WHOLLY ARTIFICIAL ARRANGEMENTS UNDER ATAD AND EU CASE LAW

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Since I moved to Sweden, one greatest gift that I have received from the country I now call home has been the possibility to study and fulfil my intellectual curiosity. Thanks to the generosity of the system, I have been able to study almost whatever I have ever been interested in. Being admitted into the LLM program in International Tax law and EU Tax law was just another step taking me further in my academic journey. And I am endlessly grateful to all the professors and guest lecturers in the course of the program. To you Katia Cejie (program director) and Prof. Bertil Wiman (my supervisor), thank you for taking me one step further in my academic journey. To all the wonderful classmates I had from almost all major tax jurisdictions of the world, thank you all for the enriching experience. I would never have been able to study in Uppsala University if I never had a solid academic foundation. And to that, I give all the credits to my mother (Arrey Flora Ojong) who was my very first teacher in primary school and greatest supporter in all aspects of my education.

Abstract

Since the coming into force of the EU Anti-Tax Avoidance Directive (ATAD), there has been a lot of questions as to the meaning of the concept of wholly artificial arrangements and how member states can enact legislation to combat abuse of rights and other fraudulent practices within the European Union. However, the concept of wholly artificial arrangements as enacted in articles 6 & 7 of the ATAD is not new. It’s a concept that has been well developed within the case law of the Court of Justice of the European Union and hence, the judgments and opinions of the Court of Justice of the European Union are very important in understanding articles 6 & 7 of ATAD. As demonstrated in this thesis, despite the fact that member states are free to enact measures aimed at combatting abusive practices when it comes to tax matters, however they must do so in a such a way as not to go against EU law or EU basic freedoms. Hence EU law remains supreme. Furthermore, the fact that a taxpayer decides to take advantage of favourable tax rates abroad does not presume an intention to fraud and all cases of abuse of rights must be dealt with on a case-by-case basis. As shall be shown in this thesis, the only instance where the Court of Justice of the European Union will accept restrictive measures in order to combat tax avoidance and tax evasion, is only when it involves the use of wholly artificial arrangements in order to circumvent both EU law and
national law. And this must be based on both an objective and a subjective test as shall be seen in the thesis.

Chapter One

1.1 Introduction:

According to EU law, EU citizens (legal and natural), are free to work, live and establish themselves in which ever member state of their choice without any restriction be it from

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1 EU law is made up of two parts; primary law and secondary law. EU primary law consists basically of the Treaty of the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). Every action taken by the EU is founded on the treaties. Treaties are the starting point for EU law.
either their home state or the destination state. If this is the case, it is because of the fundamental freedoms that have been enshrined in EU Law by EU Treaties. The most well-known fundamental freedoms of the EU include; the free movement of; goods, capital, services and persons, in the single EU internal market.

Thanks to these EU freedoms, companies or legal persons, are free to do business wherever in the EU, without any form of discrimination or restriction. That-not-withstanding, Although the EU provides for these fundamental freedoms, both EU nationals and corporate entities are not allowed to use EU law for abusive purposes, and hence member states are therefore permitted to implement measures that may be considered to be restrictive towards the basic EU freedoms, in order to prevent the abuse of EU Law and distort the common market.

According to the case law of the EU, restrictive measures aimed at combatting abusive practices can only be permitted in the cases involving the use of Wholly Artificial Arrangements, in order to; (1), circumvent domestic legal provisions, (2), to abuse EU law, by using EU law. One area in which the use of wholly artificial arrangements is very common, is in the area of Company law and more precisely Tax law.

In the area of Tax law for example, the fact that, the EU does not have a harmonised system of direct taxation, allows member states to freely impose whatever taxes they deem fit in within their respective jurisdictions. Hence each EU member state has a different Direct Tax Regime. Because of such differences, there is therefore a tendency for Companies or legal persons, to take advantage of EU law to reduce their tax base by holding some of their assets in jurisdictions wherein corporate taxes are lower than what would have been applicable if such holdings where established in their domestic jurisdictions.

The differences in the legal landscape within the EU makes it conducive for EU nationals to abuse EU law. Another complicating factor in the area of abuse of EU law or abuse of rights as shall be hereinafter referred, is the fact that, the instances in which the Court of Justice of the European Union accepts measures aimed at combatting wholly artificial arrangements are

On the other hand, the body of law that comes from the principles and objectives of the treaties is known as secondary law; and it includes; regulations, directives, decisions, recommendations and opinions. Primary EU law has direct effect on all member states while depending on the circumstances, certain secondary EU law also do have direct effect on member states. (https://ec.europa.eu/info/law/law-making-process/types-eu-law_en).


3 More on this in the sections ahead.
very narrow, limited, and sometimes confusing. The reasons for this is because such measures will most likely conflict with EU basic freedoms and could be judged to be disproportionate. Within the jurisprudence of the Court of Justice of the European Union, the principle of abuse of rights is well developed and today, it is considered to be a settled area of law.

