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The Definition and
Modern Trends of
Tax Planning in
the European Union

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Abstract

The present PhD Thesis is devoted to the actual legal issue of the concept, content, and basis of setting the criteria of lawful tax planning as a corner stone of the economic operation of the European business undertakings. The study aimed to analyse the current case law of the Court of Justice of the European Union (ECJ) in tax disputes on the basis of the recent legislation of the EU Member States and the applicable international law for the purpose of defining the concept and criteria of lawful tax planning and distinguishing it from aggressive tax planning or criminal tax evasion. The practical goal of the present research is to consider optimal and legitimate tax strategies of companies operating in the EU.

The structure of the Thesis is determined by the goal and tasks of the research and includes the introduction, three chapters consisting of paragraphs and sub-paragraphs, the conclusions with eight propositions and the list of sources. The introduction explains the topicality of the research topic, defines its subject and object, determines the degree of scientific development of the theme and outlines the goal of the research. **The first chapter** investigates taxation in the EU, summarising EU single market and tax harmonisation, with a particular focus on EU tax system in two major areas: customs and indirect taxation, and the competences of EU institutions and the ECJ in the taxation field, specifically in the area of direct tax harmonisation and integrated regulation of the single market. **The second chapter** provides analysis of tax planning in the EU Member States, specifying the main concepts and identifying the boundaries of legitimate tax planning in the EU law and its interpretation by the ECJ. Particular emphasis is placed on the definition of aggressive tax planning, the presentation of the ECJ's approach to tax planning issues in court rulings, and to the arrangements of payment of dividends. Schemes of transfer of loss and profit as well as the practice of the ECJ in hearing tax planning cases in the EU Member States in the Baltic region were investigated. Based on the study of the previous two chapters **the third chapter** provides an in-depth analysis of factors affecting the modern entrepreneurship and tax planning, with a particular focus on anti-money laundering and sanctions legislation of the USA, EU and several other countries. Business secret, the role of mass media and the legislation on "whistleblowers" are demonstrated. Finally, the principle of freedom of establishment in the EU is studied and a scenario analysis of its compatibility with tax planning is carried out. Based on the conducted research, the conclusions are made. For instance, modern entrepreneurship ensures that the concept of tax planning remains strong in both theoretical and practical terms, continually adapting to the changing economy and emerging trends.

The main text of the Thesis consists of 168 pages. References contain 191 sources. Also, 12 Figures are included in the Thesis.

Keywords: Optimum tax strategies, taxation, EU tax system, tax legislation, Latvian Tax Law, Court of Justice of the European Union.

Anotācija

Nodokļu plānošanas definīcija un tendences Eiropas Savienībā

Šī promocijas darbs ir veltīts aktuālajam jēdziena, satura un pamata juridiskajam jautājumam, likumīgas nodokļu plānošanas kritēriju noteikšanai, kas ir Eiropas biznesa uzņēmumu ekonomiskās darbības stūrakmens. Pētījuma mērķis bija analizēt pašreizējo Eiropas Savienības Tiesas (EST) judikatūru nodokļu strīdos, pamatojoties uz jaunākajiem ES dalībvalstu tiesību aktiem un piemērojamajām starptautiskajām tiesībām, lai definētu likumīgas nodokļu plānošanas jēdzienu un kritērijus un atšķirību starp to un agresīvu nodokļu plānošanu vai noziedzīgu izvairīšanos no nodokļu maksāšanas. Šī pētījuma praktiskais mērķis ir apsvērt optimālas un leģitīmas nodokļu stratēģijas uzņēmumiem, kas darbojas ES.

Darba struktūru Promocijas darbā nosaka pētījuma mērķis un uzdevumi, un ietver ievadu, trīs nodaļas, kas sastāv no rindkopām un apakšpunktiem, secinājumus ar astoņiem priekšlikumiem un avotu sarakstu. Ievadā ir izskaidrota pētījuma tēmas aktualitāte, definē tā priekšmetu un objektu, noteikta nosaka tēmas zinātniskās attīstības pakāpi un iezīmē pētījuma mērķi. **Pirmajā nodaļā** ir aplūkota nodokļu politika ES, apkopojot ES vienoto tirgu un nodokļu harmonizāciju, īpašu uzmanību pievēršot ES nodokļu sistēmai divās galvenajās jomās: muitas un netiešo nodokļu jomā, kā arī atsaucoties uz ES institūciju un EST kompetencēm nodokļu jomā, īpaši tiešo nodokļu saskaņošanas un vienotā tirgus integrētā regulējuma jomā. **Otrajā nodaļā** ir sniegta analīze par nodokļu plānošanu ES dalībvalstīs, precizējot galvenos jēdzienus un identificējot leģitīmas nodokļu plānošanas robežas ES tiesībās un tās interpretāciju EST. Īpašs uzsvars šeit tiek likts uz agresīvās nodokļu plānošanas definīciju, EST pieeju izklāstu nodokļu plānošanas jautājumos tiesu nolēmumos un uz dividenžu izmaksas kārtību. Tika pētītas zaudējumu un peļņas pārnesšanas shēmas, kā arī prakse, kad EST tiek izskatītas lietas par nodokļu plānošanu ES dalībvalstīs Baltijas reģionā. Balstoties uz iepriekšējo divu nodaļu izpēti, **trešajā nodaļā** sniegta padziļināta analīze par faktoriem, kas ietekmē mūsdienu uzņēmējdarbību un nodokļu plānošanu, īpašu uzmanību pievēršot nelikumīgi iegūtu līdzekļu, ASV, ES un vairāku citu valstu noziedzīgi iegūtu līdzekļu legalizācijas un sankciju likumdošanai. Tiek demonstrēts biznesa noslēpums, masu mediju loma un likumdošana par trauksmes cēlējiem. Visbeidzot, tiek pētīts brīvības veikt uzņēmējdarbību princips ES un veikta tā saderības scenārija analīze ar nodokļu plānošanu. Pamatojoties uz veikto pētījumu, tiek izdarīti secinājumi. Piemēram, mūsdienu uzņēmējdarbība nodrošina, ka nodokļu plānošanas koncepcija ir spēcīga gan teorētiski, gan praktiski, pastāvīgi pielāgojoties mainīgajai ekonomikai un jaunajām tendencēm.

Promocijas galvenais teksts ir 168 lappuses. Literatūras sarakstā ir 191 avoti. Tāpat promocijas darbā ir iekļauti 12 attēli.

Atslēgvārdi: Optimālas nodokļu stratēģijas, nodokļi, ES nodokļu sistēma, nodokļu likumdošana, Latvijas Nodokļu likums, Eiropas Savienības Tiesa.

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Introduction

The topicality of the PhD Thesis research is reflected within its economic, social and political scope, however, first and foremost, this marks the dynamic nature of the field of study. The necessity and value for doctrinal interpretation arises from the significant changes in the case-law on tax disputes and the legitimacy of tax planning in the Member States of the European Union, over the last 20 years. Lawful tax planning is justified from an economic and business point of view and is, in itself, of great importance – no company or individual has any interest in, or is even compelled to, pay higher taxes in the course of their business activity than what is required by law. This draws on the complexity of the case along with the question of a reasonable understanding of “lawfulness” of tax planning and the interpretation of this lawfulness by various subjects of law and in reference to business activity. The approval of the Doctoral Thesis results was noted in the Socrates journal No 3(24), 2022, under the topic “Factors Affecting Modern Entrepreneurship and Tax Planning,” and in Socrates journal No 2(23), 2022, under the topic “Definition of Tax Planning in the Case Law of the Court of Justice of the EU (ECJ).

This understanding will vary across the EU depending on the legal situation and the legal dispute, but the main effect will be the interpretation according to the competence of individual EU Member States. Moreover, it should be noted that large-scale tax planning is further contextualised by considerable political motivation and ambition to maximise tax preferences. Although the concept of legitimate tax planning does exist, the interpretation and practical application of various theoretical statements will depend on the court of the country that raises the issue of tax planning within its competence.

The topicality of the study is related to the fact that the case law of the EU Court of Justice in tax disputes and tax planning is at present among the most elaborate and systematic ones, but also very recent and not fully established, being subject to the effect of numerous factors, primarily the range of EU Member States, taxation policy and tax behaviour of subjects developing it, and the transnational nature of tax planning.

