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Poland's Implementation of EU GAAR Compromises Constitutional and EU Principles

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One of the most potent legal instruments for preventing tax avoidance is Article 6 (general anti-avoidance rule, EU GAAR) of the Anti-Tax Avoidance Directive (ATAD). This article analyses Poland's very restrictive implementation of EU GAAR to demonstrate that the implementation, although permissible under Article 3 ATAD, has led to the protection of the Polish tax base at the cost of constitutional and EU principles. The main purpose of this article is to reveal the incompatibility of the Polish GAAR with the constitutional and EU principles of legal certainty and proportionality and to draw consequences from it. Furthermore, the article aims to show that the EU should have taken a different approach to the EU standard for abuse of tax law.

Keywords: GAAR, ATAD, tax avoidance, Poland, constitution, EU primary law, CJEU, proportionality, certainty, repressive.

1 Introduction

The Anti-Tax Avoidance Directive[1] (ATAD) is at the forefront of the anti-tax avoidance endeavours of the EU. Among the rules included in the ATAD, the general anti-avoidance rule (GAAR) as enshrined in Article 6 ATAD (EU GAAR) constitutes the single most important anti-avoidance provision under EU law that generally aims to prevent abuses of tax law in EU Member States.[2] It reads as follows:

General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

The EU GAAR aims to harmonize a general anti-abuse rule in the domain of tax law among all of the EU Member States. It has a wide scope, and its phraseology is ambiguous. However, according to Recital 11 of the preamble to ATAD, the EU GAAR should not be too broad as it should only target abusive arrangements, affording taxpayers the possibility to optimize their affairs beyond the scope of abuse.[3] The range of abusive arrangements should be extrapolated from the appropriate (reasonable) understanding of Article 6 ATAD. This is, however, unlikely to happen given the differences in the fiscal agendas of the Member States.

The above issue is further complicated by Article 3 ATAD, which says that: 'This Directive shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases'.

This provision formally allows EU Member States to implement or redraft their existing GAARs to target tax avoidance arrangements more strictly than what is

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1 Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (19 July 2016).

2 Before it entered into force, i.e. 1 Jan. 2019, several GAARs were contained in partially harmonized areas of direct tax law in order to prevent an abuse of the EU directives.

3 *See* ATAD, Recital 11 of the preamble.

possible under the EU GAAR.[4] An analysis, however, shows that its wording and structure create such a low threshold for abuse that it is difficult to interpret that rule in accordance with the Court of Justice of the European Union's (CJEU's) doctrine of abuse applicable to tax law that is referred to as the general anti-avoidance principle (GAAP).[5] Consequently, it is reasonable to assume that the minimum standard in respect of the EU GAAR does not exist and that Article 6 constitutes the maximum standard to prevent abuse of tax law, which dangerously balances at the verge of compatibility with the EU primary law (GAAP).

Against this background, this contribution aims to demonstrate that the combination of Articles 6 and 3 ATAD is an exceedingly dangerous EU legislative mix. If the legislatures of the Member States presume that the EU GAAR constitutes just a minimum standard for the prevention of abuse of tax law, which they may legitimately do according to Article 3 ATAD, then the Member States may implement the EU GAAR to protect their tax bases at the cost of constitutional and EU principles. This article analyses the partial implementation of the EU GAAR by the Polish legislator with effect from 1 January 2019[6] in order to verify the hypothesis about the 'dangerous combination' of Articles 6 and 3 ATAD. The principle purpose of that analysis is to reveal that the Polish GAAR currently appears to be incompatible with various fundamental principles of constitutional importance as included in the EU Treaties and the Polish Constitution[7] (the Constitution) and safeguarded by the CJEU and the Polish Constitutional Tribunal (the Tribunal), respectively. As a result of that analysis, the article intends to further demonstrate that the EU should have taken a different approach to the EU standard for abuse of tax law in order to reduce the risk of a breach of the fundamental rights and the constitutional principles by EU Member States. The article also argues that the Ministry of Finance (the author of the amendments to the Polish GAAR) and the Polish legislature are to blame for the overzealous implementation of the EU GAAR. Both ignored the EU's warnings in the preamble to the ATAD whereby the domestic GAAR should be designed in order to apply only to artificial (non-genuine) arrangements in order to comply with the GAAP.

Firstly, the hypothesis and the disposition of the Polish GAAR are analysed. Secondly, the compatibility of the Polish GAAR as purportedly adjusted to the EU GAAR with the constitutional principles of good legislation (PL: *zasady przyzwoitej legislacji*) and the EU principle of legal certainty is analysed. Thirdly, the analysis discusses compatibility with the Polish constitutional and the EU principle of proportionality. Finally, the article critically reflects on the outcome of the partial implementation of the EU GAAR to the Polish tax law, in particular by indicating the reasons supporting the claim that the Polish GAAR is not compatible with the EU and Polish constitutional principles as well as the legal consequences stemming from that. This implementation may thus be considered as the incorrect transposition of EU secondary law into the Polish legal order.

Although the analysis below concentrates on the compatibility of the Polish GAAR with the Polish Constitution and EU primary law, the similarities among GAARs,[8] especially among the EU Member States, due to their obligation to conform with the EU GAAR and constitutional principles in democracies across the world, [9] makes the analysis particularly relevant to other countries in which the issue in question may arise under their constitutional laws. Moreover, the Tribunal's perception of the principle of legal certainty within the broader framework of the principle of good legislation and the principle of proportionality under the Constitution significantly converges with the CJEU's perception of the principles of legal certainty and proportionality, respectively. All of this speak to the international relevance of this article, in particular for other EU Member States.

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4 *See also* ATAD, Recital 3 to the preamble. The minimum protection standard under Art. 3 ATAD covers all anti-avoidance rules included in ATAD.

5 *See* B. Kuźniacki, *6. The GAAR (Article 6 ATAD)*, in *A Guide to the Anti-Tax Avoidance Directive* 132–133 (W. Haslehner et al. eds, Edward Elgar Publishing 2020); Compare A. B. Moreno & J. J. Zornoza Pérez, *The General Anti-abuse Rule of the Anti-tax Avoidance Directive*, in *The EU: Harmonization and Cooperation in Direct Taxation* 118 and 126–130 (J. M. Almudí Cid et al. eds, Kluwer Law International 2019); M. F. de Wilde, *Is the ATAD's GAAR a Pandora Box?*, in *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* 308–314 (P. Pistone & D. Weber eds, IBFD 2018).

6 PL: *Ustawa z 23 października 2018 r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych, ustawy – Ordynacja podatkowa oraz niektórych innych ustaw* [The Act Amending the Act on Personal Income Tax, the Act on Corporate Income Tax and the Tax Ordinance and other Acts of 23 Oct. 2018], Journal of Laws, item 2193.

7 PL: The Constitution of the Republic of Poland of 2 Apr. 1997, Journal of Laws, No. 78, item 483.

8 *See* M. Lang et al. ed., *GAARs – A Key Element of Tax Systems in the Post-BEPS World* (IBFD 2016); M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU* (Linde Verlag 2016).

9 *See* for instance, the evident similarity between the principle of ability to pay under the Polish and Italian Constitutions as follows from the reasoning of the Italian Supreme Court of Cassation (*Corte Suprema di Cassazione – sezione quinta civile*) in a few judgments concerning the general principle of 'taxation according to the concrete ability to pay taxes' contained in Art. 53 of the Italian Constitution: judgments numbers 30055/08, 30056/08, 30057/08, 30058/08. *See* more in C. Garbarino, *Italy*, in *A Comparative Look at Regulation of Corporate Tax Avoidance* 218 (K. B. Brown ed., Springer 2012). *See also* the similarities between the principles of good legislation under the Polish Constitution and principles of predictability and specificity of legislation under the Austrian constitutional law in E. Pinetz, *Final Report on Action 6 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Prevention of Treaty Abuse*, 70(1/2) Bull. for Int'l Tax'n 117 (2016).

2 Analysis of the hypothesis and the disposition of the Polish GAAR

Article 119a § 1 of the Tax Ordinance Act of 29 August 1997[10] (TOA) constitutes a core part of the Polish GAAR and states that:

> an action shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for performing that action and the course of action was artificial (tax avoidance).[11]

The definition of tax avoidance under the hypothesis of the Polish GAAR consists of three functional elements/tests: (1) the main purpose or one of the main purposes of an activity is to gain a tax advantage (the intention test); (2) the activity contradicts the object or purpose of the tax law or a provision thereof (the contradiction test); and (3) the artificiality of the action (the artificiality test). The definition of tax avoidance is pivotal to the functioning of the Polish GAAR, therefore, there is an in depth examination of these elements in sections 2.1–2.3 and a subsequent investigation of the legal consequences in section 2.4.

2.1 *The Intention Test: 'The Main Purpose or One of the Main Purposes'*

The intention test is satisfied not only when the main purpose of a taxpayer's action was to gain a tax advantage but even when it was one of the main purposes. Taken literally, this test targets tax optimization (minimization) rather than only tax avoidance because a rational taxpayer, especially in the course of business or investment transactions, always considers the tax consequences and aims to reduce the tax burdens.[12]

Internationally, the use of the phrase 'one of the main purposes' in the EU GAAR has sparked widespread criticism among scholars because it invokes a surprisingly low threshold of abuse that is able to target sound economic arrangements.[13] This criticism has been addressed even by scholars who defend GAARs as a necessary and inherent feature of modern tax systems.[14] The legislator in Poland, however, copied that phrase entirely from the EU GAAR to the Polish GAAR.

The Polish legislator made some attempts to clarify the intention test. Article 119d TOA says that the assessment 'whether gaining a tax advantage was the main or one of the main purposes of performing an action shall be made *taking into consideration economic purposes of an action indicated by the party*'. [the author's emphasis]

In fact, the cited provision gives no indication at all on how to apply the intention test and appears to be superfluous since the tax authorities must always take into consideration the economic purposes of an action indicated by the party under the provisions regulating the matter of gathering evidence in tax proceedings. One of them is simply the testimony of the party to the procedure, e.g. the taxpayer in tax proceedings initiated and brought under the Polish GAAR.[15]

The rational understanding of Article 119d TOA seems to be that the economic purposes of an action are relevant when assessing the intention test irrespective of their indication by the taxpayer. At the same time, economic purposes are relevant when assessing the artificiality test that results directly from the content of Article 119c § 1 TOA:

> A course of action *shall not be artificial* if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing legitimate objectives would adopt that course of action *predominantly for justified economic reasons*. The reasons referred to in the first sentence *shall not include the purpose of gaining a tax advantage contrary to the object or purpose of tax law or its provision*. [the author's emphasis]

This provision shows the relationship between the intention test and the artificiality test: the economic purposes (justification) are relevant to the assessment of both tests. There is also a subtle link between those tests that may be found via the preliminary works to the amendments to the Polish GAAR:

> The project made an 'ambitious' attempt to give words in Polish language a new meaning; namely, the proposed Article 119d TOA stated that 'gaining a tax advantage is to be considered *the main or one of the main purposes* of the action, if, taking into account the other economic purposes of the actions indicated by the party, it should be considered that *this purpose was not negligible*'.[16] [the author's emphasis]

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[10] PL: TOA Consolidated version: Official Journal of 7 July 2020, item 1325.