In the absence of a harmonised system of direct taxation within the EU, conflicts are still bound to arise, and corporate entities and other EU nationals, would always take advantage of loopholes in EU law. Hence there is an urgent need to address the issue of abuse of rights. After the completion of the OECD\textsuperscript{4}, BEPS project (Base Erosion and Profit Shifting)\textsuperscript{5}, the EU responded with the Anti-Tax Avoidance Directive (ATAD). This Directive, came into force on the 1\textsuperscript{st} of January 2019\textsuperscript{6}. Articles 6 & 7 of the ATAD deal directly with the concept of wholly artificial arrangements by laying down minimum measures for member states to combat abuse of rights through the use of wholly artificial arrangements. However, articles 6 & 7 does not fully solve the problem of abuse of rights as it creates more questions as it tried to answer. Hence there is bound to be a recourse to the case law of the CJEU.\textsuperscript{7}

\textbf{1.2 Aim and Research Questions of Thesis.}

The main aim of this thesis is to investigate if the concept of wholly artificial arrangements as developed in the case law of the CJEU, is adequately captured in articles 6 & 7 of the ATAD and if such provisions of ATAD can eliminate the problem of Treaty Abuse against the backdrop of the freedom of establishment.

The first question of the thesis is as follows; to what extent can the jurisprudence of the CJEU be relied upon in understanding the concept of wholly artificial arrangements as contained in articles 6 & 7 of the ATAD? And can articles 6 & 7, solve the problem of EU treaty abuse through the use of wholly artificial arrangements?

\textsuperscript{4} The Organisation for Economic Co-operation and Development (OECD), \url{https://www.oecd.org/about/}.

\textsuperscript{5} Base Erosion and Profit Shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. The two action plans that are directly related to articles 6 & 7 of ATAD include; action 3 (designing effective Controlled Foreign Company Rules), and action 6 (preventing the granting of Treaty Benefits in inappropriate circumstances). \url{(https://www.oecd.org/ctp/beps-2015-final-reports.htm)}.

\textsuperscript{6} The Anti-Tax Avoidance Directive (ATAD), contains five legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning. \url{(https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en)}.

\textsuperscript{7} More on these questions shall be seen in the second chapter of this thesis.
1.3 Thesis Method and Materials

1.4 Legal-Dogmatic Approach

Since this thesis will be looking at concepts within both existing new legislation which in this case is the ATAD, as well as the development of the concept of Wholly Artificial Arrangements in the case law of the Court of the Justice of the European Union (CJEU), the best method in carrying out such a study, is the legal dogmatic approach. This approach which seeks to give a systematic exposition of principles, rules and concepts governing a particular legal field or institution, as well as enable us to analyse the relationships that exist between them, with a view to solving uncertainties and gaps in existing law, is best suited in investigating the relationship between articles 6 & 7 of ATAD and the case law of the CJEU as concerns the concept of Wholly Artificial Arrangements.

In order to achieve the aim of the thesis as well as adequately answer the research questions, the main materials that will be used, shall mainly constitute judgements and opinions of the Court of Justice of the European Union, and of the Attorney General of the same court. The legal dogmatic approach basically has three main aims, to describe, prescribe and justify the law. This enables the researcher to, describe existing law, make some prescriptions, as well as justify any newly proposed solutions. Hopefully at the end of this thesis, I would have been able to fulfil all these three aims.

1.5 Organisation of Thesis

After the introductory section of the Thesis, it continues with the second chapter that gives a general overview of Anti-Abuse measures within the EU and more specifically, articles 6 & 7 of ATAD. After that, the thesis continues with the third chapter, which looks into the development of the principle of abuse of rights in the jurisprudence of the CJEU. After looking at the development of the principle of abuse of rights under EU law, the fourth chapter will more specifically look into how EU case law can be used in understanding the provisions of articles 6 & 7 of ATAD. The thesis will end with some concluding remarks in chapter 5.

Chapter Two
2.1 Prevention of Abuse of Rights in the EU.

Although it has generally been the prerogative of member states to adopt anti-abuse measures, however, several initiatives have been taken at the level of the EU in order to introduce anti-abuse measures in EU Law. The European commission started off by raising the alarm in a communication in 2006 in which it invited member states to discuss the problem of tax fraud and tax evasion as well as adopt a common European response to the problem. The 2006 initiative by the commission was followed by other initiatives which culminated with anti-abuse measures being introduced in EU Law \(^8\). In 2012, the European Commission released a document in which it detailed out measures that member states could take to fight against tax avoidance and tax evasion. In the 4\(^{th}\) recommendation of this document, the EU Commission provided a detailed definition of what constitutes tax abuse and how member states should frame their General Anti-Avoidance Rules (GAAR). Member states were encouraged to include GAAR’s in their legislation which should be aimed principally to combat;

‘an artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance’. An arrangement as mentioned above means; any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event. It may comprise more than one step or part.

And, an arrangement becomes artificial; “where it lacks commercial substance”\(^9\), and in determining whether an arrangement is artificial, member states should consider whether there is the existence of one or more of the following situations.

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(a) the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole; (b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct; (c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other; (d) transactions concluded are circular in nature; (e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows; and (f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.  

Furthermore, the 2012 EU Commission’s recommendations on GAAR’s, goes ahead to indicate that,

the purpose of an arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply.