In this regard, the present PhD Thesis is devoted to the actual legal issue of the concept, content and basis of setting the criteria of lawful tax planning as the foundation for the economic operation of European business entities.

It is important to emphasise that although the general approach to defining lawful tax planning – beginning with the distinguished and fundamental case of *Cadbury Schweppes*¹ –

¹ Cadbury Schweppes and Cadbury Schweppes Overseas, 12.09.2006 [Electronic resource] // Info Curia – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04> (Accessed: 10.12.2025)

has remained unchanged, it has evolved to be more detailed and accurate. In February 2019, the EU Court of Justice published the preliminary ruling on the dispute between Danish companies and tax authorities, which only confirms the continuity of the EU Court of Justice's principle regarding the definition of lawful tax planning. Against the background of development and innovation within the matter, there is still room for further enhancement of the approach.

Firstly, the current interpretation in tax planning legislation, defined on the basis of the *Cadbury Schweppes* case and the last two Danish cases, uses the concept of the economic objective and essence, which form the so-called "substance" where tax benefits only present an accompanying factor and circumstances instead of the core element of a dispute, in particular, in cases related to falsification of circumstances. Substance as the core element of any action of a company that is disputed from the point of view of tax authorities, has shifted the focus between objective and subjective factors that form the basis for deciding on (un-) lawfulness of tax planning, which will be further discussed in the Thesis.

It is important to point out that the concept of lawful tax planning is not defined by the laws on taxes on corporate profits. Accordingly, in order to introduce this definition, the research observes the comments and statements made by the EU Court of Justice, Advocates General.

Derived from such, in the EU business operations are based on the principles of business activities and the freedom of establishment, thus not only the interpretation of lawful tax planning will vary depending on the jurisdiction, but also special legislation – the legislation of the so called extra territorial sanctions law, USA taking the leading role in this field, will be involved in interpretation of the law on tax planning, bilateral sanctions being on one side of the issue, and provisions which are not accepted by the UN or an alternative body, on the other. However, these provisions affect other countries and business operations of the entities of such countries with the country subject to the USA sanctions, for example, USA has terminated the agreed regime with Iran as a consequence of introduction of the regime against Iran and Cuba.

Thus, when a product is purchased or any transaction is carried out with entities subject to sanctions, the maximum measure entails blocking of accounts and the minimum – checking, and in the case, it triggers merely a secondary effect on tax planning, a major impact is ergo generated on business operations, with the two being closely interlinked.

The above aggressive provisions are first provided by legislation and principles aimed at fighting money laundering. The concept and substance of the above provisions will be analysed in detail in Chapter 3. If, from the point of view of USA, a company or any private individual violates the provisions of anti-money laundering legislation or is suspected for this,

no transactions in US dollars may be carried out. Unfortunately, this affects not only tax planning, but also the execution of business on a global level, and such risks may not be neglected. The next matter where the approach has changed is business secrets and client confidentiality. These principles, which used to be non-negotiable before, now have obtained acutely narrow or, to be more accurate, no interpretation. Even lawyers have to join the system of notification of suspicious transactions and operations, with the exception of situations where they provide legal assistance in criminal and administrative cases with regard to money laundering.

Considering all the above, it is obvious that national and international economic and geopolitical developments have driven the creation of the lawful tax planning arrangements at micro and macro levels. This has substantially undergone major changes within last 20 years due to the dynamics of national legislative approach, the international law, the interpretation of the operations, and measures of companies trying to optimise the tax burden through the courts. The concepts and frameworks of offshores, tax heavens and tax holidays have been becoming the past, and tax planning as such is balancing between national and international lawfulness and unlawfulness.

Degree of scientific development of the theme

There are no complex scientific studies and analysis of the concept of lawful tax planning based on the recent case law in the national or foreign literature on law, i. e. there are no comparative studies using court cases, opinions of Advocates General, judges and experts of law planning as primary sources.

Non-existence of similar studies is, first, owed to the lack of the basic practical analysis of the rulings of the Court of Justice of European Union which have entered into force. In most cases the matters of tax planning on the EU level are analysed in textbooks (Christiana N. L. Panayi, Luca Cerioni, Mihaela Tofan, Ana Paula Dourado) and journalistic (Gutman, Piero Borya) literature.

The theoretical base of the research is provided by the works covering exclusively matters of tax planning, as well as scientific monographs and articles by recognised experts published in English.

The empirical base of the research was provided by the legislation sources – the Treaty on Functioning of the European Union, the legislative acts of the European Union (Directives), and the legislative acts of the Member States of the European Union. The rulings of the Court of Justice of the European Union, as well as the opinions of Judges and Advocates General present an important part of the sources.

The object of the research is the legal relationship ruling the legal framework and business environment of tax policies of the companies, which are operating as tax residents in the Members States of the European Union.

The subject of the research is the legitimate tax planning and distinction between legitimate and unlawful tax planning, which is most often understood as tax evasion, as well as the practical application of company tax planning for the purpose of minimising tax payments to the budgets of the relevant Member States of the EU, which materialises into the subject of review by the Court of Justice of the European Union as regards conformity of such planning with EU law.

The goal of the research is the analysis of the case law of the Court of Justice of the European Union (ECJ) within the tax disputes for the last 20 years on the basis of the legislation of the EU Member States and applicable international law for the purpose of defining the concept, criteria of lawful tax planning, its strategies as well as its distinction from aggressive tax planning and tax evasion within EU.

The **research hypothesis** derives from the question “How does the definition of tax planning in the European Union emerge from the integration of legal judgments from the ECJ, elements intrinsic to tax planning like aggressive tax planning and artificial arrangements, and the relevance of legislative sources within the European Union?”. In order to explore and test this hypothesis, the following research questions will guide the study:

1. To what extent does alignment among the single market, harmonisation of taxation, competences of EU institutions, and the Court of Justice of the European Union influence the formulation and delineation of tax planning concept within the European Union?
2. How does the Court of Justice of the European Union’s interpretation of legitimate tax planning concepts, principles, and boundaries in EU law influence tax planning practices within EU member states?
3. How do the evolving dynamics of modern entrepreneurship influence the implementation, application, and direction of tax planning within the European Union?

By addressing these research questions, the study aims to provide a comprehensive analysis of the role in defining tax planning and its implications for tax governance in the European Union. In order to attain the above-referred goal of the research, the following interlinked tasks were set and completed:

1. Review the classic arrangements of tax planning that have been subjected to criticism by the national tax authorities and courts of the EU Member States.
2. Perform a comparative-legal analysis of the conclusions and rulings of the EU Court

of Justice in disputes regarding legitimacy of tax planning, its principles and boundaries during the last 10 years.

3. To reveal the basic approaches by members of the professional community to the definition of legitimate tax planning, its characteristics, principles, and boundaries.
4. Review the basic criteria of compatibility of tax planning with the principles of the freedom of establishment and performance of economic activity in the European Union.
5. To define the concept of legitimate tax planning, as well as its principles, characteristics, and boundaries.

Methodology of PhD research

The employs several research methods to analyse topics related to tax planning within the European context. These methods include the comparative method, case analysis, synthetic analysis, inductive analysis, and examination of legislative sources.

1. **Comparative Method:** The comparative method is utilised to analyse the concept and characteristics of tax planning. By comparing and contrasting ECJ decision cases such as *Cadbury Schweppes*, *Commission of the European Communities v Italy*, and *Belgium v Truck Center SA*, the research explores the varying approaches and interpretations of tax planning within different jurisdictions. This method allows for a systematic examination of the legal principles, practices, and interpretations relevant to tax planning.
2. **Legal Case Analysis:** Extensive case analysis is conducted to examine specific ECJ cases that are relevant to tax planning. For example, cases such as *Credit Suisse* (regarding arrangements for payment of dividends), *Belgium v Truck Center SA* (concerning redemption, merging, and restructuring), and *Marks & Spencer* (focusing on shifting loss and profit) are thoroughly studied. These case analyses provide detailed information on the court's reasoning, legal arguments, and application of relevant legal principles. They contribute to understanding of how the court approaches and interprets tax planning issues.
3. **Synthetic Analysis:** The synthetic method is employed to define elements inherent to tax planning such as aggressive tax planning, artificial arrangements, and etc. Various sources are synthesised, including legal amendments of countries, recommendations of the European Commission, declarations submitted at the OECD forums, press releases and etc. By synthesizing these sources, the research aims to provide a comprehensive and legally grounded understanding of aggressive tax planning and its implications within the European Union.