[11] Unless otherwise indicated, all translations of the TOA from Polish to English were made by Centrum Tłumaczeń i Obsługi Konferencji LIDEX [The Centre of Translations and Conference Services LIDEX] via Lex online.

[12] *See* P. Baker & T. Liao, *Improper Use of Tax Treaties: The New Commentary on* Article 1 *and the Amended Art 13(5)*, 66(11) Bull. for Int'l Tax'n 600 (2012); L. De Broe & J. Luts, *BEPS Action 6: Tax Treaty Abuse*, 43(2) Intertax 132 (2015); Compare R. Kok, *The Principal Purpose Test in Tax Treaties Under BEPS 6*, 44(5) Intertax 408 (2016); M. Lang, *BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, 74(7) Tax Notes Int'l 658 (2014).

[13] *See* Moreno & Pérez, *supra* n. 5, at 126–128; De Broe & Luts, *supra* n. 12, at 142.

[14] *See* F. Zimmer, *In Defence of General Anti-Avoidance Rules*, 72(4) Bull' for Int'l Tax'n (2019), secs 10 and 13.

[15] *See* Art. 122, 187 and 191 TOA. *Cf.* PL: SAC's judgment of 12 Feb. 2008, Case No. I FSK 264/07, http://orzeczenia.nsa.gov.pl/doc/E7AAC8A352 (accessed 27 Nov. 2020).

[16] *See* W. Nykiel, *Nowe przepisy dotyczące klauzuli przeciw unikaniu opodatkowania – wybrane aspekty legislacyjne*, in *Współczesne problemy prawa podatkowego – teoria i praktyka. Księga jubileuszowa dedykowana Profesorowi Bogumiłowi Brzezińskiemu (tom I)* (J. Głuchowski ed., Wolters Kluwer Polska 2019), Lex online, sec. 3.

This means that the intention of the authors of the amendments to the Polish GAAR was to give the phrase 'one of the main purposes' the meaning of 'one of many different purposes', including every non-negligible purpose of gaining a tax advantage. As indicated in the quote above, it was an attempt to bestow a new meaning to the word 'main' (PL: *główny*) because the Polish dictionary defines it as 'most important' (PL: *najważniejszy*), 'fundamental' (PL: *podstawowy*), and 'essential' (PL: *zasadniczy*)[17] but not 'non-negligible' (PL: *nie mało istotny*). Although this contra-linguistic meaning of the word 'main' under the Polish GAAR was eventually omitted by the legislator, it demonstrates how broad a definition of tax avoidance the authors of the amendments to the GAAR were aiming to create. Despite the fact that the legislator abandoned the idea of giving new meaning to the word 'main' – non-negligible – this extremely broad definition of tax avoidance is still in force since the intention test uses the phrase 'one of the main purposes', and this phrase is ambiguously defined under the TOA.

Interestingly, a comparative analysis of the GAARs and doctrines of abuse of tax law that were in force before the ATAD and the new provisions of the Polish GAAR that were entered into force show that the threshold for entering into an abusive arrangement in the Member States has never gone below *sole, essential*, *predominant* or *dominant* purpose to obtain a tax advantage.[18] The UK GAAR could be considered to be the only exception in that regard as it uses the phrase 'one of the main purposes'. However, due to the 'double reasonableness test' embedded in that rule, the threshold of abuse is high and results in the rule being applied only to artificial arrangements clearly abusing tax advantages, as stipulated by tax law.[19] Admittedly, it is very unlikely that only one of the main purposes of such arrangements rather than their sole or essential purpose was to obtain a tax advantage. The Polish GAAR is therefore quite alone in respect of the wording and construction of the intention test.

Although, at first glance, the wording of the intention test is identical under the Polish GAAR and Article 6 ATAD, there are other provisions of the Polish GAAR that attempt to explain that the test – Articles 119c § 1 and 119d TOA – was intended to give a broader meaning of tax intention than its equivalent in Article 6 ATAD. Clearly, the GAAR that was included in the proposal to the ATAD (Article 7(1)) relied on the essential purpose of obtaining a tax advantage to construe the intention test[20] whereas the preparatory work for the changes to the Polish GAAR reveal that the phrase 'one of the main purposes' should be understood as 'one of many different purposes'. The case law foundational for the GAAP pulls towards the 'essential' rather than 'one of the main purposes' when construing the intention test. This is due to the fact that there is nothing in the CJEU relevant case law to imply that one of the main purposes to obtain a tax advantage can constitute a threshold of abuse among Member States in the non-harmonized area of direct tax law.[21] A legislative attempt to clarify the intention test via Article 119c § 1 and Article 119d TOA failed; in particular, it did not align the intention test with its equivalent under the GAAP which is instructive for Article 6 ATAD.[22] Instead, more confusion was added as the intention test was closely intertwined with the contradiction test and the artificiality test but without bringing any clarity. The intention test under Article 6 ATAD is not nearly so chaotic.

2.2 'Contradiction test: 'contrary in the circumstances concerned to the object or purpose of tax law or its provisions'

The contradiction test requires examining whether an action is taken in order to gain a tax advantage that is contrary to the object or purpose of the tax law or a provision thereof. There is no explicit clarification on how to apply that test in the wording of the Polish GAAR. Useful guidance can only be found in the Polish doctrine and jurisprudence both of which indicate that the contradiction test will often require determining the economic

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17 Polish dictionary, https://sjp.pwn.pl/szukaj/główny.html (accessed 7 June 2020).

18 *See* A. Olesińska, *Is Polish GAAR Compatible with the Directive 2016/1164 (ATAD)?*, Toruński Rocznik Podatkowy (2017), sec. 6, http://www.trp.umk.pl/index.php/trp-2017/2-uncategorised/190-eng-agnieszka-olesinska-is-polish-gaar-compatible-with-the-directive-2016-1164-atad (accessed 1 Dec. 2020); Compare R. Prebble & J. Prebble, *Does the Use of General Anti-avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55(1) St. Louis U. L. J. 32 (2012).

19 *See* Olesińska, *supra* n. 18, sec. 6; Compare A. Burchner, J. Cape, & M. Hodkin, *United Kingdom – Branch Report,* in *Anti-avoidance Measures of General Nature and Scope – gaar and Other Rules* IFA Cashiers vol. 103A (IFA 2018), sec. 1.4.4; A. Seely, *Tax Avoidance: A General Anti-Abuse Rule*, Library Standard note: SN6265, House of Commons (9 May 2013).

20 The reason for finally switching from 'the essential purpose to 'one of the main purposes' by the EU Council seems to be to bring Art. 6 ATAD as close as possible to the PPT (MLI) in order to implement anti-abuse solutions at the EU level as consistently as possible with OECD BEPS solutions. *See* ATAD, Recital of the preamble. Cf. A. Perdelwitz, *Developing a Common Framework Against Tax Avoidance in the European Union*, in *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (P. Pistone & D. Weber eds, IBFD 2018), s. 15.3.6.

21 *See* CJEU's judgments of 26 Feb. 2019 in the Danish Beneficial Ownership Cases, CJEU 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16, C-299/16, *N Luxembourg 1, X Denmark A/S, C Danmark I, Z Denmark ApS*, ECLI:EU:C:2019:134 regarding the abuse under the IRD and CJEU 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *T Danmark and Y Denmark Aps*, ECLI:EU:C:2019:135, on the abuse of the PSD; *See also* the CJEU 26 Feb. 2019, *X GmbH*, Case C-135/17, ECLI:EU:C:2019:136, para. 84; CJEU 7 Sept. 2017, Case C-6/16, *Eqiom SAS*, ECLI:EU:C:2017:641, para. 30; CJEU 20 Dec. 2017, Joined Cases C-504/16 & C-613/16, *Deister Holding and Juhler Holding*, ECLI:EU: C:2017:1009, para. 60. Cf. CJEU 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes*, ECLI:EU:C:2006:544, paras 51, 55, 56, 57, 61, 63, 68, 69, 72, 75, and 76.

22 *See* ATAD, Recital 11 of the preamble.

non-tax reasons of an action;[23] thus is very much intertwined with the artificiality test. Indeed, Polish jurisprudence dictates that the contradiction test must be examined in conjunction with the artificiality test.[24]

One confusing aspect in respect of the contradiction test is the wording of Article 119c § 1 TOA which states that (1) a course of action will not be artificial if an entity acting reasonably and pursuing legitimate objectives adopts that course of action predominantly for justified economic reasons and (2) the justified economic reasons do not include the objective of gaining a tax advantage contrary to the object or purpose of tax law or its provisions. Hence, the non-tax economic justifications of an action resulting in a tax advantage benefit must be scrutinized while determining the contradiction test. This means that Article 119c § 1 TOA is flawed due to a logical error (*idem per idem*): the economic justifications are used to determine the artificiality test[25] the definition of which is partly dependent on the contradiction test which is consequently largely conditioned by economic justifications.

The confusion regarding the contradiction test also follows from the very terminology of this test since it relies on four equally important and alternative contradictions; specifically, the contradiction with: (1) the object of tax law; (2) the object of a provision of tax law; (3) the purpose of the tax law; and (4) the purpose of a provision of tax law. The legislator did not provide any clarification on what the above four types of contradictions mean and how to determine them.