And,

in determining whether an arrangement or series of arrangements has led to a tax benefit, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s). In that context, it is useful to consider whether one or more of the following situations occur; (a) an amount is not included in the tax base; (b) the taxpayer benefits from a deduction; (c) a loss for tax purposes is incurred, (d) no withholding tax is due; (e) foreign tax is offset.

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10 ibid
11 ibid
The consequence of all these initiatives culminated to the introduction of an anti-abuse clause in the Parent-Subsidiary Directive \(^{12}\), as well as member states also adopting anti-abuse provisions in their national legal systems. However, since there is no harmonization in the area of direct taxation within the EU, it was necessary for there to be an EU wide initiative that seeks to establish minimum standards against tax evasion and tax avoidance.

2.2 The Anti-Tax Avoidance Directive (ATAD).

The EU Council Directive 2016/1164, was Adopted in October 2016 and member states are expected to start implementing its measures as from the first of January 2019 \(^{13}\).

The main objective of the Anti-Tax Avoidance Directive (ATAD), is to lay down rules against tax avoidance practices that directly affect the functioning of the EU common market. It contains five legally binding anti-abuse measures. They include provisions for Controlled Foreign Companies (CFC rules aimed at deterring profit shifting to low/no tax jurisdictions), the Switchover rule (to prevent double non-taxation of certain income, Exit Taxation rules (to prevent companies from avoiding tax when relocating assets, Interest Limitation (to discourage artificial debt arrangements designed to minimise taxes, and the General Anti Avoidance Rule, (to counteract aggressive tax planning when other rules do not apply)\(^{14}\).

In May 2017, the ATAD was amended by another EU Council Directive 2017/952. The principal purpose of the ATAD 2, was the inclusion a Hybrid Mismatches Rule whose objective is to prevent multinational companies from gaining an unfair competitive advantage by exploiting the differences in tax systems within the EU and other countries to achieve double non-taxation, double deduction, deduction without inclusion and non-taxation without inclusion \(^{15}\). On a general note, the ATAD, merely provides a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable

\(^{12}\) See COUNCIL DIRECTIVE (EU) 2015/121 of 27 January 2015; amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.


\(^{14}\) ibid

environment for businesses. Hence member states are free to impose more stricter measures against tax avoidance as long as they do not go against EU law.

2.3 The Concept of Wholly Artificial Arrangements under ATAD.

Articles 6 & 7 of the ATAD contain specific provisions on the use of Wholly Artificial Arrangements for the purpose of tax avoidance and evasion. Article 6 lays down the GAAR’s while article 7 concerns the use of Wholly Artificial Arrangements by Controlled Foreign Companies (CFC), to avoid taxes.

According to article 6;

   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.

From the provisions of the article mentioned above, GAAR’s should be applicable to arrangements that have as principal aim to obtain a tax advantage that goes against the objective of the applicable law. The Applicable law in this case is both EU law and the National law of the member states. Despite the provisions of the GAAR of ATAD, some questions still remain unanswered. For example, what constitutes an artificial arrangement? Which relevant facts and circumstances should be taken into consideration? Which reasons are valid?

The second paragraph of article 6 tries to clarify the meaning of artificial arrangement, however instead of using the expression “arrangements” as is the case in the first paragraph, the second paragraph rather talks about “non-genuine”, hence my guess here will be that,

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16 Article 6 of the COUNCIL DIRECTIVE (EU) 2016/1164 on General Anti Abuse rule (GAAR).
artificial arrangements are synonymous to non-genuine. But then, what’s genuine and what’s not-genuine? To that end therefore, the second paragraph describes a non-genuine arrangement as arrangements that “are not put in place for valid commercial reasons which reflect economic reality”\textsuperscript{17}. Here again, how do you determine economic reality?

In article 7 of ATAD, on CFC rules, there are also some questions. In the last part of the sixth (vi) paragraph of section 2 (a) of article 7, the expression “a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances”\textsuperscript{18}, is used. I guess, this may be used to answer the question raised earlier on what constitutes economic reality. Even here again, there is still no clear meaning as to what constitutes substantive economic activity hence leaving room for decisions to be made based on subjective judgments.

Also, in article 7, an attempt at providing a definition of what constitutes a non-genuine or artificial arrangement is made. According to section 2 (b);

an arrangement or a series thereof shall be regarded as non-genuine to the extent that the entity or permanent establishment would not own the assets or would not have undertaken the risks which generate all, or part of, its income if it were not controlled by a company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income\textsuperscript{19}.

Here again, there is still no clarity as to what constitutes genuine and what constitutes artificial and hence in order to answer some of the questions raised as well as better understand the concept of “Wholly Artificial Arrangements”, we would have to look into the case law of the CJEU. Another question that also arises is to what extent are member states free to impose CFC rules without falling foul of EU law?

The answers to all of these questions can be found in the judgements of the CJEU as we shall see ahead. But before that, I will first of all go back in history, by looking into the development of the principle of abuse of rights, which as some authors have argued constitutes a general principle of EU law.