4. **Inductive analysis:** Inductive analysis is used to derive general principles and conclusions from specific cases and empirical evidence. It involves examining individual cases, rulings, and empirical data related to tax planning to identify patterns, trends, and underlying principles. This approach helps build a comprehensive understanding of tax planning regulations and their implications within the European context.
5. **Examination of Legislative Sources** The thesis extensively examines legislative sources, including the Treaty on the Functioning of the European Union, legislative acts of the European Union (Directives) and legislative acts of the Member States of the European Union. These sources serve as fundamental references, providing the legal framework and principles to understand tax planning regulations. They contribute to the analysis by providing information on the legal provisions, directives, and guidelines that govern tax planning practices within the European Union. The Doctoral Thesis extensively relies on the rulings of the Court of Justice of the European Union. These rulings provide authoritative interpretations of EU law and contribute to the analysis of tax planning regulations. They provide insight into the viewpoint of the court, legal reasoning, and the application of legal principles. Additionally, the opinions of Judges and Advocates General are considered, as they provide valuable legal arguments and considerations in the field of tax planning.

Scientific innovation of PhD research

The theoretical importance of the research is provided by the fact that the present PhD research is the first scientific experience of doctrine categorisation of ‘tax planning’ concept within the legal framework and the practices of the EU Court of Justice.

The practical importance of the research results lies in the definition of concept and form of the lawful ‘tax planning’, which comprises a substantial part of the fiscal and monetary activities of business entities into the EU Member States. The analysis opens prospects for entrepreneurs on accounting and planning of their tax payments and distribution of legitimate profits within the framework of lawful legal arrangements, cementing the practical significance of this Doctoral Thesis.

The core statements for defence and conclusions of the research bring forward that in compliance with the legislation of the EU, tax planning as such is not prohibited and the aim of restricting and eliminating its abuse is the prevention of concluding artificial agreements leading to distortion of the intention of the economic activities of a company, as well as tax evasion, for example, hiding the taxable profit.

There are four circumstances worth focussing attention to in the course of qualification of the activities of companies as potentially unlawful tax planning: whether the establishment and registration of a resident company controlled by a foreign holding company affects the economic reality of the EU Member State, whether the company performs actual economic activities in the selected country, whether the foreign company subject to control physically exists at the location of its establishment, and whether this company has premises, personnel, and equipment.

Degree of reliability of the research performed. Approbation of Research Results

The results of the research were presented on 16 May 2018 at the seminar “Changes in tax planning in the international environment” in Riga, Latvia, at the interdisciplinary conference on social sciences “Places” on 2 April 2019 in Rīga Stradiņš University, as well as on 15 December 2018 and 7 January 2019 there were delivered lectures on tax planning concepts to the students of Riga BA School of Business and Finance.

The structure of the PhD Thesis is determined by the goal and tasks of the research and includes the introduction, 3 chapters consisting of subchapters, the conclusion, the list of used sources, and literature.

1 Taxation in the European Union

1.1 EU single market and harmonisation of taxation

This section of the research explores taxation in the European Union, the harmonisation efforts of the EU single market and the taxation systems regarding the principles present in its customs and indirect taxation policy. Furthermore, it looks into interactions and competences shared between the EU institutions and the Court of Justice of the European Union, particularly in matters of direct and indirect taxation, shedding light on their roles in harmonisation and integrated regulation within the single market.

1.1.1 EU taxation system in the field of customs and indirect taxes

The EU as an international organisation is distinguished by the quite prominent and developed legislative function in the Union, which is primarily related to the concept of an international supranational organisation defining its own legal order along with the legal systems of the Member States in the fields delegated by them to it. Moreover, as it is stated in the literature, the integrated legal order of the European Union is provided by the unified organisational (institutional) mechanisms which is operative within the scope of competence, voluntarily transferred to it by the Member States and defined by the treaties on establishment.² Thanks to the law making of communities and later, also of the Union, at present there is a system of legal provisions which may be referred to as the EU law or the EU legal system, presenting a specific legal system the provisions of which govern the relations having developed during the integration processes within the EU.³

Tax matters are the basic source of state financing; in the contrary case the state cannot perform its functions,⁴ and this applies not only to national countries as such and in isolation but also the European Union as a whole. The legal relationship developing within the interaction of the Member States, the EU institutions, private individuals and corporate entities residing or located in the territories of the Member States for implementation of the goals of the single market, social-economic, or currency integration, presents a basic element of the matter of legal regulation of the EU law⁵. The goal is to achieve the economic integration of the Member States and thus generate more wealth and prosperity throughout the Union.⁶

² The Inward Investment and International Taxation Review. Third Edition; edited by Tim Sanders. Published in the United Kingdom by Law Business Research Ltd, London, 2013. p.733.

³ *Ibid.*

⁴ Lazdiņš, J., Ketners, K. 2013. The Effect of Court Rulings on the Dynamics of the Latvian Tax Law. Law, No 5, 24. [Electronic resource] // *EU Law Electronic data 2025*. URL: https://www.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Jurid-zin-5_2013_.pdf (Accessed: 10.12.2025.)

⁵ Lazdiņš, J., Ketners, K. The Effect of Court Rulings on the Dynamics of the Latvian Tax Law. Law, No 5, 2013. 24. [Electronic resource] // *EU Law Electronic data 2025*. URL: https://www.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Jurid-zin-5_2013_.pdf (Accessed: 10.12.2025.)

⁶ Lang, M., Pistone, P., Schuch, J., Staringer, C., Rust, A., Kofler, G., Spies, K. Introduction to European Tax Law on Direct Taxation. 2025, 3

For the purpose of maintaining a stable functioning of the domestic market in the EU territory, the creation of which led to increase of cross-border and transnational transactions related to movement of goods and services and carried out by and between EU Member States gave rise to the necessity of eliminating not only direct barriers on the way of movement of capital, goods, services, and persons, but also hindrances indirectly affecting the fundamental freedoms of the domestic market. The common market created by the Treaty of Rome in 1958 was intended to eliminate trade barriers between the Member States with the aim of increasing economic prosperity and contributing to “an ever closer union among the peoples of Europe”.⁷

The above indirect barriers were to a large extent related to the tax burden established and existing on the level of every Member State according to its national legislation and, obviously, needed effective agreement thereof. In this regard Articles 91–93 of the Treaty on Functioning of the European Union⁸ (hereinafter – TFEU) point out the necessity to eliminate indirect obstacles in the form of disproportional tax obligations. In the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Towards an Internal Market without tax obstacles: A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, the study recommends issuing EU-level guidance on ECJ rulings to support consistent application of tax laws and reduce barriers within the Internal Market.⁹ The legal regulation of taxes and duties in EU depends on the presence of several factors: first, the difference between the fields of direct and indirect taxation in EU can be distinguished, where each of them has its specifics of regulation on the national level. Second, administration in the fields of direct and indirect taxation in the EU Member States is regulated on the EU level based on the aims and objectives important for integration of the EU Member States.¹⁰ As it is stated in literature, taxation is often seen as a potential obstacle to achieving a harmonised internal market and, as a result, is susceptible to infringing the fundamental freedoms. This is the main reason for a number of directives and regulations in the area of taxation in the EU, however, harmonisation has only been achieved in the field of indirect taxes whereas direct taxation is still largely subject to different national regimes.¹¹

⁷ The internal market: general principles [Electronic resource] Electronic data 2025 URL: <https://www.europarl.europa.eu/factsheets/en/sheet/33/the-internal-market-general-principles> (Accessed: 07.08.2025).

⁸ Treaty on Functioning of the European Union [Electronic resource] //EU Law. Electronic data 2018.URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> (Accessed: 10.12.2025.).

⁹ Communication from the Commission to the Council, the European Parliament and the Economic And Social Committee Towards an Internal Market Without Tax Obstacles A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities, Brussels, 23.10.2001 COM (2001) 582, page 12. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0582> (Accessed: 28.07.2025).

¹⁰ Terra, B., Wattel, P. European Tax Law. Third edition. Kluwer Law International, 2001, p. 532.

¹¹ Lang, M., Pistone, P., Schuch, J., Staringer, C., Rust, A., Kofler, G., Spies, K. Introduction to European Tax Law on Direct Taxation. 2025, 3-4.

