/99, Germany / Commission [2002] ECR I-7421, para. 95; ECJ 10 December 2009, case C-390/07, Commission / United Kingdom, n.y.r., paras. 43 et seq. See furthermore the similar reasoning by Mutén, L., "Lecture in honour of Klaus Vogel: European tax law, quo vadis?", 62 *Bulletin for International Taxation* (2008), p. 2 (at p. 4).
[310] See also de Broe, note 7, pp. 914 et seq.; Terra and Wattel, note 4, pp. 554 et seq.
[311] The latter qualification is rightfully emphasized by Petrosovitch, note 4, p. 564.
[312] Cf. Sørensen, note 7, p. 454.

Finally, as regards all legal or case-law presumptions, it should be noted that they apply only once the tax authorities have plausible evidence capable of justifying an application of the presumption[313]. Furthermore, the ECJ has held that any assessment of tax avoidance within the meaning of Art. 15 (1) (a) MD must be open to judicial review[314]; therefore, the tax authorities are required, if applicable, to state why they consider inconclusive the evidence that the taxpayer furnished in order to rebut a presumption or to comply with a reversal in the burden of proof[315].

7. Conclusion

The above deliberations show a high degree of conceptual convergence between Art. 15 (1) (a) MD and the unwritten doctrine of prohibition of abuse of Union law as developed in the case-law of the ECJ. Both concepts are based on a combination of, first, teleological interpretation (purposive construction) and, second, specific criteria that allow for an application of the allegedly abused provision to the ultimate economic effects of a composite transaction, rather than merely to individual elements of such a transaction[316]. Under both approaches, it is accepted that "wholly artificial arrangements" may be considered to indicate abuse and tax avoidance in so far as they imply a reduction of the tax burden. It has to be acknowledged, though, that the Court does often not distinguish sufficiently between the application of anti-avoidance standards, and "pure" purposive construction that has priority over the former in so far as it allows for a "substance over form" analysis. Notwithstanding this caveat, it can be inferred from the case law and scholarly writing that in both contexts, the quintessential task consists in drawing as bright a line as possible between legitimate tax planning and tax mitigation, on the one hand, and attempts of tax avoidance to be frustrated under an anti-abuse rule or doctrine, on the other hand.

To that effect, the application of Art. 15 (1) (a) MD, too, relies on an objective test of tax avoidance and on a subjective test of a corresponding intention of the taxpayer. The objective test ought to be understood to comprise two distinct elements: First, it has to be determined whether a series of transactions can be assessed as a whole with respect to its ultimate economic effects, even beyond the wording and legalistic concept of the secondary Union law provision at issue. Arguably, only those transactions and events that are carried out,

[313] See, by analogy, ECJ 9 March 2010, Joined cases C-379/08 and C-380/08, Raffinerie Mediterranee, n.y.r., paras. 55-57.
[314] Cf. ECJ 17 July 1997, case C-28/95, Leur-Bloem [1997] ECR I-4161, para. 41; likewise de Broe, note 7, pp. 924 et seq.; Terra and Wattel, note 4, p. 554; Weber, note 65, p. 234.
[315] See, by analogy, ECJ, 13 March 2008, case C-96/06, Viamex Agrar [2008] ECR I-1413, para. 42. See also Petrosovitch, note 4, p. 565; Weber, note 65, p. 235.
[316] See also Freedman, note 16, p. 57.

controlled, or embraced as highly likely by the taxpayer or by somebody acting on her behalf, according to a preconceived plan, should be assessed as a "composite transaction" with a view towards their ultimate economic results. Second, it must be analyzed whether it would be consistent with the objectives of the Merger Directive and with the purpose of the provision at issue to deny the benefits of the Directive. In this context, it is essential to also take into account the inconsistencies and deliberate generalizations that visibly compromise the attainment of certain tax policy principles or objectives underlying the specific benefits of the Merger Directive at issue or, in so far as relevant, its conditions and qualifications. Their exploitation cannot, as a general rule, be regarded as tax avoidance.