\textsuperscript{17} Second paragraph of article 6 of ATAD.
\textsuperscript{18} sixth (vi) paragraph of section 2 (a) of article 7
\textsuperscript{19} Second paragraph of section 2 (b), of article 7.
Chapter Three

3.1 The Development of the Principle of Abuse of Rights.

The main objective of Articles 6 & 7 of the ATAD are clearly to fight against the use of EU law for the avoidance of tax or to be more precise, the use of EU law for abusive tax purposes. As earlier mentioned both articles 6 & 7 of ATAD, do concern the use of artificial arrangements principally for the avoidance of taxes. Although the ATAD Directive sets down minimum standards for the setting of General Anti Avoidance Rules (GAAR) as well as Specific Anti Avoidance Rules (SAAR)\(^\text{20}\), however, the general principle of the abuse of rights, has been in the development and generally been used within the case law of the CJEU. The sections below will therefore look into how this principle has been developed within the jurisprudence of the CJEU.

3.2 Establishment of the Principle

The principle of abuse of rights is as old as EU case law. The foundations of this principle were laid down in the case of Van Binsbengen\(^\text{21}\). The facts of the case are as follows. In 1972, by power of attorney, Mr. M.G.J. M Kortmann, A Dutch national, was authorised to represent Mr. Van Binsbengen in an appeal before the Dutch Court of Last Instance (Central Raad van Beroep). However, before the appeal process could go through, Mr. M.G.J.M. Kortmann moved his residence from the Netherlands to Belgium and because of this reason, the registrar of the Dutch Court of Last Instance informed him of the fact that, he could no longer represent Mr. Van Binsbengen.

The main reason cited for this decision was article 48 (1), of the law of 2nd February 1955, on the organisation and rules of procedure of Netherlands social service courts). According to this article, only persons established in the Netherlands can act as legal representatives or

\(^{20}\) SAAR’s, address specific areas of harmful tax practices as seen in the case of article 7 of ATAD on Controlled Foreign Companies.

\(^{21}\) Case 33-74. Reference to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep (Netherlands court of last instance in social security matters) for a preliminary ruling in the action pending before that court between; Johannes Henricus Maria Van Binsbengen, residing at Beesel (Netherlands), and Bestuur Van De Bedrijfsvvereniging voor de Metaalnijverheid, (Board of the Trade Association of the Engineering Industry), registered at The Hague, on the interpretation of Articles 59 and 60 of the EEC Treaty relating to freedom to provide services within the Community.
advisers and since Mr Kortmann had relocated to Belgium, he could therefore no longer act as a legal representative. Mr Kortmann appealed to the decision by invoking article 59 of the EEC Treaty, which permits all citizens of the EEC area to be free to provide services in which ever member state of their choice, and hence according to Mr. Kortmann, the provisions of article 48 (1), are therefore incompatible with article 59 of the EEC Treaty, and hence it should be revoked.

In the judgement that followed, the court decided that:

- a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory, of the freedom guaranteed by article 59, for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state”. And hence article 49 (1), although a restriction is compatible with articles 59 and 60 of the EEC Treaty, since their "objective aim is to ensure the observance of professional rules of conduct connected, in particular with the administration of justice with respect for the professional ethics.

Despite the fact that, there is no mention of the word "Abuse", in the judgement of the CJEU, however, it clearly laid down the foundation for the development of the principle of abuse of rights. By stating that, “member states have the right to establish laws and rules for the purpose of preventing a person from avoiding professional rules, by moving their residence abroad while providing services principally aimed at their state of origin, this somehow clearly rebukes abusive behaviours through the use of EEC Treaty provisions. The Van Binsbengen case, marked the first time, the CJEU frowned at behaviours or behaviours, whose principal objective was the use of community law to circumvent national rules of member states.

Despite the fact that this case did lay down the foundations of the principle of abuse of rights, however, a lot of questions were left un-anwered. For example, the definition of the principle was vague, its scope was not clear, and the measures that member states could take in order to combat abuse was not clear either. The judgement in the Vans Binsbengen also gave member states more power in deciding what constituted an abuse since no criteria was laid down by the court. This also carried the risk of member states greatly restricting the use of basic freedoms provided for by the EEC Treaty.

\[\text{Ibid}\]
Hence, the Van Binsbengen case, although for the first time did recognised the principle, it really did not do much clearly defining the principle and setting down any criteria.

3.3 **Defining the Scope of the Principle.**

Despite the lack of clarity from the judgement of the Van Binsbengen case as concerns the principle of abuse of rights, however the development of the principle continued to take its course after several judgements. The main objective of most of the judgements that followed was in clearly defining and narrowing down the scope of the principle. As seen in what has been termed “the Greek Challenge Cases”\(^\text{23}\), the court was able to define the extent to which member states could take measures in combatting Treaty abuse.

The Greek Challenge cases involved a series of cases from Greece which concerned the interpretation of provisions of the Second Company Directive\(^\text{24}\). The main question that was submitted to the CJEU for a preliminary judgement was whether national measures or an administrative act that required an increase in the capital amount of public limited companies was contrary to the Second Company Directive or if a national anti-abuse measure could go above the minimum standards set by Union Law.

In the *Pafitis* case\(^\text{25}\), the court made it clear that “the application of such a rule must not detract from the full effect and uniform application of Community law in the Member States”\(^\text{26}\). The reasoning behind this decision was simple for as the Advocate General stated in his opinion, allowing member states to adopt anti abuse measures that go against Community law would greatly undermine community law\(^\text{27}\). This same line of reasoning was adopted in the case of *Kefalas*\(^\text{28}\) and *Diamantis*\(^\text{29}\). In the Kefalas case, the court even went ahead to set down limits on the power of member states in adopting anti-abuse measures against

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\(^{23}\) mostly cases submitted from Greece which are examples of abuse of rights.