The term “tax sovereignty” commonly refers to a state’s authority to independently design and enforce its tax laws. This includes the authority to determine all aspects of the national tax system, among them which taxes to levy, which entities, activities and events to tax, and the applicable tax rates and exemptions.¹² Along with the above, major limitations of the Member States’ sovereignty affects the operation in EU in the field of direct and indirect taxation, since the Union is restricted in acting in the relevant field and shares competences and functions with the Member States. As it is underlined in the literature, relations between the EU and its Member States in the tax area are constructed according to the model of the tax federalism. According to the opinion of D. V. Vinnickiy: “[...] in the field of overlapping of the guidelines of national constitutional legal orders aimed at mutual restriction of tax sovereignties, there can be the universal part of the international tax law defining not permitted forms of restriction of fundamental economic freedoms (movement of goods, services, persons and capital) by the national tax mechanisms.”¹³ Although there would still be discrepancies in national tax rates, there would be less room for tax evasion. Because profit distribution would be based on hard-to-manipulate corporate activity indicators, such actual economic presence and operations, strategies like shifting profits to countries with low taxes would be less successful.¹⁴

The Union sets uniform principles of taxation in relation to a restricted number of taxes and duties by means of harmonisation,¹⁵ manifested mainly as adoption of directives and, in a few exceptional cases, as regulations which although differ in accordance to their legal force, still provide high independence in the field of taxation to the EU Member States.

The political tax setting in the EU contains elements of both the ‘independent nation state’ and the ‘federal system.’ The three main criteria that may be applied to the design of tax policy in this setting are jurisdiction, distortion and enforcement. Jurisdiction or ‘subsidiarity’ is central to the Treaty of Maastricht; generally it means that the power to tax rests with the Member States. Distortion, the leitmotif of the Treaty of Rome, implies that taxes should be levied without unduly interfering with trade and investment. The taxes under review can be broadly categorised in taxes on consumption, labour and capital.¹⁶

From among taxes and duties, in addition to the uniform customs tariff within the scope of the customs union, regulated on the level of the EU legislation, first, indirect taxes should be

¹² Carmona Lobita, J. and Loureiro Ferreira, F., Recent EU Direct Tax Initiatives: The End of Tax Sovereignty?, EU Tax Focus, 10.01.2025, IBFD.

¹³ Vinnickiy, D. V. 2017. *International tax law: issues of theory and practice*. M.: Statut, 463.

¹⁴ Deffaa, W. *New impetus for EU taxation policy*. *Intereconomics* 46, 287–296 (2011), p. 291 <https://doi.org/10.1007/s10272-011-0393-4> (Accessed: 09.12.2025.)

¹⁵ European Tax Law B. Terra, P. Wattel. Third edition. Kluwer Law International, 2001, p 532.

¹⁶ Cnossen S. Tax policy in the European Union: a review of issues and options. Cesifo working paper no. 758 category 1: Public finance, August 2002.

distinguished,¹⁷ in particular, the VAT, excise duties, the tax on changes of capital of business companies. Traditionally, the tax system of any county consists of direct and indirect taxes.¹⁸ It is indirect taxation in the Member States, which is to a large extent regulated on the EU level, as it is particularly important for providing the four fundamental freedoms of the domestic market, as well as for creating the EU budget. According to the EU tax legislation, the share of income from indirect taxes is transferred to the consolidated budget of the EU.¹⁹ For instance, Anna Wolak – Tuzimek concluded that in Poland, indirect taxes accounted for approximately 70 % of total fiscal revenue between 2016 and 2020, highlighting their substantial contribution as a key component of public budget funding.²⁰ Unlike direct taxes, indirect taxes are levied on production and consumption and are not paid by the taxpayers who pay them.²¹ Consequently, indirect taxes are levied by the government and transferred to the final consumer price, which is subject to the tax burden (VAT and excise taxes).²² For instance, the standard VAT rate in Latvia is 21 %; however, a reduced rate of 12 % or 5 % applies to certain goods and services.²³

The EU policy making in the field of indirect taxation is based on the subsidiarity principle.²⁴ This principle and applied is implemented in compliance with Articles 90–93 of the TFEU. One of the first measures undertaken in the field of harmonisation of indirect taxation on the Union level referred to the regulation of taxation related to the increase of the equity capital of business organisations. The goal was defined as harmonisation of the tax on capital imposed by the member states to transactions on increase of the equity capital of business companies. Regulation of this tax was implemented by the Council adopting Directive 69/335/EEC on 17 July 1969²⁵ on approximation of the legislation of the Member States in regard to taxes on raising of the equity capital, which was further amended and supplemented

¹⁷ However, during the recent years, increase of the number of company groups with branches located in various EU Member States and their engagement in transnational operations has led to the necessity of regulation of uniform taxation principles also in the field of direct taxation of the profit of such companies, which was regulated by means of adoption of relevant directives.

¹⁸ Honcharenko, I., Dudchenko, N., & Zhuk, V. Particularities of Indirect Taxation in Countries of the Eu // *Financial & Credit Activity: Problems of Theory & Practice*, 2023, 3(50), p. 42.

¹⁹ *Ibid* p. 43.

²⁰ Anna Wolak-Tuzimek, The Effect of Indirect Taxes on the State Budget Revenue, *Central European Review of Economics & Finance* 35(4): p. 37. <https://doi.org/10.24136/ceref.2021.015> (Accessed: 28.07.2025).

²¹ Honcharenko, I., Dudchenko, N., & Zhuk, V. Particularities of Indirect Taxation in Countries of the Eu // *Financial & Credit Activity: Problems of Theory & Practice*, 2023, 3(50), p. 43.

²² *Ibid*.

²³ VAT in Latvia. URL: <https://marosavat.com/vat/latvia/> (Accessed 17.10.2025)

²⁴ In compliance with the principle of subsidiarity, the EU institutions do not have the right to independently intervene with the functioning of any fields of economy of the EU Member States, except in case when such intervention can be justified by fulfilment of the EU strategic tasks.

²⁵ Council Directive (EU) 69/335/EEC 17.07.1969. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31969L0335> (Accessed: 10.12.2025.)

by Directive 74/553/EEC²⁶ of 11 November 1974 and Directive 85/303/EEC²⁷ of 17 June 1985. These documents were later replaced by the new Council Directive 2008/7/28²⁸ of 12 February 2008 concerning indirect taxes on the raising of capital.

The above-referred legislation mainly refers to the taxes (duties) imposed to contributions to equity capitals of business companies, as well as state duties imposed to securities presenting the equity capital, shares of stock, and bonds. In order to minimise the risk of discrimination and double taxation, and to pursue a more global goal of the most favourable attitude towards movement of capital within the common market, harmonised the tax on capital and eliminated state duties. The CJEU has ruled in several cases addressing the issue of discrimination – the Court has stated that discrimination can only arise when different rules are applied in comparable situations or when the same rule is applied in different situations.²⁹

Value Added Tax³⁰ was introduced in the Community in the beginning of the 1970s by three directives on harmonisation of the legislation equally with the principle of proportionality according to which the operation of the EU institutions is restricted to authority provided to them by the foundation documents, as well as directly provided by the goals of integration. The VAT was crucial in supporting the EEC's growth and in greatly simplifying the oversight of the member countries' economic integration.³¹

The following are relevant council directives of Member States regarding turnover taxes and introduction of the VAT: the first Council Directive 67/227/EEC,³² the second Council Directive 67/228/EEC³³ and the third Council Directive 68/227/EEC³⁴ (11 April 1967) 69/463/EEC,³⁵ by means of which the Community intended to replace taxes of production and consumption imposed until this moment by the Member States and considerably hindering the trade.

²⁶ Council Directive (EU) 74/553/EEC 07.11.1974. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31974L0553> (Accessed: 10.12.2025)

²⁷ Council Directive 85/303/EEC [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0303> (Accessed: 10.12.2025.)

²⁸ Council Directive (EU) 67/227/EEC 11.04.1967. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31967L0227> (Accessed: 10.12.2025.)

²⁹ X v Ministerraad, Case C-68/15 17 May 2017. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62015CJ0068> (Accessed: 10.12.2025.)

³⁰ Tax competition in Europe. Edited by W.Schon. European Association of Tax Law Professors. 2003, 518

³¹ Value-Added Taxes Begin in Europe. URL: <https://www.ebsco.com/research-starters/history/value-added-taxes-begin-europe> (Assessed: 18.09.2025.)