Paramount confusion stems from the contradiction of the object of tax law or its provision. Strikingly, even the authors of the amendments to the Polish GAAR (then: Undersecretary of State, Filip Świtała; and Director of the Tax System, Dominik Kaczmarski) could not respond to questions on what it actually means that an action was taken contrary to the object of tax law or its provision and how to determine it.[26] This object normally constitutes the scope of all actions that are subject to tax law, for instance, corporate income tax law or personal income tax law. If an action is carried out contrary to the object of tax law or its provision, it is typically also contrary to the purpose of tax law or its provision.[27] In addition, the theory and the practice of Polish tax law does not recognize the concept of contradiction with the object of tax law or its provision. An anti-avoidance connotation was always associated with the concept of contradiction with the purpose of tax law or its provision.[28] Accordingly, the contradiction test in respect of the concept of a contradiction with the object of tax law or its provision is extremely confusing which has led to its application by the tax authorities being prone to divergent and unpredicted outcomes. Although the concept of contradiction with the purpose of tax law or its provision is clearer than the concept of contradiction with the object of tax law or its provision, it is still very difficult to determine its application. The legislature has not explained it at all.

The Council for the Prevention of Tax Avoidance [PL: *Rada do Spraw Przeciwdziałania Unikaniu Opodatkowania*] (henceforth CPTA) is an independent body that opines on the validity of the application of the Polish GAAR.[29] In one of its opinions, the CPTA stated that the contradiction test is 'self-fulfilling when it is demonstrated that an action was artificial and performed primarily to gain a tax advantage'.[30] That observation was followed by the head of the national revenue authority (NRA) in its refusal to provide the taxpayer with a 'safeguarding opinion' regarding the Polish GAAR (had the taxpayer received such an opinion, their action would not be considered as tax avoidance).[31]

This approach to the contradiction test is perplexing as it implies that this test is redundant. This redundancy stems from the methodology of applying the Polish GAAR as proposed by the CPTA: An artificial action aimed primarily to gain a tax advantage is deemed to contradict the object or purpose of the tax law or its provision. This result of the interpretation of the Polish

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23 Compare B. Dauter, *Article 119a. Unikanie opodatkowania*, in *Ordynacja podatkowa. Komentarz* (S. Babiarz et al. eds, Wolters Kluwer Polska 2019), Lex online, para. 11.

24 *See* PL: SAC judgment 31 Jan. 2019, Case No. II FSK 3242/18, http://orzeczenia.nsa.gov.pl/doc/4D3BA6C19A (accessed 10 Nov. 2020).

25 The lack of predominant economic justifications implies artificiality.

26 *See* PL: *Stenogram z Posiedzenia Komisji Finansów Publicznych Sejmu VIII kadencji (nr 370) z 17 Oct. 2018 r.* [*The Transcripts from the Commission of Public Finance's Meeting of the VIII Parliamentary Term (No. 379) of 17 Oct. 2018*], at 43–45, http://orka.sejm.gov.pl/zapisy8.nsf/0/BC7D822C63A7F50EC12583D3003DB53A/%24File/0360908.pdf (accessed 11 June 2020).

27 Compare This is why many prominent scholars do not distinguish between the object and purpose of the law. In respect of the object and purpose of a tax treaty, *see* L. De Broe, *International Tax Planning and Prevention of Abuse: A Study Under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, Doctoral Series vol. 14, 247 (IBFD 2008); D. Ward, *Ward's Tax Treaties 1996–1997*, 25 (Carswell 1996); K. Vogel & R. Prokisch, *General Report,* in *Interpretation of Double Tax Conventions* IFA Cahiers Vol. 78A, 72 (IFA 1993).

28 Compare A. Ladziński & A. Olesińska, *Przepisy o przeciwdziałaniu unikaniu opodatkowania – ogólna klauzula przeciwko unikaniu opodatkowania*, in *Nowe narzędzia kontrolne, dokumentacyjne i informatyczne w prawie podatkowym* 146 (B. Brzeziński, K. Lasiński-Sulecki & W. Morawski eds, Wolters Kluwer 2018).

29 PL: Art. 119m § 1 TOA.

30 *See* PL: Resolution of the Council for the Prevention of Tax Avoidance, 18 Dec. 2019, No. 3/2019, para. 46, https://www.gov.pl/attachment/b5c97b9c-717d-4a2b-9964-2dfbc184e065 (accessed 12 Nov. 2020).

31 *See* PL: *Odmowa wydania opinii zabezpieczającej dot. wydzielenia zorganizowanej części przedsiębiorstwa oraz przekształcenia spółki z ograniczoną odpowiedzialnością w spółkę komandytową przez Szefa KAS of 23 Jan. 2020*, https://sip.mf.gov.pl/faces/views/szczegoly/szczegoly-karty-pism.xhtml?dokumentId=-186358&poziomDostepu=PUB&indexAccordionPanel=-1#tresc (accessed 1 Dec. 2020).

GAAR disregards a separate and standalone test under the GAAR – the contradiction test. Although a degree of tax intention and artificiality certainly matters when determining the contradiction test, as all of the tests under the Polish GAAR appear to be intertwined,[32] the contradiction test always requires a careful examination of the wording of the tax law provisions that have been applied or circumvented to gain a tax advantage.[33] Regrettably, neither the terminology of the Polish GAAR nor the practice of its application by the tax authorities support this methodology.

An extra dimension of confusion in the application of the contradiction test follows from the recent refusal by the head of the NRA of 28 May 2020 to issue a safeguarding opinion regarding the disposal of a company's shares to an associated company.[34] In that case, the head of the NRA stated the assessment of the contradiction of a tax advantage with the object and purpose of a tax provision must, as a rule, '*depart from traditional methods of interpretation, as they are useless for the purpose of applying the GAAR'.* Accordingly, the head of the NRA created a new rule for applying the Polish GAAR: exempting the contradiction test from the standard methods of interpretation such as literal, systemic, and purposive. The question is then what methods can be used when applying the contradiction test if the standard methods of legal interpretation cannot be utilized? The head of the NRA appears to indicate that an arbitrary approach to determining the contradiction test within the discretionary power of the tax authorities is not only justified but seemingly the only correct way to apply the Polish GAAR.

It might be easy to blame the EU legislator for that outcome of the implementation of Article 6 ATAD by Poland because its wording implies that it is the object or purpose of the entire corporate tax regime rather than those of specific tax provisions applied to obtain a tax advantage. Such an assessment, however, would be unfair. First, the wording of all EU directives, including the ATAD, must be flexible enough to accord with the frameworks of 28 different legal systems at the time of adopting it. The EU legislator correctly assumes that the legislators of the Member States will adjust the terminology of the directive to their legal systems in a manner that achieves the purpose of the directive. It is quite obvious, therefore, that the phrase 'the object or purpose of the applicable tax law' has a capacious range and could be implemented in various ways. In fact, the phrase 'the object or purpose of the applicable tax law' should not be taken literally as it would refer to the overall object or purpose of the tax regime that are often too general and remote to allow the suitable application of the contradiction test.[35] The decision by the Polish legislature to copy/paste the wording of Article 6 ATAD and to overcomplicate the contradiction test by illogically 'explaining' it in Article 119c § 1 TOA was intentional in this author's view. The objective was to complicate the contradiction test as much as possible in order to make its operation impossible to predict by the taxpayers and thus afford the full discretion to do so to the head of the NRA.

2.3 *Artificiality Test: 'The Course of Action Was Artificial'*

An attempt to clarify the scope and meaning of artificiality in a negative way, i.e. indicating when an action is not artificial, can be found in Article 119c § 1 TOA cited above. It indicates that a course of action is not artificial if an entity acting reasonably and pursuing legitimate objectives would adopt that course of action predominantly for justified economic reasons. There is no explanation of what the actual meaning is of acting reasonably and pursuing legitimate objectives. The next part of the clarification refers to the adoption of a course of action predominantly for justified economic reasons.[36] Due to the use the phrase 'predominantly for justified economic reasons' to indicate which actions are not artificial, the spectrum of artificial actions is potentially very broad. It includes all actions adopted for important but not predominant economic reasons.

In Article 119c § 2 TOA, the legislature decided to supplement the negative definition of artificiality with a positive and open-ended list of fact patterns the existence of which triggers artificiality. It states that an assessment indicating that a course of action was artificial:

> may be derived, in particular, based on the existence of: 1) unjustified split of activities, or 2) engaging intermediating entities despite the lack of economic or financial justification for that, or 3) elements aimed at reaching a state identical to or resembling the state from before performing the action, or 4) self-cancelling or self-compensating elements, or 5) economic risk exceeding the expected advantages other than tax advantages to such an extent so that it has to be assumed that an entity acting reasonably would not

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32 Compare Kuźniacki, *supra* n. 5, sec. E.

33 Compare G. Prats et al., *EU Report,* in *Anti-avoidance Measures of General Nature and Scope – GAAR and Other Rules*, IFA Cahiers vol. 103A 69 (IFA 2018); F. van Brunschot, *The Judiciary and the OECD Model Tax Convention and Its Commentaries*, 59(1) Bull. for Int'l Fiscal Documentation 8 (2005).

34 *See* PL: *Odmowa wydania opinii zabezpieczającej dot. sprzedaży akcji spółki kapitałowej do podmiotu powiązanego przez Szefa KAS of 28 May 2020*, No. DKP3.8011.8.2019.

35 *See* Prats et al., *supra* n. 32, at 69.

36 For the logical error (*idem per idem*) in that explanation, *see supra* sec. 2.2.

choose such a course of action, or 6) a situation where the tax advantage gained is not reflected in the economic risk incurred by the entity or its cash flows, or 7) profit before tax at a marginal level in comparison to the tax advantage which does not result directly from actual economic loss, or 8) the involvement of an entity that does not conduct actual business activity or does not serve an important economic function, or which has its registered office or place of residence in the country or in the territory set out in regulations issued pursuant to Article 23v.2 of the Act on Personal Income Tax of 26 July 1991 or Article 11j.2 of the Act on Corporate Income Tax of 15 February 1992.

This list may appear to be beneficial for determining artificiality, but is it really?

Firstly, the list includes eight cases of artificiality without any hierarchy between them, although some of them clearly have more weight than others in the context of tax avoidance. For instance, point 3) – elements aimed at reaching a state identical to or resembling the state from before performing the action is typical for 'round-tripping' schemes that often may constitute tax avoidance practices leading to an abuse of tax law.[37] However, its weight is entirely not defined which means, for example, that point 7) – profit before tax at a marginal level in comparison to the tax advantage that does not result directly from actual economic loss – is as important to artificiality as point 3) (circular structures).