\(^{24}\) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent *OJ L 26, 31.1.1977, p. 1–13.*

\(^{25}\) Case C-441/93 Pafitis (n 17), § 68

\(^{26}\) ibid

\(^{27}\) Opinion of Advocate General, Tesauro in case C-441/93, Pafitis, (n 17), § 28.

\(^{28}\) Case C-367/96, Kefalas, (n 1), § 22

\(^{29}\) Case C-373/97, Diamantis (n. 40), § 34.
Community law by stating that, such anti-abuse measures must not alter the scope of community law or compromise its objectives

Beyond the “Greek Challenge” cases, further judgements of the court have continuously tried to narrow down the scope of the anti-abuse principle as laid down in the Van Binsbengen case.

In the *Centros* case, the Danish Trade and Companies Board refused to register a branch of *Centros*, a company registered in England and Wales, by a Danish national whose sole objective was to take advantage of the more lenient company registration rules in England and Wales and hence circumventing stricter Danish company registration rules. The main argument of the Danish Trade and Companies Board was the fact that they have the right to stop any behaviour that seeks to circumvent the application of the national law governing formation of private limited companies especially as such behaviours constitutes an abuse of the freedom of establishment.

However, the court took a different opinion by arguing that, a presumption of fraud cannot be drawn just by the fact that a "company does not conduct any business in the member state in which it has its registered office and pursues its activities only in the member state where its branch is established is not sufficient to prove the existence of abuse of fraudulent conduct which would entitle the latter member state to deny that company the benefit of the provisions of community law relating to the of establishment.

This same line of reasoning was adopted in the case of *Sergers*.

Looking at the judgement of the court of in the above-mentioned cases, it is clear the court has continuously restricted the power of member states to impose anti-abuse measures. Any anti-abuse measure must be compatible with Community law. In the Centros case, it did state that,

national measures liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty must fulfil four conditions; they must be applied in a non-discriminatory manner; they must be suitable for

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30 Case C-367/96, Kefalas, (n 1), § 23 & Case C-373/97, Diamantis (n. 40), § 34.
31 Case C-212/97. Centros
32 Case C-212/97, Centros § 22.
33 Ibid § 29.
34 Case 79/85, Sergers.
securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.\textsuperscript{35}

Furthermore, the decision of the court in the cases of; \textit{Pafitis, Kefalas, Diamantis, Sergers and Centros}\textsuperscript{36}, narrowed the scope of the principle abuse of rights. That notwithstanding, in none of these cases did the court lay down any criteria upon which member states could identify and limit abusive behaviour.

3.4 \textbf{The Emsland-Stärke Criteria for the Abuse of Rights Principle.}

The landmark Emsland-Stärke\textsuperscript{37}, case plays a central and pivotal role in the development of the abuse of rights principle since it was the first time that the court finally laid down criteria that should be used in identifying behaviours or arrangements that can constitute an abuse of rights.

In the Emsland-Stärke case, agricultural products that originated from Germany were exported to Switzerland and released for home use. However, these same goods were exported back to Germany and to Italy, (both Community members), without any changes on them and using the same means of transport. On each of these transactions, the exporters claimed an export refund. However, after a re-evaluation of the transactions in Germany, German authorities requested a refund of the export refund that had been paid earlier. The main reason for this decision was the fact that, the goods had been released for home use in Switzerland and hence, the export refunds were wrongly reclaimed.

In the 37th paragraph of the judgement, the commission, while citing article 4 (3), of Council Regulation No 2988/95 of December 18, 1995\textsuperscript{38}, on the protection of the European Community's financial interest, did clearly state that,

\begin{quote}
acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall
\end{quote}

\textsuperscript{35} Case C-212/97, Centros § 34.

\textsuperscript{36} Case C-367/96, Kefalas, (n 1), § 23 & Case C-373/97, Diamantis (n. 40), § 34, case C-441/93, Pafitis, Case 79/85, Sergers and Case C-212/97, Centros.

\textsuperscript{37} Case C-110/99 Emsland-Stärke

result, as the case shall be, either in failure to obtain the advantage or in its withdrawal\textsuperscript{39}.

As can be seen in the cited paragraph above, it was in the Emsland-Stärke case that the expression "Artificial" was first used to denote transactions whose main objective was to obtain an advantage that is contrary to the objectives of Community Law.

The Emsland-Stärke case also re-emphasised the existence and importance of the general legal principle of abuse of rights which according to paragraph 38 of the judgement of the court, did existed in almost all of the member states\textsuperscript{40}.

In paragraph 39\textsuperscript{41}, the concept of an abuse of rights is clearly spelled out and for there to be an abuse of rights, three tests must be fulfilled. These tests include; the objectivity test, the subjectivity test and the procedural test.