³² Council Directive 85/303/EEC [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0303> (Accessed: 10.12.2025.)

³³ Council Directive (EU) 67/228/EEC 11.04.1967. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: (Accessed: 10.12.2025).

³⁴ Council Directive (EU) 67/227/EEC, 1967 JO Sp Edn. [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=CELEX:31967L0227> (Accessed: 10.12.2025.)

³⁵ Council Directive (EU) 69/463/EEC 09.12.1969. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31969L0463> (Accessed: 10.12.2025.)

The most important act in the field of harmonisation of the VAT in EU was the Sixth Council Directive 77/388/EEC³⁶ of 17 May 1977 on Harmonisation of the laws of the Member States relating to turnover taxes—common system of VAT: uniform basis of assessment, which introduced the general provisions regarding the method of assessment of VAT, defined the main concepts and principles of assessment and application of this tax.

Similar to preceding directives in the field of regulation of VAT, the Sixth Directive was aimed at eliminating tax barriers within the territory of the Community. From the moment of adoption of the above referred Directive, its text has been amended and supplemented 28 times by adopting new directives. In 2006 all the EU provisions regarding VAT were codified in a single text on the basis of the new Council Directive 2006/112/EC³⁷ of 28 November 2006 on the common system of VAT. According to its provisions, VAT is applied to deliveries of goods and provision of services for remuneration within the boundaries of a single country, as well as for importation of goods.

As noted in the literature, VAT is the most prospective tax from the point of view of financing the operation of EU: “[...] existence of VAT within the tax system of a country is a mandatory precondition for joining the EU by it, as financial revenue from VAT presents a basic source for creating the EU budget. VAT is established in the Member States which set its rate within the range defined by the EU legislation.”³⁸

European Union made a major reform of VAT which entered into force in full scope in 2022. The European Commission proposed the program of the most thorough reform of the VAT system in the European Union during a quarter of century. According to the opinion of the executive agency of the European Union, this project will allow improving and upgrading the system for both tax authorities and undertakings. “25 years after establishment of the Single Market, undertakings and consumers still need to balance between 28 different national VAT system in their cross-border transactions”,— the EU Commissioner for Economic and Financial Affairs, Taxation and Customs Pierre Moscovici: “Criminal elements and, possibly, terrorists have been using the existing gaps for much too long by organising fraud that costs 50 billion euros annually.”³⁹

³⁶ Council Directive (EU) 77/388/EEC 17.05.1977. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/eli/dir/1977/388/oj/?locale=LV> (Accessed: 10.12.2025.).

³⁷ Directive 2006/112/EEC [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/eli/dir/2006/112/oj> (Accessed: 10.12.2025.).

³⁸ *The European Union and Direct Taxation: A Solution for a Difficult Relationship* by Luca Cerioni. Routledge, 2018, p. 275.

³⁹ Pierre Moscovici. The European Commission has developed draft reform of the VAT system in EU. [Electronic resource] // Electronic data 2025. URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3443 (Accessed: 10.12.2025.).

According to Moscovici, it is necessary: “to put an end to this anachronistic system based on national borders [..]. By 2022 the EU Member States should view cross-border transactions with VAT as domestic on the domestic market.”⁴⁰ As stated in the Communication of the European Commission, the EU Member States annually lose more than 150 billion euros of VAT, including an estimated 50-billion-euro loss, 100 euros per every citizen of the Union, in the result of cross-border VAT fraud. These funds can be channelled for funding criminal organisations, including terrorist groups. According to estimates, the proposed reform is forecasted to reduce the loss by 80 %.

The VAT reform, as considered in Brussels, renders the system more robust and convenient for business. The European Commission is willing to create a system which will help European companies to use all the advantages of the single market and to compete better on global markets. The firms engaged in cross-border transactions now have higher expenses for ensuring compliance (between the national VAT systems – IF) than the ones whose operations are restricted to just within one country. Simplification and upgrading of VAT were forecasted to reduce these expenses by approximately 1 billion euros.

The main practical deficiency of the initial VAT system is the volume of artificial transactions and unpaid tax on the account of fraud. According to the data of Eurostat, the volume of VAT fraud in 2019 amounts to 50 billion euros.⁴¹ In 2022, the shortfall in VAT compliance reached EUR 89.3 billion.⁴² While the level of fraud in the tax area is high, it is crucial to combat the fraud in accordance with human rights. For instance, in *Dzivev and Others* case, CJEU stated that illegally obtained evidence may not be used in proceedings for VAT fraud, for the reason that such methods of evidence collection infringes a person’s right to a private life.⁴³ However, in *Tarrico* case, the Court decided that in case of VAT fraud extending the limitation period and its immediate application is not an infringement of the fundamental rights.⁴⁴

⁴⁰ Pierre Moscovici. The European Commission has developed draft reform of the VAT system in EU. [Electronic resource] // Electronic data 2025. URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3443 (Accessed: 10.12.2025.).

⁴¹ European Commission, Communication from the Commission to the European Parliament, the European Parliament, the European Council and the Council, 15.1.2019 [Electronic resource] // EUR-Lex. Electronic data 2025, URL: https://taxation-customs.ec.europa.eu/system/files/2019-01/15_01_2019_communication_towards_a_more_efficient_democratic_decision_making_eu_tax_policy_en.pdf (Accessed: 10.12.2025.).

⁴² European Commission, VAT Gap in the EU, Taxation and Customs union, 2024 report. URL: https://taxation-customs.ec.europa.eu/taxation/vat/fight-against-vat-fraud/vat-gap_en (Accessed: 31.10.2025).

⁴³ *Dzivev and Others*, 17.01.2019. // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=209925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=107773> (Accessed: 09.05.2025).

⁴⁴ *Taricco and Others*, 08.09.2015. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2015, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62014CJ0105> (Accessed: 09. 05.2025).

The core principles of imposing excise duties, like in the case of VAT, are regulated on the level of the EU legislation and applied to particular types of goods. CJEU for the first time tested regulation of VAT with principle of equality in case *RPO* in 2015. The regulation stipulated that to digital books that are available online is applied the standard VAT rate, while the books that are available on CD-ROM amounts to a different, lower rate of VAT. The Court justified this difference since all digital services available online were subject to the standard VAT rate.⁴⁵ Not long after that, in 2018 the Council adopted a Directive allowing alignment of VAT rules for electronic and physical publications.⁴⁶

Regarding excise duties, the Council has adopted Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement, and monitoring of such products. Later it was replaced with Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty, characterised by a new structure of provisions.

Directive 2008/118/EC established the basis for assessment and payment of excise duties. In particular, excise duties are applied to:

- 1) energy products and electricity;⁴⁷
- 2) spirit and alcoholic drinks;⁴⁸
- 3) tobacco products.⁴⁹

All products subject to excise duties in the EU are also subject to ‘common provisions’ which establish rules for excisable products.⁵⁰ These products may also be subject to other indirect taxes and duties, however, only in compliance with the provisions concerning

⁴⁵ RPO, 07. 03. 2017. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025, URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=188625&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=113866> (Accessed: 09.05.2025).

⁴⁶ Council Directive (EU) 2018/1713 of 6 November 2018 amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/eli/dir/2018/1713/oj/eng> (Accessed: 08.05.2025).

⁴⁷ Mineral oils along with other energy products in the category of which they were included in compliance with the ruling of the EU Court of Justice in case of Braathens Sverige AB, are subject to excise duties in compliance with Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. For the Member States having recently joined the EU, Council Directives EC 2004/74/EC and 2004/75/EC amending Directive 2003/96/EC stipulated transitional provisions. (Accessed: 08.05.2025).

⁴⁸ Spirits and other alcohol products are subject to excise duties based on two Directives adopted by the Council on 19 October 1992, namely, Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages and Directive 92/84/EEC on the approximation of the rates of excise duty on alcohol and alcoholic beverages.