Secondly, not attributing any weight to the cases of artificiality affords the opportunity for the tax authorities to take a very restrictive approach whereby the existence of only one of the cases is sufficient for concluding that an action is artificial. Indeed, such a restrictive approach was expressed by the CPTA and followed by the head of the NRA.[38]

Thirdly, the list of cases of artificiality refers to a variety of fact patterns that are typical for tax avoidance practices. Fact patterns are determined in the course of gathering evidence under tax proceedings. This means they should be unequivocal and determinate rather than vague and indeterminate. Regrettably, the legislature uses wording full of vague phrases to describe the cases of artificiality such as: 'unjustified split of activities', 'lack of economic or financial justification', 'elements aimed at reaching a state identical to or resembling the state from before the action performance', 'self-cancelling or self-compensating elements', etc. The cases of artificiality are therefore indeterminate, which is quite odd considering that they should meet the requirements that are typical for fact patterns. Significant ambiguity surrounding the cases of artificiality is good for the tax authorities as it gives them a substantial amount of discretion in identifying such symptoms.[39] For taxpayers, in turn, it merely leads to a lack of predictability.

By comparison, Article 6(1) ATAD does not have any open-ended list of cases of artificiality. Instead, the artificiality test is met when an arrangement or a series of arrangements are not genuine when taking all relevant facts and circumstances into account. In that regard, it is noteworthy that the ATAD proposal clarifies that (1) 'the proposed GAAR is designed to reflect *the artificiality tests* of the CJEU, where this is applied within the Union' and, therefore, (2) 'the application of GAARs should be limited to arrangements that are "wholly artificial" (non-genuine)'.[40] It seems wise to therefore understand the phrases 'artificial' and 'non-genuine' identically (and thus use them interchangeably) in the context of the possible application of Article 6 ATAD and the GAARs of Member States. This observation is confirmed by the relevant CJEU case law and is therefore in accordance with the GAAP.[41]

Article 6(2) ATAD states that an arrangement or a series of arrangements will be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons that reflect economic reality. This is in line with the relevant CJEU case law and thus the GAAP, however, the Polish GAAR does not include such a phrase. The EU GAAR therefore requires the tax authorities to examine whether an arrangement is entirely or only partially artificial.[42] The artificial component of the arrangement does not make the entire arrangement artificial. Accordingly, a tax advantage can be denied by the tax authorities only to the extent that it comes from a

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[37] *See* R. J. Danon, *The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR!*, 74(4/5) Bull. for Int'l Tax'n (2020), s. 2.1.1. *See also* the judgment of the IN: Supreme Court of 20 Jan. 2012, *Vodafone International Holdings BV v. Union of India*, Civil Appeal No. of 2012 (arising out of S. L.P. (C) No. 26529 of 2010), para. 68; the FR: Supreme Administrative Court (Conseil d'État) of 25 Oct. 2017, Case No. 396954, *Verdannet.*

[38] *See* PL: Resolution of the Council for the Prevention of Tax Avoidance from 18 Dec. 2019, No. 3/2019, para. 46, https://www.gov.pl/attachment/b5c97b9c-717d-4a2b-9964-2dfbc184e065 (accessed12 Nov. 2020). *See* PL: *Odmowa wydania opinii zabezpieczającej dot. wydzielenia zorganizowanej części przedsiębiorstwa oraz przekształcenia spółki z ograniczoną odpowiedzialnością w spółkę komandytową przez Szefa KAS of 23 Jan. 2020*, No. DKP3.8011.19.2019, https://www.gov.pl/attachment/b5c97b9c-717d-4a2b-9964-2dfbc184e065 (accessed 12 Nov. 2020).

[39] *Compare* A. Gomułowicz, *Klauzula przeciwko unikaniu opodatkowania, czyli – Ave Caesar morituri te salutant*, 10 Przegląd Podatkowy 18 (2019).

[40] *See* the ATAD proposal, at 9 and recital 9.

[41] *See* case law *supra* n. 21; Compare D. Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44(2) Intertax 114 (2016); K. Lenaerts, *The Concept of 'Abuse of Law' in the Case Law of the European Court of Justice on Direct Taxation*, 22(3) Maastricht J. Eur. & Comp. L. 329 (2015); E. Robert & D. Tof, *The Substance Requirement and the Future of Domestic Anti-Abuse Rules Within the Internal Market*, 51(11) Eur. Tax'n 436 (2011).

[42] *Compare* CJEU 21 Jan. 2010, *SGI*, Case C-311/08, ECLI:EU:C:2010:26, para. 66; CJEU 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161, paras 81 and 92.

non-genuine arrangement or a series of arrangements, i.e. only in that artificial part. The 'to the extent' approach is consequently designed to guard the proportionate legal consequences of the EU GAAR: the prevention of abuse of tax law must not exceed what is necessary to guarantee that the tax is levied in appropriate circumstances. This outcome is not guaranteed by the wording of the Polish GAAR.

Moreover, it is clear that the threshold level for artificiality is set much lower in the Polish GAAR than in Article 6 ATAD and the GAAP. Even *seemingly* the most pro-fiscal CJEU judgments, i.e. the Danish Beneficial Ownership (BO) cases, state that:

> A group of companies may be regarded as being an artificial arrangement where it is *not set up for reasons that reflect economic reality*, its structure is *purely one of form* and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law.[43] [italics added]

Hence, under the GAAP and Article 6 ATAD, artificiality only exists if an arrangement (e.g. a group of companies) is not established for reasons that reflect economic reality, i.e. if it does not have valid commercial (non-tax) reasons which most likely implies that its structure is purely one of form. Such arrangements are economically fictitious, not able to conduct genuine and independent economic activity, and hence are correctly considered to be artificial. A minimal alignment of legal fiction and economic or even physical reality is required in order to benefit from the right or the tax advantage provided by that legal fiction.[44]

This is in a stark contrast with the artificiality threshold in the Polish GAAR that indicates that an action (an arrangement or transition) that is not adopted *predominantly* for justified economic reasons is artificial. The GAAP and Article 6 ATAD rather point to the opposite end of the spectrum of perception of artificiality: an action (an arrangement or transition) that is adopted predominantly for tax avoidance reasons (non-valid commercial reasons) is artificial. The justified economic reasons do not need to be predominant to avoid a status of artificial action. It is enough that such reasons would be *valid*, i.e. that sufficiently reflect economic reality. The predominant degree of justified economic reasons neither stems from Article 6 ATAD nor from the GAAP. It is a purely Polish invention.

2.4 *Tax (Legal) Consequences (The Disposition of the Polish GAAR)*

Once the hypothesis of the GAAR is fulfilled, i.e. all three tests are passed, the arising tax consequences are severe and may be quite complex. The only straightforward consequence is that the tax advantage is denied. Then, depending on the circumstances, different consequences follow.

First, the tax effects of the action are determined on the basis of the state of affairs that would have occurred had an appropriate action been performed. The appropriate action is an action that might have been performed by an entity in the given circumstances had it acted reasonably and pursued legitimate objectives other than tax advantages contrary to the object or purpose of tax law or its provision for which the course of action would not be artificial. An appropriate action may also consist of deciding to take no action.[45]

Second, tax effects will be defined in accordance with the hypothetical (appropriate) action as indicated by the taxpayer if the main or one of the main purposes of conducting the action was to obtain a tax advantage.[46] If the circumstances subsequently indicate that gaining a tax advantage was the only goal of the action that is qualified as tax avoidance, the tax effects will be determined on the basis of the state of affairs that would have occurred had the action not been performed.[47]

Third, if a tax advantage follows from tax law provisions that provide a subject-based or object-based tax exemption, exclusion from the taxable base or a deduction from revenue, income, or tax, then the tax effects are determined as if the above provisions did not apply.[48]

Beyond the above set of various tax consequences, the application of the Polish GAAR automatically leads to the determination of additional tax liability[49] in the form of a fine.[50] This fine actuates a tax on top of the

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[43] *See N Luxembourg 1, X Denmark A/S, C Danmark I, Z Denmark ApS* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 21, regarding IRD, para. 127 and *T Danmark and Y Denmark Aps* (C-116/16 and C-117/16), *supra* n. 21, on PSD, para. 100.

[44] *See* R. Ismer, *Abuse of Law as a General Principle of European Union (Tax) Law*, in *A Guide to the Anti-Tax Avoidance Directive* 80 (W. Haslehner, K. Pantazatou, G. Kofler, Alexander Rust eds, Edward Elgar Publishing 2020).

[45] *See* PL: Art. 119a § 2 and § 3 TOA.

[46] *See* PL: Art. 119a § 4 TOA.

[47] *See* PL: Art. 119a § 5 TOA.

[48] *See* PL: Art. 119a § 6 TOA.

[49] The additional tax liability is excluded only to the natural persons who bear liability for a fiscal petty offence or a fiscal offence in relation to the same act. *See* PL: Art. 58e TOA.

[50] *See* PL: Art. 58a § 1 point 1) TOA.

statutory tax rate that is applicable to the income in question after a tax advantage has been denied. Its severity is conditioned by the circumstances under which the Polish GAAR was applied:

1. If tax avoidance concerns Corporate Income Tax (CIT) or Personal Income Tax (PIT), excluding flat-rate forms of taxation, the additional tax liability is equal to 10% of the sum of the unduly disclosed or overstated tax loss and the undisclosed taxable income to the extent arising from the decision based on the Polish GAAR.[51] The amount that is subject to the additional 10% tax rate will often be much higher than the amount of the tax advantage, e.g. an overstated tax loss will always be more substantial than the tax advantage stemming from it[52];
2. If tax avoidance regards other taxes, the additional tax liability is equal to 40% of the amount of the tax advantage to the extent arising from the decision issued under the Polish GAAR; [53]
3. These additional tax rates are doubled if:
   a. the base for determining additional tax liability exceeds PLN 15 million (ca. EUR 3.27 million) – with regard to the amount in excess of that amount[54];
   b. less than ten years have passed since the end of the calendar year in which the taxable person or tax remitter received the final decision with the application of the Polish GAAR. This regards the amount constituting the base for determining the additional tax liability and is related to applying these provisions or measures.[55]

In practice, the combination of the first and third legal consequence may lead to taxation that severely jeopardizes the cash flow of the taxpayer and entirely consumes the income stemming from the action targeted by the Polish GAAR. For example, the head of the NRA applies the GAAR in 2021 to conclude that the tax loss of a taxpayer in 2020 was overstated by PLN 120 million. In that example, the double additional tax rate (20%) applied to the overstated tax loss in excess of PLN 15 million (PLN 105 million) would be PLN 21 million. Hence, the taxpayer would be obligated to pay PLN 21 million of income tax for 2020, although they did not generate income at all in that year. Assume that the taxpayer derives income in 2021 in the amount of PLN 21 million. The obligation to pay PLN 21 million under the GAAR in 2021 for the overstated tax loss in 2020 would entirely consume the taxpayer's income in 2021. Still, a statutory 19% tax rate has to be paid by the taxpayer in relation to taxable income in 2021, i.e., almost PLN 4 million. This demonstrates how the application of an additional tax rate (20%) under the GAAR by the head of the NRA may completely distort the cash flow of the taxpayer by consuming not only the entire income at their disposal but even their savings. In a likely scenario, it may lead to the bankruptcy of the taxpayer.