The subjective test concerns the *intentions* of the taxpayer's arrangement, rather than the preliminary question whether the latter may be assessed on a composite basis. Both aspects must not be confused; it would therefore be inadequate to rely on the criteria of a preordained plan and of taxpayer control also for the purposes of the subjective test required by Art. 15 (1) (a) MD, as the Court sometimes does within the framework of its general anti-abuse doctrine. Instead, it is necessary – but should also be regarded as sufficient – to find that tax savings played a significant role in the deliberations of the taxpayer and her advisors when organizing the restructuring. It should thus not be required that the operation "may have no explanation other than the mere attainment of tax advantages".

As acknowledged in Art. 15 (1) (a) MD, tax avoidance may be presumed if there is a lack of valid commercial reasons for the operation in dispute. This is equivalent to a narrowly defined concept of "wholly artificial arrangement" for which U-turn schemes or circular transactions are paradigmatic. Arguably, the authorization to make use of such a presumption also allows Member States to disregard the question whether the scheme at issue is merely exploiting inconsistencies or generalized assumptions inherent to the Merger Directive. It may thus be relied on as a bulwark against "excessively aggressive" tax planning.

In conformity with the Court's case-law, Art. 15 (1) (a) MD must be understood as having no direct effect in the tax systems of the Member States, which may also not rely on a more "general principle of prohibition of abuse" in order to counter abusive schemes within the ambit of the Merger Directive. Moreover, it is not incumbent upon Member States to transpose Art. 15 (1) (a) MD into national law. They may have resort to the authorization to apply an anti-abuse rule or doctrine at their own discretion, and in any form that is considered adequate within the respective national constitutional framework. Member States also enjoy autonomy with respect to procedural aspects, and regarding the burden of proof in particular,

as has rightfully been stated – although not always fully consistent – in the Court's jurisprudence. However, any corresponding provisions, including rebuttable presumptions, must respect fundamental principles of Union law, such as equivalence and effectiveness in the implementation of Union law, and the principle of proportionality. Finally, it is suggested that the Court should reconsider its strict position on the (in)admissibility of irrefutable presumptions of tax avoidance against the backdrop of generous Union legislation to that effect.

De lege ferenda, this paper recommends some amendments of Art. 15 (1) (a) MD. The subjective test of taxpayer intentions currently required by the wording of the provision should be abolished. Despite its widespread use in international practice, it is not warranted by any of the fundamental principles that legitimize or limit the application of anti-avoidance measures. Instead, it tends to render a GAAR or general anti-avoidance doctrine ineffective if interpreted strictly; and in any event, it is an unnecessary source of legal uncertainty and ensuing tax litigation. Moreover, Art. 15 (1) (a) MD should explicitly grant Member States discretion to have resort also to – even irrefutable – presumptions of tax avoidance beyond scenarios of a lack of "valid commercial reasons", in so far as these presumptions are proportional. This authorization would preferably be subject to framework conditions established through a comitology procedure. One of the main challenges would then be the elaboration of reasonably targeted anti-avoidance standards.

Two topics that would merit further discussion and that have not been dealt with in the present paper are, first, whether it would make sense, in the specific context of Art. 15 (1) (a) MD, to link the authorization of national anti-avoidance measures to the requirement of a simultaneous implementation of an advance tax ruling system on the application of these measures[317]; and, second, whether Art. 15 (1) (a) MD should provide any guidance – and if so, which – with respect to the increasingly popular[318] mandatory disclosure rules for tax avoidance transactions.

[317] See, in this context, the argument made in favour – but not in the specific context of Art. 15 (1) (a) MD – by van de Leur, M.W.M., "Abuse of law: a double-edged sword?", 17 *International VAT Monitor* (2006), p. 321; but also the reservations made by Tiley, note 75, p. 70.

[318] For a comprehensive overview, see OECD, "Tackling Aggressive Tax Planning through Improved Transparency and Disclosure", Report on disclosure initiatives, February 2011, available at <http://www.oecd.org/dataoecd/13/55/48322860.pdf>.

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