⁴⁹ Tobacco products are subject to excise duties based on three directives, namely, Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes and Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

⁵⁰ Common Excise Duty Provisions [Electronic resource] // European Commission. Electronic data 2025, URL: https://taxation-customs.ec.europa.eu/taxation/excise-taxes/common-excise-duty-provisions_en (Accessed: 09. 05.2025).

assessment and payment of excise duties and VAT. All in all, as stated in the literature, “the EU activities in the field of harmonisation of EU can be described as dense and productive”.⁵¹

The system of the indirect taxes of EU also comprises taxes on consumption regarding transportation.⁵²

Customs duties present the other type of mandatory payment, forming the system of “own resources” of the EU. They mainly perform the protection function and are set, as a rule, as antidumping and compensation duties. Customs duties are applied at the EU external borders for imported and exported goods and are set considering:

- 1) the tariffs of goods;
- 2) the origin of goods;
- 3) the quantity of goods;
- 4) the customs value of goods;
- 5) the tariff rate.

The above duties present a type of indirect taxes collected in full amount in the budget of the Union according to the procedure defined by the EU Customs Code. For the purpose of application of the above Code, special Council Regulation (EEC) No 2454/93 of 2 July 1993 was adopted. The adopted Code comprised approximately 75 Regulations adopted from 1968 to 1992 and it was aimed at establishing clarity and uniformity in interpretation of the EU law related to trade with the “third countries”.

It can be concluded that, at present, the EU operates an efficiently functioning system of indirect taxes, by the assistance of two distinguishing features of its regulations robustness and coherence—in contrast to the system of direct taxation, which is susceptible to the risk of considerable restriction of tax sovereignty of the Member States in the field of the latter.

1.1.2 Interaction and competences of the EU and Member States in the field of direct taxation

Achievements in the field of science and technology have provided the possibility for a modern person to overcome large distances over short terms and to create efficient production, which has allowed him to perform economic activities not only in one country but also on the basis for development of the global economy.

⁵¹ EU tax law: current issues of functioning of the uniform system / A.S. Zaharov.—M.: Wolters Kluwer, 2010.—p.29.

⁵² Council Directive 83/183/EEC of 28 March 1983 “On tax exemptions applicable to permanent imports from a Member State of the personal property of individuals”. URL: <https://eur-lex.europa.eu/eli/dir/1983/183/oj/eng> (Accessed: 30.12.2025) and Council Directive 83/182/EEC of 28 March 1983 “On tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another”, URL: <https://eur-lex.europa.eu/eli/dir/1983/182/oj/eng> (Accessed: 30.12.2025).

The tax systems of the countries cannot unilaterally resolve issues emerging in taxation and related to the global movement of labour, goods, finance and services, as well as the phenomena of tax evasion, changing of tax residence for the purpose of minimisation of tax liabilities and other negative phenomena concerning cross-border movements, which determines the necessity of inter country cooperation in the field of taxation.⁵³

On the international level cooperation of the EU Member States in the field of direct taxation takes place: within the framework of participation in OECD and international multilateral and bilateral tax agreements; and on the level of EU – within the framework of Directives on administrative cooperation and mutual assistance. Cooperation of the EU Member States in the field of direct taxation has several goals: (1) the possibility of exercising tax sovereignty and the possibility of complying with the tax legislation; (2) fighting tax evasion; (3) maintenance of due functioning of the domestic market.

In this regard, exchange of information and provision of assistance in tax collection present the most efficient types of cooperation. The tax law of the EU can only be efficiently applied if there is exchange of information. On the international level and the EU level, particular attention is focused on implementation of the new international standard of automated information exchange. Cooperation in the field of tax collection is implemented on the basis of the OECD Convention and on the basis of the Directive. Cooperation between the EU Member States which is implemented in compliance with the Directive is most efficient as there is a developed standard document form allowing compliance with tax requirements. There is also a mechanism for covering expenses of the requested country carrying out actions aimed at satisfying the requirements of the requesting country.

Existence of the legal basis for tax administration in cooperation of the EU Member States in the field of direct taxation, according to the author's opinion, allows the EU Member States to exercise their taxation rights by not reducing the degree of efficiency of the legal mechanism of provision of free movement of goods, services, persons and capital. As regards the third countries, the members of the European Economic Area, existence of an agreement with the EU Member State plays the key role in determining whether any national measures restricting economic freedoms are acceptance and proportional for attaining the goal of providing effective tax control and fighting tax abuse.⁵⁴

Cooperation between Member States on tax matters has a quite long and rich history. Starting from 1977, mutual assistance in the field of direct taxation became possible in

⁵³ *The European Union and Direct Taxation: A Solution for a Difficult Relationship* by Luca Cerioni. Routledge, 2018, p.275.

⁵⁴ B. Terra, P. Wattel. *European Tax Law*. Third edition. Kluwer Law International, 2001. p. 532.

compliance with EU Council Directive 77/799/EC, whose provisions supplement the existing provisions regarding mutual assistance in exchange of tax information according to valid bilateral agreements signed by and between Member States. As from 1981, the application of the provisions of this Directive was extended also to cooperation of the Member States in the field of VAT (Council Directive 79/1071/EEC), and as from 1993 also to excise duties (Council Directive 92/12/EEC).

When the EU single market was created and the actual control on borders was lifted, the necessity to create a system of management of VAT control regarding intra-Community trading, in particular, VIES–VAT Information Exchange System, became obvious. The necessary legal provisions for implementation of the administrative cooperation in the field of VAT were defined by Directive 2006/112/EC on administrative cooperation on VAT and Council Regulation No 1798/2003 of 7 October 2003 regarding administrative cooperation on VAT, laying down the mechanism for information exchange between tax authorities of the Member States regarding tax base according to the request by the interested tax authority of another Member State.

For the purpose of implementing interaction and control in the field of application and payment of excise duties, the Council adopted Regulation of 16 November 2004 No 2073/2004 regarding administrative cooperation in the field of excise taxes. This legal act defines the principles of interaction and exchange of information between competent authorities of the Member States for the purpose of maximum efficient management and provision of the uniform application of excise duties. In compliance with this regulation, the Member States are obliged to periodically exchange information regarding assessed and paid excise duties. The Member States are also obliged to cooperate with the Commission on matters of effectiveness of administrative cooperation between competent authorities of the Member States in the field of assessment and payment of excise duties.

It should be noted that the above-referred acts are interlinked and provide for identical mechanisms of legal assistance; in this regard it would be logical for the Commission and the Council to undertake steps in the near future to consolidate these provisions on cooperation of tax authorities of the Member States in a uniform legal act.

The work of ECOFIN group, established on 9 March 1998 plays an important role in the mechanism of interaction between the EU and the Member States in the field of direct taxation³⁶, its first task was the analysis of the list of measures represented by the EU Council, based on the information of the Member States. The first internal report of the group was presented in November 1998 and listed approximately 85 measures which had primary negative effect on the entire taxation.

In February 2009, the European Commission supported two draft directives “On mutual assistance on collection claims of taxes, duties and other payments” and “On administrative cooperation in the field of taxation”.

1.2 Competences of EU institutions and the Court of Justice of the European Union in the field of direct and indirect taxation

The field of taxation within the European Union is subject to the competences of various EU institutions, each playing a crucial role in ensuring the harmonisation and coherence of tax policies. The European Commission and the Court of Justice of the European Union hold significant authority in the realm of direct and indirect taxation, respectively.

By formulating tax initiatives and overseeing their implementation, the EC aims to harmonise tax legislation among member states. This harmonisation process is vital to eliminate tax barriers, ensure the functioning of the internal market, and prevent tax discrimination between member states.

The CJEU’s role in the harmonisation of direct taxation is equally important – CJEU has the final say over how EU law is to be interpreted correctly.⁵⁵ As it interprets EU tax law provisions and the overall EU legal system, the CJEU provides uniformity in the application and enforcement of tax laws across member states. The CJEU’s case law sets the framework for the development of national tax legislation, ensuring that tax planning practices stay within the boundaries of legitimate tax arrangements. Its interpretations of relevant legal principles and criteria help define what constitutes acceptable tax planning within the EU. In some cases, CJEU can also decide on the interpretation of a Double Taxation Convention, however CJEU has acted as an arbitrator only once in 2017 in the case *Austria v Germany*.⁵⁶

This section delves into the specific roles of the EC and the CJEU, examining how they contribute to the harmonisation of direct taxation and the integrated regulation of the single market through their case law. The harmonisation of direct taxation is a critical aspect of creating a level playing field for businesses and individuals operating within the EU.