The legislature then attempted to decrease the severity of the Polish GAAR by stating that the additional tax rates will be reduced by half if a taxpayer or a tax remitter adjusted their tax return to reverse the effects of the tax avoidance on a one-off basis. In practice, the rules on the right to undo the effects of tax avoidance are extremely complicated, and this is beyond the scope of this contribution. This author also has not yet located any tax expert in Poland who is able to explain how those rules should operate. Presumably, the attempt to relax the acute fines from the application of the Polish GAAR are not very effective due to their complexity.

An in examination of the disposition of the Polish GAAR reveals that the legal consequences are quite unusual and extremely severe. At first glance, the implementation of Article 6 ATAD in this manner appears to be compatible with ATAD since Article 6(3) ATAD states that '[w]here arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability will be calculated in accordance with national law', and Recital 11 of the preamble to ATAD indicates that 'Member States should not be prevented from applying penalties where the GAAR is applicable'. Those passages of the ATAD together with its Article 3 clearly allow Poland to implement the rules severely governing the legal consequences of the Polish GAAR. It is going too far to actually confiscate the taxpayer's property for overstating a tax loss stemming from tax avoidance action.[56]

The definition of tax avoidance in the Polish GAAR is very broad and vague – much broader and vaguer than under the GAAP and Article 6 ATAD. Therefore, it is worth asking whether a combination of a very broad and vague definition of tax avoidance together with extremely severe and complex legal consequences of the Polish

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51 *See* PL: Art. 58b § 1 TOA.

52 *See* PL: Art. 58b § 1 TOA.

53 *See* PL: Art. 58b § 2 TOA.

54 *See* PL: Art. 58c § 1 point 1) TOA.

55 *See* PL: Art. 58c § 1 point 2) TOA.

56 *See infra* s. 3.2.

GAAR is compatible with the set of relevant constitutional and the EU principles. Section three below will address this issue.

3 Examining the compatibility of the Polish GAAR with the constitutional principles and the EU general principles

This section analyses the compatibility of the Polish GAAR with the constitutional and the EU principles. Each sub-section focuses on a different set of intertwined principles that arise out of the Polish Constitution and EU primary law.

3.1 *Examining the Compatibility with the Polish Constitutional Principles of Good Legislation (The Requirements of Precision and Maximum Predictability of Tax Law) and the EU Principle of Legal Certainty*

The principles of good legislation require the legislature to enact laws that are sufficiently clear and precise that can be understood by their addressees, on the one hand, and enforceable by courts and administrative bodies, on the other.[57] Only such laws may be considered to be compatible with the Constitution.[58] These seem to be the most important constitutional principles to be analysed in respect of the compatibility of the Polish GAAR with the Constitution.

The Tribunal has emphasized the *particular importance* of the *specific nature* of legal provisions in the fields of criminal and *tax law* since their application restricts the rights of citizens to freedom and to hold private possessions, respectively.[59] Tax laws in which the wording is too vague or ambiguous therefore constitute a violation of Article 2, 84, and 217 by challenging the legality of the imposition of taxes.[60] In this regard, the Tribunal concluded that the legislature must ensure maximum predictability of decisions taken on the basis of statutory tax law provisions.[61] Taken literally, this demands a substantial amount of legislature.

The Tribunal analysed this issue in its judgment of 11 May 2004 in a case (K 4/03) regarding the constitutionality of the former GAAR (former Article 24b §1 TOA). The core critique of the former GAAR by the Tribunal targeted its general and ambiguous phrasing such as 'one could not have expected', 'other significant benefit', and 'benefits stemming from the reduction of tax liability'. In the view of the Tribunal, the GAAR did not meet the requirement of maximum predictability of decisions taken on the basis of provisions containing such phrases and, therefore, did not comply with the principles of good legislation, including the principle of specificity. Moreover, according to the Tribunal, tax law provisions are deemed to violate the principles of good legislation if they do not allow the tax authorities and courts to interpret them in a uniform manner.

In the Tribunal's perspective, the use of vague phrases by the legislature, including those in the GAARs, can be considered as constitutional as long as they satisfy three conditions imposed to ensure the maximum predictability of decisions taken on the basis of provisions containing such phrases: (1) vague phrases must be comprehensible enough to prevent exceedingly wide options of individual interpretation; (2) vague phrases must be accompanied by substance guaranteeing the uniformity of jurisprudence (decisions applying the law); and, finally, (3) the interpretation of ambiguous terms must not permit the bodies applying such terms to engage in quasi-law-making. These conditions must be treated in a particularly restrictive manner when the legislator delegates the interpretation of ambiguous phrases to administrative bodies, e.g. to tax authorities.[62]

The requirements of precision and maximum predictability of tax law under the principles of good legislation could be considered as manifesting the principle of legal certainty which is internationally recognized as a central requirement for the rule of law.[63] It is no surprise that a very similar approach to that of the Tribunal, as analysed above, has been taken in tax cases by the CJEU in respect to the EU principle of legal certainty that was deemed by the CJEU as one of the fundamental principles of the EU law almost 40 years ago.[64] According to the CJEU, this principle the EU Member States to legislate clear and precise laws so that the legal situations and relationships governed by EU law and the domestic law of EU Member States are foreseeable. This principle aims to ensure that interested parties, such as taxpayers, can be certain as to

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57 *See* the PL: Tribunal judgments 21 Mar. 2001, Case Co. K 24/00 and of 19 Dec. 2008, Case No. K 19/07.

58 *See* A. Gomułowicz & J. Małecki, *Podatki i prawo podatkowe* 111 (LexisNexis 2010).

59 *See* the PL: Tribunal judgments 12 June 2002, Case No. P 13/01 and of 20 Nov. 2002, Case No. K 41/02.

60 *See* the PL: Tribunal judgments 3 Dec. 2002, Case No. P 13/02 and of 19 Sept. 2006, Case No. K 7/05.

61 *See* the PL: Tribunal judgment 13 Sept. 2011, Case No. P 33/09.

62 *See* A. Zalasiński, *Poland – Branch Report*, in: *Tax Treaties and Tax Avoidance: Application of Anti-avoidance Provisions*, IFA Cahiers vol. 95a 640 (IFA 2010).

63 *See* J. R. Maxeiner, *Some Realism About Legal Certainty in Globalization of the Rule of Law*, 3(1)1 Hous. J. Int'l L. 28–29 (2008); E. Claes, W. Devroe & B. Keirsblick, *Facing the Limits of the Law* 92–93 (Springer 2009).

64 *See* CJEU 21 Sept. 1983, Case C-205/82, *Deutsche Milchkontor GmbH and others v. Federal Republic of Germany*, ECLI:EU:C:1983:233, at 2633, para. 30.

the legal and economic consequences of their actions.[65] The similarity between the interpretive approach of the Tribunal and the CJEU appears to follow from the fundamental principle of law that is common to all of the EU Member States and thus the entire EU – the rule of law.[66]

In the case *Commission v. Greece,*[67] the CJEU implied (paragraphs 32–33) that a transposition of Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital[68] to the domestic law of the EU Member State is not appropriate if it relies on criteria that is more restrictive than that included in Directive 69/335, and the restriction does not aim exclusively at preventing abusive practices. References to the breach of the principle of legal certainty, in turn, were used by the CJEU as an additional argument about the incompatibility of the domestic law with EU law, in particular an inappropriate transposition of Directive 69/335.[69] The CJEU used similar reasoning in two important cases regarding direct taxation – *SIAT*[70] and *Itelcar.*[71]

These three cases demonstrate that the suitability of anti-avoidance rules to prevent tax avoidance is not enough to ensure their compatibility with EU law. To ensure compatibility, such rules must be proportionate, and their proportionality must be closely associated with their precision. If such rules are not clear, precise, and predictable enough to determine their scope in advance with sufficient accuracy, they do not meet the requirements of the principle of legal certainty. The lack of sufficient delineation of their scope invalidates the possibility of deciding whether they may be applied proportionally to achieve their anti-avoidance purpose in accordance with the EU standard of abuse.

Considering the above case law of the Tribunal and the CJEU as well as the observations stemming from the preceding sections on the Polish GAAR, it could be considered that the Polish GAAR failed to sufficiently satisfy the requirements of the principle of legal certainty as stemming from the principles of good legislation under the Constitution and the EU principle of legal certainty. This conclusion derives mainly from observations revealing that the Polish GAAR contains many vague and broad phrases and is sometimes constructed in a logically incorrect way. Its very broad and ambiguous wording and functional elements (tests) do not allow its scope to be determined in advance with sufficient precision. Similarly, the definition of tax avoidance is so broad and unclear that it may cover genuine economic arrangements and transactions if they have important tax minimization components. As a result, the Polish GAAR vests the tax authorities with such vast discretionary power for determining tax avoidance that its application may lead to heterogeneous and quasi-law-making decisions of the tax authorities. This rule can hardly be seen as being compatible with the constitutional principles of good legislation, including the principle of legal certainty and the EU principle of legal certainty.

It is noteworthy that the infringement of the principle of legal certainty as enshrined in the Polish Constitution and EU primary law is predominantly actuated by purely Polish elements of the Polish GAAR rather than Article 6 ATAD.

First, although the intention test is linguistically identical in the Polish GAAR and Article 6 ATAD, the former gravitates towards a wide and vague meaning of 'one among many other non-negligible purposes', which follows from the preliminary work while the latter moves towards a narrower understanding of 'essential purpose' as stemming from the GAAP and the preliminary works to the ATAD.[72] Moreover, the infringement of the principle of legal certainty should be seen through the Polish GAAR and Article 6 ATAD as a whole rather than by focusing on only one of them (the intention test – an entry gate to the definition of tax avoidance). Examining the other elements of the Polish GAAR with Article 6 ATAD, the weight of the discussed infringement tilts significantly to the former.