3.5 The Objectivity Test.

As mentioned in the judgement; the objectivity test can be satisfied if there is, evidence that the conditions for the grant of a benefit were created artificially, that is to say, that a commercial operation was not carried out for an economic purpose but solely to obtain from the Community budget the financial aid which accompanies that operation. This requires analysis, on a case-by-case basis, both of the meaning and the purpose of the Community rules at issue and of the conduct of a prudent trader who manages his affairs in accordance with the applicable rules of law and with current commercial and economic practices in the sector in question\textsuperscript{42}.

Following this judgement, an analysis of this judgement presupposes that, an important element in fulfilling the objectivity test is the financial gain that’s being sought and according to the Commissions opinion during the proceedings of the Emsland-Stärke case, such financial advantages, "are not to be granted or, in some cases, are to be withdrawn retrospectively if it is shown that the commercial operations at issue were for the purpose of obtaining an advantage which is incompatible with the objectives of the applicable

\textsuperscript{39} Case C-110/99, Emsland-Stärke, § 37
\textsuperscript{40} Case C-110/99, Emsland-Stärke, § 38
\textsuperscript{41} Case C-110/99, Emsland-Stärke, § 39
\textsuperscript{42} ibid
Community rules in that the conditions for obtaining that advantage were created artificially" 43.

3.6 The Subjective Test.

The subjective test is directly connected to the objective test outlined above. Subjectivity here presupposes a malicious intent aimed at using Community rules for a financial benefit which is against the objectives of community rules. According to the opinion of the Court, one way that malicious intent can be deduced is by looking at if there was any collusion between the community exporter seeking a financial refund and the importer of the goods 44.

3.7 The Procedural Test.

The third test which is not really so important as the first and second tests, concerns the burden of proof. Accordingly, the burden of proof falls on the relevant national administration but this may be reversed in the case of a serious abuse. It is therefore the responsibility of the national court to determine whether all three tests have been fulfilled. As usual, although the court did recognise the exclusive right of the national courts to determine if there is an abuse, using the criteria mentioned above, however, it makes it clear that such a prerogative should be exercised in such a manner that does not undermine Community law 45.

The court’s judgement in the Emsland-Stärke case and the various test laid down in the case, has continuously remained the main standard for determining if there is an abuse or not and the extent to which measures adopted are commensurate in combatting such an abuse. This case also introduced the concept of “artificial arrangements” which have as principal purpose, circumventing, evading or avoiding higher tax rates or more stricter rules in a member state, by hiding assets to jurisdictions with lower rates or more lenient rules in either another member state or a non-member state. The concept of “artificial arrangements”, as shall be shown ahead plays a central role in the current efforts of the EU, in combatting tax avoidance. The court’s reasoning in the Emsland-Stärke case has been applied in several other cases, that

43 Case C-110/99, Emsland-Stärke, § 43
44 Case C-110/99, Emsland-Stärke, § 53
45 Case C-110/99, Emsland-Stärke, § 54
involve different aspects of EU law, (freedom to provide services, freedom of establishment, free movement of goods, social security, free movement of workers, common agricultural policy, and company law).

Looking at the development of the principle of abuse as seen in the jurisprudence of the Court, one can notice that, the main method used by individuals or companies in abusing community rules usually involves what some authors have described as U-Transactions, even though the court itself in the judgement of the Emsland-Stärke case did make mention of the expression “circular transactions”.

Despite the impressive work done by the court in developing the principle of abuse of rights, and the fact that member states do have the right to enact anti-abuse measures, however applying the reasoning of the court in that case has not been easy especially in the areas of EU Company and Tax law, due to the high risk of anti-abuse measures going against EU basic freedoms and other EU law. The next section of this thesis will therefore look into the different ways in which the reasoning of the court has been applied in other cases in the area of Company law and Tax law. My main reason for specifically looking into these areas of law is because the ATAD is principally concerned with issues of tax avoidance from companies that use wholly artificial arrangements as a means to avoid taxes.

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48 Case 229/83 Leclerc and Others v ‘Au Blé Vert’ and Others [1985] ECR 1, paragraph 27.
52 Case C-3 67/96 Refalas and Others v Greece [1998] ECR 1-2843, paragraph 2.


54 Case C-110/99, Emsland-Stärke
Circular Transactions or U Transactions is a technique used by tax evaders to confuse tax authorities from detecting suspicious transactions. This is usually done by moving assets around within a group of companies in order to lower the tax burden.
Chapter 4

4.1 From Emsland-Stärke to Cadbury Schweppes, using the Objective and Subjective Tests on Wholly Artificial Arrangements, to understand Articles 6 & 7 of ATAD.

The judgements in the Emsland-Stärke55 and Cadbury Schweppes56 cases, are very important especially in the area of abuse of rights and the avoidance of taxes. Not only do both cases do lay down the criteria to be used in identifying wholly artificial arrangements whose principal aim is to circumvent national legislations by taking advantage of Treaty provisions at the detriment of the objectives of the same treaty, however, especially in the case of Cadbury Schweppes, they also help us in understanding the extent to which member states can impose restrictive measures to combat tax avoidance which are compatible with the laws of the EU.