1.2.1 Role of EC and the Court of Justice of the European Union in harmonisation of direct taxation

Traditionally, the EU taxation policy is analysed in special literature as a system of measures “implemented by not only EU institutions and bodies, but also by their Member States for the purpose of harmonisation of tax legislation of the Member States in order to eliminate

⁵⁵ Lang, M., Pistone, P., Schuch, J., Staringer, C., Rust, A., Kofler, G., Spies, K. Introduction to European Tax Law on Direct Taxation. 2025, p. 9.

⁵⁶ *Austria v Germany*, 12.09.2017. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025, URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=194281&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=123293> (Accessed: 08.04.2025).

tax barriers on the EU internal market, provision of implementation of the freedoms of movement of goods, persons, services and capital provided by TFEU, preventing bad faith and harmful tax competition between the jurisdictions of the Member States, prevention tax discrimination on the internal market, development of new principles and mechanisms for avoiding double taxation, as well as providing fighting tax crime.”⁵⁷ The development of EU tax policy is clearly visible in at least two areas, specifically the establishment of a framework for good tax governance and the taxation of large multinational enterprises.⁵⁸

The leading role in implementation of the EU tax policy is assigned to the European Commission which deals with preparation of new tax initiatives in EU and implements control and supervision of their implementation. The EU Court of Justice, with its highly demanded ability to interpret EU tax law provisions and the entire EU law system on certain matters, also plays a special role in defining the law enforcement practice.⁵⁹

In comparison to the indirect taxation, whose enforcement requires a high degree of harmonisation on the level of EU acts, regulation of the field of direct taxation is still implemented mainly on the level of the Member States⁶⁰ and in a part its development is described by a clash of their interests and goals of a general European integration. As it was correctly pointed out by A.S. Notin, “in the practice of the EU Court of Justice there are differences in approaches to direct and indirect taxes. There are few rulings of the EU Court of Justice in the field and direct taxation and they are mainly prohibiting by nature. In case of absence of positive integration legislation, these rulings set the framework for development of the legislation of the EU Member States”.⁶¹ Considerable encouragement to this is provided by the fact that the TFEU does not address particular authorities of the organisation in the field of direct taxes, however the Union may use the so called implied competence in this matter (Article 94).⁶² Despite the fact that the first proposals for relatively large-scale harmonisation

⁵⁷ EU tax law: current issues of functioning of the uniform system / A. S. Zaharov. M.: Volters Kluver, 2010, 24.

⁵⁸ Lang, M., Pistone, P., Schuch, J., Staringer, C., Rust, A., Kofler, G., Spies, K. Introduction to European Tax Law on Direct Taxation. 2025, 47

⁵⁹ As it is underlined in the literature, “the peculiarities of the EU tax policy necessitate active development of the court doctrine of the “precedent of interpretation” as the theoretical base of the judicial legislation in the field of regulation of taxes” (see Notin S.A. Case law within the system of sources of tax law: on the basis of the example of the EU and RF: PhD Thesis in Law Science. M., 2003). See details in §1.2.1 of the present Thesis.

⁶⁰ Regarding this see also Korolev G.A. Basic aspects of the European Union taxation policy // International law and international organisations. 2014. N 2.313–317, Ponomareva K.A. Problems of harmonisation of taxation of profit and income in the European Union, their evaluation from the point of view of Member States and the Court of Justice of the European Union // Topical issues of the Russian law. 2016. N 12.183–193, Ibid. Problems of relation of the tax law of integration associations and agreements on avoidance of double taxation (based on the example of the European Union) // Law and economics. 2016. N 7.55–61.

⁶¹ Notin A.S. Ibid

⁶² In this regard see Golovcenco O. N. Harmonisation of direct taxation in the Member States of the European Union // Financial law. 2016. N 2. 39–44, Ponomareva K.A. Current processes of tax harmonisation in the field of direct taxation in the European Union // Taxes. 2017. N 5. pp. 45–48.

of direct taxes were expressed already in 1962, only during the last 15–20 years an actual necessity has emerged to adopt acts at the EU level, aimed at increasing approximation of the principles of taxation of corporate activities, and this is related, inter alia, also with more active development of market relations.

In the field of direct taxation on the EU level a range of directives and other acts containing its core principles in relation to particular taxes have been adopted, in particular:

- 1) taxation of companies⁶³ as regards:
- 2) mother and subsidiaries, as well as
- 3) mergers, split-offs, transfer of assets and exchange of the shares of stock of companies located in different Member States;
- 4) taxation of income gained from savings in the form of payment of interest,⁶⁴
- 5) taxation of interest and royalties paid between affiliated companies of different Member States.⁶⁵

Harmonisation of direct taxation during the development of the overall European economic space established until now is quite a complex process which has undergone a number of stages; however, only the last of these are important for the goals of the present research.

The 1990s forced the Commission to revise its approaches. The idea of a full-scale harmonisation of taxation of companies was too radical in nature, considering the willingness of the Member States to maintain the fiscal (tax) sovereignty.

The cooperation of the EU and the Member States led to a successful adoption of the “Package of three” in July 1990, as well as the development of proposals regarding the setoff of foreign loss, cancellation of tax at source for interest within a group of companies and payments of royalties. The above package includes Council Directive 90/434/EEC of 23 July 1990 “On the common system of taxation”, Council Directive 90/435/EEC of 23 July 1990 “On the common system of taxation applicable in the case of parent companies and

⁶³ Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31990L0434> (Accessed: 10.12.2025.) and Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0096> (Accessed: 10.12.2025.).

⁶⁴ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:111:FULL> (Accessed: 10.12.2025.).

⁶⁵ The EU Commission in its communication of 23 May 2001 “Tax policy in the European Union – priorities for next years” agreed that the competence of taxation of private individuals (direct taxes) can be left to the Member States, even if the EU reaches a higher degree of integration. At the same time the EU Commission noted the necessity of coordination on the EU level as regards taxation of private individuals for providing their freedoms, elimination of tax barriers and prevention of double taxation. See also Council Regulation 280/68/EEC, Euroatom, ECSC of 29 February 1968 “On income tax of private individuals working in the EU structures”.

subsidiaries of different Member States” and Convention 90/436/EEC of 23 July 1990 “On the elimination of double taxation in connection with the adjustment of profits of associated (dependent) enterprises”.

In April 1992, the Commission established the Committee of Independent Experts on taxation of companies; and its main task was evaluation of the importance of effect of taxation on the adoption of business decisions regarding investing and international distribution of income between undertakings. According to the Committee conclusions, differences in taxation of the Member States may affect the distribution of investment and distortion of convergence, and thus it is necessary to implement substantial measures aimed at reduction of distortions affecting performance of economic transactions on the internal market.

In March 1996, in the report “Taxation in EU”⁶⁶ the Commission once again pointed out the necessity to eliminate obstacles on the internal market caused by both direct and indirect taxation. Concerning particularly direct taxation, it announced the preparation of proposals regarding elimination of double taxation of royalties and interest which is paid between dependent companies.

Sixth stage (the codification stage)

The central provision of “Monti package” in 1997 was the adoption of the Code on taxation of business operations,⁶⁷ which meant the beginning of the new strategy of the European Commission—creation of a political agreement according to which the Member States agreed to respect the principles of fair competition and refrain from adoption of tax measures producing negative effects for other countries. The scope of application of the code included the tax measures in relation to business operations which had direct and substantial effect on the choice of their location within the European Community, the tax measures providing for a considerably lower level of effective taxation, including taxation based on the effective rate. The tax measures listed in the Code include both laws and administrative acts. These measures can be implemented by setting conditional and low tax rates, tax bases, or other relevant mechanisms. The code provided for two types of mechanisms for elimination of destructive competition: “standstill” and “rollback”.

The “Monti package” also included proposals on taxation of interest and royalties, which are paid between dependent resident companies of EU Member States, and on a mechanism of minimum effective taxation of income from savings in the form of payment

⁶⁶ Taxation in the European Union, 20.03.1996 [Electronic resource] // Commission of the European Communities. URL: [https://www.verginet.net/UserFiles/File/Avrupa_Birligi/Taxation/General_Information/taxation_sec\(1996\)487_en%204%20Ek%203.pdf](https://www.verginet.net/UserFiles/File/Avrupa_Birligi/Taxation/General_Information/taxation_sec(1996)487_en%204%20Ek%203.pdf) (Accessed: 10.12.2025.).