Second, the contradiction test in Article 6 ATAD has ample scope to be flexibly implemented in dozens of various legal systems of the Member States. Copy/pasting the phrase 'the object or purpose of the applicable tax law' to the Polish GAAR with further linguistic and structural modifications that complicated rather than clarified the operation of this test was not a proper way for Poland to implement it. The contradiction test was regrettably even further overcomplicated by Article 119c § 1 TOA that attempts to

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65 *See* CJEU 15 Feb. 1996, Case C-63/93, *Fintan Duff and others v. Minister for Agriculture and Food and Attorney General*, ECLI:EU:C:1996:51, paras 20 and 31; CJEU 13 Feb. 1996, Case C-143/93, *Gebroeders van Es Douane Agenten BV v. Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1996:45, para. 27.

66 *See* Art. 2 of The Treaty on European Union (TEU), Consolidated Version OJ C 326/13 (26 Oct. 2012); *See* CJEU 6 Mar. 2018, Case C 284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 34; Opinion 2/13 of the Court (Full Court), 18 Dec. 2014, ECLI:EU:C:2014:2454, para. 168.

67 *See* CJEU 7 June 2007, Case C-178/05, *Commission of the European Communities v. Hellenic Republic*, ECLI:EU:C:2007:317.

68 Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, OJ L 249/25 (3 Oct. 1969), at 412, as amended by Council Directive 85/303/EEC of 10 June 1985, OJ L 1985/156 (15 June 1985), at 23.

69 *See* D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) Versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law*, 48(1) Erasmus L. Rev. 52–53 (2017).

70 *See* CJEU 5 July 2012, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État belge*, ECLI:EU:C:2012:415.

71 *See* CJEU 3 Oct. 2013, Case C-282/12, *Itelcar – Automóveis de Aluguer Lda v. Fazenda Pública*, ECLI:EU:C:2013:629.

72 *See supra* s. 3.1.

explain the test through logically erroneous references to the artificiality test. The statement by the head of the NRA that the standard interpretational methods, i.e. linguistic, systemic, and purposive, are not useful for determining whether the contradiction test has been passed only decreases the already low level of legal certainty of that test and the entire Polish GAAR.[73]

Third, the way the artificiality test is designed in the Polish GAAR is essentially a Polish invention. This test clearly indicates that an action (an arrangement or transition) that is not adopted *predominantly* for justified economic reasons is artificial. As a result, the potential of being deemed artificial under this test is so significant that it affects arrangements or transitions with valid (justified) commercial (economic) reasons. This contradicts both the clear wording of Article 6 ATAD and the formulation of the GAAP as they deem every arrangement or transition with valid commercial reasons not to be artificial if they reflect economic reality sufficiently rather than predominantly.[74]

The risk of applying the Polish GAAR in a heterogeneous and a quasi-law-making way – which are the most vivid symptoms of an infringement of the principle of legal certainty under the Polish Constitution and EU primary law – has already materialized. Specifically, the head of the NRA, in its refusal to issue a safeguarding opinion on 21 January 2020 (DKP3.8011.19.2019),[75] stated that a division by separation of a company was an element of an artificial arrangement. Four months later, the head of the NRA, in a refusal to issue a safeguarding opinion on 28 May 2020 (DKP3.8011.8.2019),[76] observed that a division by separation would not be considered as an artificial arrangement and should therefore be carried out by the parent company instead of disposing of shares in a subsidiary via a newly established sister company. This safeguarding opinion is also a good example of the quasi-legislative application of the Polish GAAR by the head of the NRA as it rejected the standard interpretative methods to determine whether or not the transaction contradicts the object or purpose of Article 16 (1) point 8 of the Corporate Income Tax Act (CITA).[77] Instead, the head of the NRA added new conditions to Article 16(1) point 8 CITA through the application of the Polish GAAR, concluding that the transaction conducted by a parent company was in contradiction with Article 16 (1) point 8 CITA as if that article included such new conditions in its wording. This is clearly an erroneous (quasi legislative) application of the Polish GAAR that does not meet the requirement of the principle of legal certainty to a large degree. The international jurisprudence and doctrine confirm this observation.[78]

Finally, the legal consequences of the Polish GAAR enter a maze of various fines. The complexity of those consequences is then exacerbated by a set of rules that aim to decrease the fines by half. The way this is done is staggeringly complicated. As a result, the provision of the Polish GAAR does not seem to meet the requirements of the principle of legal certainty under the Polish Constitution and EU primary law to a sufficient degree. The same is true for the hypothesis of the Polish GAAR for which the margin of freedom afforded to the Polish legislature by the EU legislature – here via Article 6(3) ATAD in conjunction with Article 3 ATAD and the Recital 11 to the preamble to the ATAD – was taken to extremes and considerably exceeded the framework of the principle of legal certainty.

3.2 *Examining the Compatibility with the Polish Constitutional and EU Principle of Proportionality*

Taxation has a clear constitutional legitimacy under Articles 84 and 217 of the Constitution. For this reason, the Tribunal has said that, even though the duty to pay taxes can be controlled from the point of view of its conformity with the Constitution, this control cannot generally be executed exclusively on the basis of the principle of proportionality.[79] There are only two exceptions to this general rule: (1) when tax law provisions do not serve fiscal but rather nationalistic or repressive purposes, for instance, the confiscation of a taxpayer's property constituting a violation of the right of ownership[80] and (2) when tax law provisions neither impose a duty on taxpayers to pay taxes nor form the basis for calculating a tax liability.[81] The former exception is actually relevant to

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73 *See supra* s. 2.2.

74 *See supra* s. 2.3.

75 *See Odmowa wydania opinii zabezpieczającej dot. wydzielenia zorganizowanej części przedsiębiorstwa oraz przekształcenia spółki z ograniczoną odpowiedzialnością w spółkę komandytową przez Szefa KAS of 23 Jan. 2020, supra* n. 37.

76 *See Odmowa wydania opinii zabezpieczającej dot. sprzedaży akcji spółki kapitałowej do podmiotu powiązanego przez Szefa KAS of 28 May 2020, supra* n. 33.

77 PL: *Ustawa z dnia 15 lutego 1992 r. o podatku dochodowym od osób prawnych* (Dz. U. 2020, 1406, consolidated text).

78 *See* CA: Supreme Court 16 Dec. 2011, *Copthorne Holdings Ltd. v. Canada* case (2011 SCC 63) *Cf.* by analogy to the PPT, Danon, *supra* n. 36, s. 3.3.4.

79 *See* the PL: Tribunal judgments 6 Feb. 2009, Case No. Ts 202/06 and of 19 June 2012, Case No. P 41/10.

80 *See* the PL: Tribunal judgments 11 Dec. 2001, Case No. SK 16/00; 9 Oct. 2007, Case No. SK 70/06; and of 7 July 2009, Case No. SK 49/06.

81 This applies in particular to tax law provisions regulating tax refund procedures; explaining the formal and technical requirements for decreasing the amount of tax payable and imposing an obligation on taxpayers to provide wealth statements (not tax statements) to the tax authorities. *See* the PL: Tribunal judgments 3 Oct. 2008, Case No. K 16/07; 22 May 2007, Case No. SK 36/06; and of 20 Nov. 2002, Case No. K 41/02.

the Polish GAAR insofar as its legal consequences, under certain circumstances,[82] lead to a confiscation of the taxpayer's property. This is clearly a repressive purpose of the Polish GAAR that blatantly and on a standalone basis infringes the principle of proportionality.

In respect of other elements of the Polish GAAR, their constitutionality cannot be examined *solely* in light of the principle of proportionality. Instead, they can be seen in terms of the relationship between constitutional obligations, on the one side, and the protection of constitutional freedoms and rights, on the other.[83] Accordingly, apart from the above exception, the principle of proportionality can be used as a measurement of appropriate (i.e. not overly invasive) interference of the legislator into the constitutionally protected values such as the freedom of taxpayers to pursue economic activity under Articles 20 and 22 of the Constitution and the right of ownership under Article 64 of the Constitution. The examination of the GAAR under the constitutional principle of proportionality may also confirm (strengthen) or deny the conclusions about the incompatibility of the GAAR with the principle of good legislation and the principle of proportionality under EU law.

The Polish GAAR may discourage taxpayers from pursuing economic activities through the most tax efficient method. This means that the GAAR may constrain the freedom of taxpayers who would like to pursue economic activity under Articles 20 and 22 of the Constitution, and it also curtails the right of ownership under Article 64 of the Constitution.

Article 22 of the Constitution considers limitations on the freedom to pursue economic activity to be justified under the principle of proportionality as enshrined in Article 31(3) of the Constitution providing that such a limitation is 'imposed only by means of statute and only for important public reasons'. Article 64 of the Constitution further stipulates that the 'right of ownership may only be limited by means of a statute, and only to the extent that it does not violate the substance of that right'. Taking those constitutional provisions into account, the Tribunal stated that any limitation on the freedoms and rights provided by the Constitution, including the freedom of economic activity, must satisfy the principle of proportionality pursuant to Article 31(3).[84] The proportionality test, therefore, requires balancing the various interests. In tax cases when the Polish GAAR is relevant, it calls for balancing the public interest as represented by the tax authorities and the private interest of taxpayers.[85]

The Tribunal states that, under Article 31(3) of the Constitution, the principle of proportionality has three interrelated requirements for a limitation of constitutional freedoms and rights in a statute (the three-step proportionality test): (1) the limitation must be necessary to protect the public interest it is associated with; (2) it must be drafted in a way that ensures the desired objectives are achieved; and (3) it must keep the effects introduced by the statute in proportion to the burdens or inconveniences arising from it to citizens. These requirements mean that only the most goal-efficient measures should be selected along with those that are the least burdensome to those to whom they are to be applied. They must also be no more onerous than what is necessary to achieve the pursued objective.[86]

That being said, the proportionality principle under the Constitution may be used to examine whether the Polish GAAR is suitable, necessary, and reasonably balanced with other relevant interests (public vs private) and principles such as the principle of legal certainty, the freedom of economic activity, and the right of ownership.[87]

A similar benefit of the principle of proportionality to that under the Tribunal's case law can be found in the CJEU case law.[88] The CJEU typically applies the principle of proportionality under the three-step proportionality test to determine whether a particular measure is proportionate[89]: (1) the measure must be suitable to achieve the desired purpose; (2) it must be necessary in the context that no other measure is available that is less restrictive of freedom; and (3) the measure must not be disproportionate to its purpose in the sense that it must not impose a burden on the person that is excessive in relation to the desired purpose to be achieved (proportionality *sensu stricto*). Despite the extensive similarities between the Polish constitutional and the EU

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82 *See supra* s. 2.4.

83 *See* PL: Tribunal judgments 13 Oct. 2008, Case No. K 16/07; 6 Feb. 2009, Case No. Ts 202/06 and of 19 June 2012, Case No. P 41/10.