The Cadbury Schweppes case, involves a UK resident and registered company that owns subsidiaries in both the United Kingdom and in other member states. On the 18th of August 2000, the Commissioners of Inland Revenue made a claim for corporation tax from Cadbury Schweppes Overseas. The main reason for the corporate tax claim was because Cadbury Schweppes Overseas had established two subsidiaries in Ireland whose corporate tax rates were lower than the corporate tax rates in the United Kingdom and according to the UK Controlled Foreign Company rules (CFC), a re-evaluation of the taxes of Cadbury Schweppes Overseas was necessary in order to take into consideration the fact that a wholly owned subsidiary of Cadbury Schweppes was paying lower taxes abroad, and hence requiring them to pay more taxes at home. According to Cadbury Schweppes, using CFC rules to require them to pay more taxes on profits derived abroad in another member state clearly restricted their fundamental freedoms

55 Ibid

56 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd Vs Commissioners of Inland Revenue; C-196/04
as provided for in articles; 43, 49, and 56 of the Treaty establishing the European Community. On the other hand, the UK Government disputed that fact by arguing that the fact that Cadbury Schweppes elected to establish a subsidiary in a low tax jurisdiction was already an indication of fraud or an attempt to avoid taxes.

In the judgement that ensued, the CJEU sided with Cadbury Schweppes, stating that the CFC rules of the United Kingdom was a restriction of the fundamental freedoms of the EU. First of all, the CJEU made it clear that, a presumption of abuse cannot be made just by the fact that a resident company elects to establish a subsidiary in a member state with a lower rate of corporate tax. Secondly, the fact nationals or registered corporations of member states sought to benefit from tax advantages in another member, cannot in itself prevent such a national or company to rely on the provisions of EU law.

The judgement of the case also laid down the circumstances under which anti-abuse measures taken by member states such as the CFC rules at issue can be justified and proportionate. According to the judgement of the court, CFC rules or other GAAR, can only be permissible if they are intended to combat the use of wholly artificial arrangements for tax avoidance.

The judges, while citing the Emsland-Stärke case, did provide criteria that should be used by national courts in determining if an arrangement is wholly artificial. These criteria (Objective and Subjective), are similar to the criteria laid down in the Emsland-Stärke case.

4.2 The Objective Test

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59 Paragraph 36 of the Cadbury Schweppes case. See also; case C-364/01, The Heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen, Case C-364/01, paragraph 71). Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, Case C-524/04

60 See paragraph 51 & 55 of the judgement of Cadbury Schweppes Case. See to that effect, paragraph 26; Case C-324/00 Lankhorst-Hohorst [2002] ECR I-11779, paragraph 37; De Lasteyrie du Saillant, paragraph 50; Case C-9/02.; and Marks & Spencer, paragraph 57; Case C-446/03).

61 The Emsland-Stärke Case was the first case to lay down an objective and subjective criteria that can be used by member states in determining if an arrangement was intended to circumvent national rules. Case C-110/99
The objective test laid down by the judgement of the court is very similar to the same criteria laid down in the Emsland-Stärke Case, in which, in order for CFC to be exempted from CFC rules, it must objectively be ascertained that the foreign subsidiary is involved in a genuine economic activity. The objective factors to be taken into consideration in this case may include; physical presence in terms of premises, staff and equipment. Such genuine economic activity must be able to be ascertained by a third party.\(^{62}\)

The objective test in the judgement of the Cadbury Schweppes Case is not as explicit as the test proposed by the Advocate General in his opinion. According to the Advocate General; in order to fulfil the objective test, three criteria must be satisfied. They include;

- firstly, whether the subsidiary is genuinely established in the host State. It means examining whether the subsidiary has the premises, staff and equipment necessary to carry out the services provided to the parent company which have resulted in the reduction of the tax due in the State of origin.

- The second criteria, relates to the genuine nature of the services provided by the subsidiary. In that connection, it is a question of looking at the competence of the subsidiary's staff in relation to the services provided and the level of decision-making in carrying out those services.

- And the third criterion involves looking at the added-value that such a CFC brings to the parent company i.e., if the services provided by the subsidiary do have any economic substance to the activities of the parent company.\(^{63}\).

### 4.3 The Subjective Test

\(^{62}\) See paragraph 67 of the judgement of the Cadbury Schweppes Case. See also; paragraphs 54 and 55 of this judgment, Case C-110/99 Emsland-Stärke [2000] ECR I-11569, paragraphs 52 and 53, and Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraphs 74 and 75).

\(^{63}\) See paragraphs; 111-114 of the Opinion of the Advocate General; MR LÉGER in the Cadbury Schweppes and Cadbury Schweppes Overseas; Case C-196/04. See also the following cases on the actual pursuit of an economic activity, through a fixed establishment (see Case C-221/89 Factortame and Others [1991] ECR I-3905, paragraph 20, and Case C-246/89 Commission v United Kingdom [1991] ECR I-4585, paragraph 21).
However, the objective test alone does not suffice in identifying a wholly artificial arrangement. Subjective elements are also equally as important as the objective element. In paragraph 62 of the court’s judgement, CFC rules shouldn’t apply in the case where the motifs of the CFC company are genuine. Hence both the objective and subjective motives should be considered together. The subjective test “requires, essentially, that the resident company show, first, that the considerable reduction in United Kingdom tax resulting from the transactions routed between that company and the CFC was not the main purpose or one of the main purposes of those transactions and, secondly, that the achievement of a reduction in that tax by a diversion of profits within the meaning of that legislation was not the main reason, or one of the main reasons, for incorporating the CFC 64.