84 *See* PL: Tribunal judgment 13 Oct. 2010, Case No. Kp 1/09. *See* more in *Uwagi do Article 22 Konstytucji*, in *Konstytucja Rzeczypospolitej Polskiej. Komentarz* vol. 4 (L. Garlicki ed., Wydawnictwo Sejmowe 2005).

85 *Compare* A. Zalasiński, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the CJEU's Direct Tax Case Law*, 35(5) Intertax 319 (2007).

86 *See* PL: Tribunal judgments 18 Oct. 2011, Case No. SK 2/10; 12 Jan. 2012, Case No. Kp 10/09 and of 23 May 2012, Case No. P 11/10; Compare A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w nowoczesnej* (Liber 2010).

87 *Compare* J. D. Rolim, *Proportionality and Fair Taxation*, 195 (Wolters Kluwer Law & Business 2014).

88 Historically, the principle of proportionality emerged in the CJEU case law in 1956. *See* CJEU 29 Nov. 1956, Case No. 8–55, *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*, ECLI:EU:C:1956:11, at 299. *See* more on the origin of the principle of proportionality in the EU law in T. Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in *The Principle of Proportionality in the Laws of Europe* 69–89 (E. Ellis ed., Hart Publishing 1999). On the more recent use of the principle of proportionality *See* J. D. Rolim, *Proportionality and Fair Taxation*, Series on International Taxation Vol. 48 122 (Wolters Kluwer 2014).

89 J. D. Rolim, *Proportionality and Fair Taxation*, 195 (Wolters Kluwer Law & Business 2014).

proportionality tests,[90] the Tribunal has never used the proportionality test to determine the proportionality of anti-avoidance measures whereas the CJEU has done so many times. The CJEU's perception of the proportionality of anti-tax avoidance measures under EU law, therefore, may be considered as an important guidance not only for deciding upon the proportionality of the Polish GAAR under EU law but (*per analogiam*) also under the Polish Constitution.

The CJEU applies the proportionality test to domestic anti-avoidance measures that restrict fundamental freedoms as ensured by EU primary law. In such cases, the CJEU examines whether a restriction is justifiable under 'overriding reasons of public interest' developed by its case law's doctrinal 'rule of reason'[91] and whether such justification is proportional.[92] One of the justifications that can be applied on a standalone basis (i.e. without a need to combine it with other justifications such as the need to a balanced allocation of taxing rights) is the prevention of *abusive* tax avoidance.[93] An analysis of proportionality of the restrictive effect of anti-tax avoidance rules led the CJEU to develop the GAAP, which is relevant for measuring the compatibility of the EU Member States' anti-avoidance rules with the EU primary law and secondary law.[94]

Although the origin of the GAAP has a long history,[95] for the purposes of examining the proportionality of the Polish GAAR, the modern case law of the CJEU is important. Two cases from the 1990s – the *Leur-Bloem* case and the *ICI* case[96] – are foundational to the CJEU's modern approach to the proportionality of anti-avoidance measures. They challenged the legislation because it was overly broad (an analogy to the argument from legal certainty) and, therefore, it could target activities that are neither artificial nor conducted for tax purposes.[97] The proportionality requirement that refers to targeting artificial activities was later refined by the CJEU by the 'to the extent' approach, meaning that anti-avoidance measures may be justified by the prevention of abusive tax avoidance not only when an activity is wholly artificial but also when it is partly artificial.[98] Similarly, a preventive (restrictive) effect of anti-avoidance measures is permissible under EU law to the extent that an activity is wholly or partly artificial. This approach is also reflected in the EU GAAR under Article 6(2) ATAD which states that 'an arrangement or a series thereof shall be regarded as non-genuine *to the extent* that they are not put into place for valid commercial reasons which reflect economic reality'.

Famously, the CJEU coined the phrase 'wholly artificial arrangement' in the above cited *ICI* case (paragraph 26) which has since been repeated in nearly all cases on tax avoidance, including the landmark case *Cadbury Schweppes*.[99] In addition, from *Cadbury Schweppes*, it follows that the threshold for abuse is that the intention of tax avoidance is *sole* (paragraph 63). *A contrario*, there is no abuse if a taxpayer shifts its *genuine economic activities* to another EU Member State for the sole purpose of avoiding taxation.[100] The CJEU case law before 2019 thus implied that abuse exists only if: (1) there is no genuine economic activity being conducted by the taxpayer and (2) the sole purpose is to conduct that non-genuine activity in order to avoid taxation.[101]

As a result of changes in the corporate tax landscape since *Cadbury Schweppes* and preceding cases, both societally and politically (especially in the course of post-Base Erosion and Profit Shifting (BEPS)), the CJEU now appears to be more prone to deviate from its settled case

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[90] This follows from the fact that this test has been borrowed by the CJEU from the German concept of proportionality, something also attributed to the Tribunal. *See* F. G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in *The Principle of Proportionality in the Laws of Europe* 1 (E. Ellis ed., Hart Publishing 1999); A. Śledzińska-Simon, *Proportionality Analysis by the Polish Constitutional Tribunal*, in *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* 385–386 (M. Kremnitzer, T. Steiner & A. Lang eds, Cambridge University Press 2020).

[91] *See* M. Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* 114–125 (Kluwer Law International 2005).

[92] *See* De Broe, *supra* n. 26, at 835–898; Zalasiński, *supra* n. 84, at 310–325. The proportionality principle is also useful in justifications for compatibility of tax treaties with EU law. *See* T. O'Shea, *EU Tax Law and Double Tax Conventions* (Avoir Fiscal Limited 2008), Ch. 3.

[93] Simply counteracting tax avoidance does not amount to such a justification. *See* CJEU 12 June 2014, Joined Cases C-39/13, C-40/13, and C-41/13, *Inspecteur van de Belastingdienst/Noord/kantoor Groningen v. SCA Group Holding BV, X AG and Others v. Inspecteur van de Belastingdienst Amsterdam and Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam v MSA International Holdings BV and MSA Nederland BV*, ECLI:EU:C:2014:1758, para. 42; Opinion Advocate General Kokott 12 Sept. 2006, Case C-231/05, *Oy AA*, ECLI:EU:C:2006:551, para. 62.

[94] *See* R. de la Feira, *EU General Anti-Avoidance Mechanisms*, in *The Dynamics of Taxation: Essays in Honour of Judith Freedman* (G. Loutzenhiser & R. De la Feria eds, Hart Publishing 2020), Ch. 8.

[95] It goes back to the mid-1980s with *Avoir fiscal* case. *See* CJEU 28 Jan. 1986, Case 270/83, *Commission of the European Communities v. French Republic*, ECLI:EU:C:1986:37. *See* B. Terra &. P. Wattel, *EU Tax Law* 78–80 (Kluwer Law International 2003).

[96] *See* CJEU 17 July 1997, Case C-28/95, *A. Leur-Bloem and Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, ECLI:EU:C:1997:369; CJEU 16 July 1998, Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, ECLI:EU:C:1998:370.

[97] *See* more in Zalasiński *supra* n. 84, at 321; Opinion Advocate General Jacobs 21 Mar. 2002, Case C-136/00, *Rolf Dieter Danner*, ECLI:EU:C:2002:198, para. 40.

[98] *See* Opinion Advocate General Geelhoed 29 June 2006, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:436, indent 4th, para. 67; CJEU 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, ECLI:EU:C:2007:161, paras 81 and 92; *SGI* (C-311/08), *supra* n. 41, para. 66.

[99] *See Cadbury Schweppes* (C-196/04), *supra* n. 21, paras 51, 55, 56, 57, 61, 63, 68, 69, 72, 75, and 76.

[100] *See* Prats et al., *supra* n. 32, at 62.

[101] For the relevant overview of such case law *see* B. Kuźniacki, *The C.J.E.U. Case Law Relevant to the General Anti-Avoidance Rule (G.A.A.R.) Under the Anti-Tax Avoidance Directive (A.T.A.D.)*, 4(2) U. Bologna L. Rev. 261–282 (2019), https://doi.org/10.6092/issn.2531-6133/10023 (accessed 12 Nov. 2020).

law in establishing the threshold for abuse. Nevertheless, despite moving from the *sole/essential/predominant/principal* intention of a taxpayer to obtain a tax advantage to *one of the main purposes* in the *Danish Beneficial Ownership* cases, the CJEU continues stating that an abusive (artificial) arrangement is one that *is not set up for reasons that reflect economic reality and its structure is purely one of form.*[102] In the context of tax cases, it is difficult to imagine that such an arrangement would be designed by a taxpayer for a purpose other than to solely or essentially obtain a tax advantage.

Furthermore, in the area of non-harmonized direct tax law cases among the EU Member States, the CJEU has never stated that the standard for abuse may rely on a threshold lower than the sole intention being to obtain a tax advantage. The CJEU only used the phrase 'one of the primary objectives' in non-harmonized direct tax law in the case *X GmbH*, but that case regarded *the artificial transfer of profits from an EU Member State (Germany) to a low tax third country (Switzerland).*[103] Again, it is implausible to consider such transfers as being carried out by a taxpayer for just the one among many primary objectives of obtaining a tax advantage. Rather they are deliberately designed and conducted to solely or essentially/mainly obtain a tax advantage. Such transfers simply do not have enough economic substance to have the potential to generate genuine business or investment advantages other than tax advantages.[104]

Considering the general view of the Tribunal on the proportionality of tax law and the CJEU's perception of the proportionality of anti-tax avoidance measures, it appears that the Polish GAAR fails to meet the requirements of proportionality under the Polish Constitution or EU law. An analysis of the Polish GAAR reveals that, although that rule may be necessary for the protection of the public interest and understood as the need to prevent tax avoidance, it is not properly drafted in a way that could ensure that it achieves the desired objectives in proportion to the burdens or inconveniences arising from it to taxpayers. Indeed, the balance between the prevention of tax avoidance and the taxpayer's freedom to conduct economic activity and the right of ownership has been compromised in favour of the prevention of tax avoidance.

It is precisely the extensive and ambiguous Polish definition of tax avoidance that causes the lack of proportionality of the Polish GAAR. It is not due to the terminology of Article 6 ATAD, in particular the phrase 'one of the main purposes', but is essentially the Polish perception of artificiality, i.e. artificial is every action not adopted predominantly for justified economic reasons. Stated differently, it is not enough to conduct genuine economic activity to a significant degree to be outside the scope of the Polish definition of tax avoidance. For this to occur, the activity must be predominant (not only significant). Clearly then, the actual targets of the Polish GAAR are not only artificial actions motivated by tax reasons, as follows from Article 6 ATAD and the GAAP, but also, to a large extent, genuine economic actions motivated by tax reasons. Intertwining the confusing contradiction test with the artificiality test only exacerbates the overall negative assessment of the proportionality of the Polish GAAR.

It is also worth pointing out the lack of any 'to the extent approach' under the artificiality test in the Polish GAAR although this approach is included in Article 6(2) ATAD. The EU GAAR thus requires the tax authorities to examine whether an arrangement is entirely or only partially artificial. A tax advantage can be denied by the tax authorities only in relation to the artificial part. A 'to the extent' approach is therefore designed to guard the proportionate legal consequences of the EU GAAR: the prevention of an abuse of tax law must not exceed that which is necessary to guarantee that the tax is levied in appropriate circumstances. This outcome is not guaranteed under the Polish GAAR as its language does not use the phrase 'to the extent'.

Altogether, the Polish GAAR interferes with taxpayers' freedom to manage their own businesses and their right to ownership in a way beyond wholly or predominantly artificial activities (arrangements or transactions) that are conducted solely or essentially for tax purposes. This corroborates with the observation that the definition of tax avoidance under the Polish GAAR significantly extends the scope of abusive tax avoidance under EU law as developed by the CJEU case law. Hence, the hypothesis of the Polish GAAR cannot be deemed as being compatible with the principle of proportionality under the Polish Constitution and EU law.

The Polish GAAR's lack of the proportionality is even more vivid in relation to its disposition since the denial of a tax advantage is automatically accompanied by the imposition of various fines on the taxpayer. They may lead to multiple taxation that is several times in excess of the tax that would have been paid if not for the tax avoidance.[105] This may actuate the confiscation of the taxpayer's property, which reveals the repercussive and thus unconstitutional nature of the Polish GAAR.

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102 *See the Danish Beneficial Ownership cases, supra* n. 21. *See also Eqiom SAS* (C-6/16), *supra* n. 21, para. 30 *Deister Holding and Juhler Holding* (C-504/16 & C-613/16), *supra* n. 21, para. 60.

103 *See X-GmbH* (C-135/17), *supra* n. 21, para. 84.

104 For the mentioned features of artificiality, *see* in particular *N Luxembourg 1, X Denmark A/S, C Danmark I (C-119/16), Z Denmark ApS* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 21, paras 130–132 and Opinion Advocate General Kokott 1 Mar. 2018, Case C-117/16, *Y Denmark Aps* ECLI:EU:C:2018:145, para. 54 and Opinion Advocate General Kokott 1 Mar. 2018, C-119/16, *C Danmark I,* ECLI:EU:C:2018:147, para. 65.

105 *See supra* s. 2.4.

4 Conclusions

The analysis shows that the Polish GAAR is incompatible with a set of cardinal constitutional principles under the Polish Constitution and EU law – the principles of good legislation, legal certainty, and proportionality – and that this incompatibility originates primarily from the decision of the Polish legislature rather than the EU legislature (Article 6 ATAD).

Combining the substantive features of the Polish GAAR (its hypothesis) with the severe legal consequences of its application (its disposition) such as a denial of a tax advantage and the determination of additional tax liability may lead to taxation that is several times in excess of the tax that would have been paid in the absence of tax avoidance. Therefore, it becomes vividly clear that the Polish GAAR is not reasonably balanced with the private interests of taxpayers and their freedom of economic activity and the right of ownership. Instead, the public interest represented by the tax authorities is palpably favoured. This may lead to an avalanche of disputes between the taxpayers and the tax authorities.

Since the Polish GAAR is very vague and broad and its consequences are extremely severe, it has the vast potential to deter reasonable and even desirable business and investment behaviour. Indeed, the Polish GAAR sends such strong deterring signals to taxpayers to not enter into any arrangement or transaction that may result in tax advantages that this rule endangers achieving the pivotal purpose of the EU: the establishment and development of an internal market. The protection of individual economic freedom and the freedom of business initiatives within the EU is certainly undermined under the Polish GAAR.

This all confirms the set of hypotheses raised at the beginning of this article. First, the combination of Articles 6 and 3 ATAD is an exceedingly dangerous EU legislative mixture whenever EU Member States' legislatures presume that the EU GAAR constitutes just a minimum standard for the prevention of abusive tax avoidance. The Polish legislature is an example of such a perception of Articles 6 and 3 ATAD. As a result, the implementation of the EU GAAR by Poland led to protection of the Polish tax base at the cost of constitutional and EU principles. Second, having the right to implement the EU GAAR more severely via Article 3 ATAD did not excuse the Polish legislature from scrutinizing the GAAP carefully and respecting the guidance in the preamble to the ATAD to design a domestic GAAR so that it applies only to artificial (non-genuine) arrangements in order to comply with the GAAP. Had the Polish legislature done this, the Polish GAAR would be compatible with the constitutional and EU principles.

De lege ferenda, the EU should have taken a different approach to the EU standard for abuses of tax law in order to reduce the risk of a breach of fundamental rights by EU Member States being ascribed to the EU and having their origin in the constitutional laws. A reasonable solution would be to add a caveat to Article 3 whereby 'a higher level of protection for domestic corporate tax bases under domestic GAARs shall not go below the standard of abuse developed by the CJEU'. Although it sounds trivial, such a caveat in Article 3 ATAD would not allow the EU Member States to consider the EU GAAR as a minimum but rather as a maximum standard of protection for domestic corporate tax bases through GAARs. This could also maximize the protection of constitutional and EU principles. Alternatively, the EU could exclude Article 6 ATAD from the scope of application of Article 3 ATAD. Either solution would prevent the EU Member States from using the ATAD as an excuse to implement or re-draft their domestic GAARs without sufficiently respecting constitutional and EU principles.

De lege lata, as a result of the affirmation that the Polish GAAR infringes the constitutional and EU principles, taxpayers conducting business or investing in Poland may attempt to legally challenge that rule in front of the Polish administrative courts that may subsequently request the CJEU to grant a preliminary ruling on the compatibility. This may happen soon since, as of the end of September 2020, the head of the NRA had completed twenty tax proceedings related to the GAAR, and eleven new tax proceedings related to the GAAR are currently pending with others expected in the near future.[106] The taxpayers can also challenge the constitutionality of the Polish GAAR before the Tribunal. Sadly, it is unlikely that the dispute would actually reach the Tribunal and, even if that happens, it is doubtful that the Tribunal would objectively examine the constitutionality of the Polish GAAR. The main reason for this is that the 'Polish constitutional crisis', which began in November 2015, has led to political control over the Tribunal.[107] It is, therefore, hardly possible to conclude that Poland would provide an impartial Tribunal and that the Tribunal would decide that the Polish GAAR is unconstitutional as this would be contrary to the view of the Polish Government. Consequently, there is a risk that, in the event of an international dispute on the basis of the Polish GAAR between a foreign investor and the Ministry of Finance, the possibility of a constitutional review of the GAAR by the Tribunal would not be sufficient. Instead, international arbitrage

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[106] Before Sept. 2020, no single tax proceedings based the GAAR were initiated by the head of the NRA, and all interpretative issues related to it were addressed via safeguarding opinions.

[107] For persuasive arguments in that regard, *see* M. Matczak, *Poland's Constitutional Crisis: Facts and Interpretations*, The Foundation for Law, Justice and Society (2018), https://www.fljs.org/content/poland%E2%80%99s-constitutional-crisis-facts-and-interpretations (accessed 14 Nov. 2020).

should be considered relevant to resolve the dispute, as happened in the *Chevron* case.[108] Indeed, the lack of a holistic, principle – and consequence-based approach to implementing the EU GAAR in Polish tax law[109] leaves current and prospective investors with so much unpredictability that a large international arbitrage dispute resolution case against Poland is not inconceivable in the near future.

The Polish GAAR has significant potential to be used by the Polish tax authorities in an arbitrary and discriminatory manner against foreign investors. In extreme cases, the foreign investors may even be deprived of their profits entirely or, in less dramatic instances, they may suffer a competitive disadvantage unlike the Polish state-owned competitors to which the Polish GAAR may be applied reluctantly or not at all in similar circumstances. In such situations, the foreign investors may legitimately take a dispute to arbitration for breaching fair and equitable treatment and indirect expropriation by Poland (the Polish tax authorities) through an investor-state dispute settlement (ISDS) based on investment treaties. Arbitrary and discriminatory tax treatment of tax authorities based on ambiguous anti-abuse tax concepts often actuate unfair and inequitable treatment that may lead to indirect expropriation of foreign investors.[110]

Considering that Poland was among the three high-loss countries along with Argentina and Venezuela involved in an ISDS with net outcomes amounting to approximately PLN 22.3 billion in losses by 2019,[111] it seems that the very restrictive legislative and administrative approach of Poland to investors is neither new nor beneficial to the country's state budget. Perhaps the vision of billions of zlotys lost in ISDS cases and dispute resolution cases caused by the Polish GAAR will convince the Poland Government and Parliament to bring the GAAR in accordance with the Constitution and EU law.

Notes

108 *See* US: District Court for the Southern District of New York 4 Mar. 2014, *Chevron Corporation v. Steven Donziger, et al*, 11 Civ. 0691 (LAK), at 469–470.

109 The rush in legislating law without proper public consultations (actually, the Polish GAAR perfectly fits into that assessment) was one of the main reasons for the negative evaluation of Poland in the European Commission's recent report on the rule of law in the EU: 'Reforms have been adopted through expedited legislative procedures with limited consultation of stakeholders or opportunities for the opposition to play its role in the law-making process.' *See* European Commission, *Commission Staff Working Document, 2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland*, SWD(2020) 320 final (30 Sept. 2020), at 1.

110 A seminal example of such arbitration is the *Yukos* case in which, among others, Russia's federal anti-tax abuse 'bad faith taxpayer' doctrine was used by the Russian tax authorities. PCA Case No. AA 227 In The Matter of an Arbitration before a Tribunal Constituted in accordance with Art. 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules – between – *Yukos Universal Limited (Isle of Man) – and – The Russian Federation*, Final Award 18 July 2014. In that case, one of the tax issues relevant to the amount of damage to be compensated was treaty abuse. In that respect it is interesting to note that three prominent tax scholars and practitioners acted as witness experts: Stef van Weeghel, H. David Rosenbloom and Philip Baker.

111 *See* T. R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56(1) Am. Bus. L. J. Volume (2019) at 150.