4.4 Burden of Proof

In the Emsland-Stärke Case mentioned in the earlier parts of this thesis, the burden of proof in cases of tax abuse is placed on the tax administration. However, this procedural requirement is reversed in the case of Cadbury Schweppes, in which the burden to proof a genuine economic activity is on the company. Hence the CFC, will have to provide documents and all relevant information necessary for an objective assessment of their business activities to be done in order to determine whether such business activities are reasonably genuine or a wholly artificial arrangement.

4.5 Compatibility with EU Law

Although the objective of the ATAD directive is to set down minimum standards for the fight against tax evasion and tax avoidance, however member states are free to enact measures that are stricter than the ATAD provisions. This therefore means that, the fact that the EU has 28 member states, there is a probability for there to be 28 different legislations setting down anti-abuse measures for all EU member states. However, despite the fact that such national legislations are supposed to combat wholly artificial arrangements, they must not go against the fundamental freedoms as provided for in the Treaty of the Functioning of the European Union (TFEU). What this therefore means is that, EU law continues to remain supreme over national law and although member states continue to retain sovereignty over issues relating to

64 Paragraph 62 of the judgement of the Cadbury Schweppes case.
direct taxation, however they must do this in such a manner that does not go against EU Law 65.

Such a declaration has been a permanent part of most judgements of the CJEU, reminding member states of their responsibilities towards the Union and at the same time limiting their legislative power in areas that may be judged as limiting the freedoms of EU citizens. According to paragraph 133 of the Inspire Art Case, (case C-167/01),

it must be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, if they are to be justified, fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the public interest; they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it, 66.

This therefore continuously puts pressure on the national legislations of member states to conform with EU law even in the area of anti-abuse in order to combat wholly artificial arrangements being put in place to circumvent national laws and hence, EU law, as well as its legal principles continue to remain supreme.

Chapter 5

5.1 General Conclusion

65 Joined Cases C-487/01 and C-7/02, Inspire Art, Case C-167/01, Halifax and Others, Case C-255/02, Kofoed Case C-321/05, Lammers Case, C-105/07, Case C-318/10 SIAT SA v État belge, Eqiom Case C-6/16,

The main objective of this thesis was to look at the extent to which the concept of wholly artificial arrangements is as developed by the case law of the CJEU, is adequately captured in articles 6 & 7 of the ATAD and if the judgements of the CJEU could help in providing guidance on how to implement the provisions of ATAD.

Looking at the judgements of the CJEU, as mentioned in the previous chapters of this thesis, the circumstances under which member states can enact measures to combat tax avoidance, tax evasion and tax fraud have been made clear from the judgements and opinions of the CJEU. Although measures aimed at combating tax fraud could potentially go against EU law, however, looking at the judgements mentioned earlier, the extent to which such measures are permissible have been made clear.

Furthermore, fraud cannot be established just by the mere fact of a tax payer wanting to take advantage of favourable tax rates abroad if they are involved in a genuine economic activity. Hence before a member state can apply measures against abuse of rights, they have to be sure that transaction involved was created specifically to evade taxes. And as has been seen in the previous chapters, this can be done by using both the objective and subjective tests.

Also, an abuse of rights claim should be evaluated and established on a case by case basis and the abuse of law doctrine applies to all areas of EU law, irrespective of the area of activity. Hence EU law cannot be relied upon to circumvent both national law and EU law itself.

The second question of this thesis was to investigate whether both articles 6 & 7 are capable to solve the problem of treaty abuse within the European Union. Here it should be mentioned that, the mere fact that articles 6 & 7 impose just minimum standards for measures aimed at combating tax avoidance and tax evasion, could lead to regulatory competition and tax jurisdiction shopping and this may also create a conducive ground for tax evasion even though to a lesser extent. Also, the fact that EU law will always remain supreme over national legislations aimed at combatting tax evasion and tax avoidance, greatly limits the powers of member states to effectively combat tax evasion and tax avoidance.

Another aspect that I think is worthy to mention in these concluding remarks is weigh in on the debate whether the abuse of rights principle can be considered to be a general principle of EU law.

The purpose of this thesis has not been to pass a judgment on which side of the debate is the winner. But, my own personal point of view or opinion on this issue seems to side with those who think it’s a general principle of EU law. Looking at the extent to which this principle has been developed, the various tests needed to establish abuse and its general applicability on all
aspects of both EU law and national legislations of member states, it is fair enough to conclude that it is a general principle of EU law. This opinion of mine is echoed by the opinion of the Attorney General Maduro\(^{67}\); in the Halifax case, in which he claims “a general principle of community law can certainly be derived from the case law of the CJEU. (paragraph 64)” and he goes further in the 69\(^{th}\) paragraph of his opinion to state that, “the notion of abuse operates as a principle governing the interpretation of community law”.\(^{68}\)

The ATAD, is still a new directive that just got into force and member states are supposed to enact legislative frameworks in order to implement its provisions. Hence it would be interesting to see how most of the issues mentioned in this thesis playout and how effective its provisions will be in combatting tax evasion and tax avoidance.

\(^{67}\)


\(^{68}\)

ibid
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