⁶⁷ Code of Conduct for business taxation, 01.12.1997. [Electronic resource] //URL: <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/> (Accessed: 10.12.2025.).

of dividends. The Monti Package aimed to harmonise cross-border taxation in the EU, reducing tax avoidance and ensuring fair treatment of companies.⁶⁸

In 2003, both proposals were implemented when the EU Council adopted Council Directive 2003/48/EC of 3 June 2003 “On taxation of savings income in the form of interest payments” and Council Directive 2003/49/EC of 3 June 2003 “On a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States”.

Seventh stage (the stage of the new organisation – legal form of EU)

Entry into force of the Treaty of Lisbon on 1 January 2009, consolidating legal entity status of the EU and complete elimination of the term of European Community, in essence provides for elimination of the term “tax law of the European Community” as well as substantial modification of the TFEU in the part on tax policy and updating of the mechanisms for its implementation. Generally, it should be noted that the main directions of the strategy of Lisbon in the field of taxation whose implementation was listed among the priorities by the Council of the European Union on 13 November 2007 irrespective of ratification of the new foundation agreement, include the package of initiatives on VAT, taxation of passenger transportation and special VAT issues in the Netherlands.

In 2015, the European Commission resumed the work on matters of harmonisation of the corporate tax in the entire territory of EU by presenting another strategy for taxation of multinational undertakings, providing that the new rules will simplify the tax legislation and reduce the cross-border investment barriers. The Commission proposes to assess the total EU tax base for corporations by applying a uniform set of taxation rules on the EU level and then distributing this tax base according to individual rules in compliance with the tax legislation of EU through the common agreed “mechanism of distribution”.⁶⁹ These rules provide for maintaining the sovereignty of the Member States on matters of direct tax legislation, manifested as the application of the national tax rate with the share of the tax base defined by the EU legislation, followed by the introduction of the common corporate base in the entire EU territory. EU carried out the harmonisation of the direct tax legislation by merging the principles and tasks of EU and the Member States in a single financial system with creation of a common budget on the EU level presenting the essence of the European integration. The first steps obliging cross-border corporations to apply the common consolidated base contributed to

⁶⁸ European Parliament, Tax co-ordination in the EU – the latest position. Ben Patterson. [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2002/312788/DG-4-ECON_ET\(2002\)312788_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2002/312788/DG-4-ECON_ET(2002)312788_EN.pdf), p. 14. (Accessed: 05.11.2025)

⁶⁹ Joann Martens-Weiner. Company tax reform in the European Union. Guidance from the United States and Canada on implementing. Formulary apportionment in the EU. Springer, 2006.

a more effective operation of the tax systems of the Member States and became another step for attaining the European common goal within the framework of the European integration.⁷⁰

Besides the above, during the recent years the focus of the European Commission has shifted from the matters of harmonisation to fighting tax evasion and abuse of tax practices where transparency should become the main means of fighting thereof. On June 17th of 2015, the Commission presented the Action Plan on reforming corporate taxation, which according to the Commission's intention, should act against tax violations and tax evasion, as well as provide growing increase of revenue.⁷¹

In 2016 the EU Council adopted Directive 2016/1164, devoted to practices of tax evasion used globally by large companies. It contains several items from the plan BEPS⁷², for example, KIK rules, provisions on hybrid arrangements, as well as provisions on the tax of capital increase at withdrawing assets (exit tax) and introduction of the rules of GAAR (General Anti-Avoidance Rule). The uniform European approach to corporate taxation, according to the Commission's intention, would eliminate many of the existing obstacles, for example, the legal uncertainty, excessive expenses for compliance with legal provisions and distortion of facts faced by all undertakings to a greater or lesser extent. The Commission names the common consolidated corporate tax base as the first means, however, while relevant proposals are at the stage of discussion, there are also other measures, for example, tools for resolving disputes on double taxation and initiatives for cross-border setoff of loss.

Different from Plan BEPS, Directive 2016/1164 is a particular legal measure the consequences of whose implementation may extend far beyond the EU borders: a part of the provisions stipulated by the Directive govern tax relations with participation of the third countries.

Along with that, the exit of the United Kingdom from EU—the so-called Brexit, had a negative effect on the process of European integration, and in literature it is being linked with the end of integration processes in the field of corporate taxation.⁷³

Thus, irrespective of the recent trends of fighting tax evasion and provision of fair taxation of profit and income, as well as taking into account the emerging disagreements revealed by Brexit, the positive integration in the field has only demonstrated fragmented

⁷⁰ Tax Avoidance and European Law: Redesigning Sovereignty Through Multilateral Regulation. M. Tofan. Routledge. 2022, p. 132.

⁷¹ European Commission – Fact Sheet. Questions and Answers on the Action Plan for Fair and Efficient Corporate Taxation in the EU. 2018. [Electronic resource] // URL: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_2141 (Accessed: 10.12.2025)

⁷² OECD Action Plan on Base Erosion and Profit Shifting, OECD Publishing. 2003. [Electronic resource] // URL: https://www.oecd.org/content/dam/oecd/en/publications/reports/2013/07/action-plan-on-base-erosion-and-profit-shifting_g1g30e67/9789264202719-en.pdf (Accessed: 10.12.2025).

⁷³ Tax Avoidance and European Law: Redesigning Sovereignty Through Multilateral Regulation. M. Tofan. Routledge. 2022, p.132.

results. The main obstacle of the road of positive integration is maintained by the requirement to unanimously adopt directions by the EU Council as provided by Article 115 of TFEU. Because of this, a range of the Commission's proposals for harmonisation failed.⁷⁴

1.2.2 Role of the case law of the Court of Justice of European Union in the integrated regulation of single market

The EU Court of Justice was founded in 1952 and is among the most important institutions of the EU.⁷⁵ It plays a vital role in the construction of the legal structure of the Union as a whole and in the development of integration processes, in particular. The main function of the Court of Justice is to ensure uniform interpretation and enforcement of the EU law. The EU Court of Justice bases its operation on the provisions of the foundation documents and the Statute of the Court of Justice which is Protocol No 3 to TFEU. Besides this, each of the sections of the Court of Justice has its own rules and procedures, recommendations for parties to proceedings.

The EU Court of Justice is a supranational institution, independent of the Member States and most frequently protects the interests of the Union as a whole, instead of individual countries. It has been assigned quite extensive exclusive competence and, within the framework of direct jurisdiction, *inter alia*, hears cases on the claims of the Commission to the Member States and their disputes. Within the framework of indirect competence, the Court of Justice reviews preliminary requests by the jurisdiction authorities of the Member States regarding enforcement and interpretation of EU treaties and acts of its bodies and institutions. The EU Court of Justice plays a special role in developing the law enforcement practice in tax disputes.

In the report by the Ruding Committee in 1992, it was pointed out that there are gaps in the network of international tax treaties between the Member States and that taxation of the capital and tax on heritage is not always covered by the scope of application of such treaties. The Committee also noted that the Member States had concluded a range of bilateral tax conventions with the third countries; and their provisions often present the grounds for discrimination of the Union taxpayers.

In this regard, it is vital to note that the law of international treaties introduces a collection of provisions provided by international tax treaties and transposed or implemented in domestic, national legislation of the Member State. At present, international tax treaties present the major source of the international tax law.

⁷⁴ The European Union and Direct Taxation: A Solution for a Difficult Relationship by Luca Cerioni. Routledge, 2018, p. 275.

⁷⁵ Court of Justice of the European Union (CJEU). Available at: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en. (Accessed: 12.11.2025.)

The EU law prevails over the above provisions of the national law, however, at the same time it respects their importance.⁷⁶ For a long time of its existence, the main subject of legal regulation of the EU tax law was indirect taxation, as this was the major obstacle for creation and functioning of the single market. Over time, EU tax coordination has developed to enable effective data exchange between Member States and enhance administrative collaboration. The Eurofisc network addresses cross-border VAT fraud, and the European Commission assists in the recovery of outstanding taxes. In addition, the **FISCALIS** programmes help implement EU tax policies by narrowing tax gaps and encouraging the adoption of best practices among Member States and EEA countries.⁷⁷ International tax treaties are to a large extent related to regulation of direct taxation – the subject of legal regulation has recently come into the focus of the EU attention in relation to the accomplishment of the functioning of the internal market. Direct taxation is now viewed as the subject of legal regulation within the context of measures of provision of due functioning of the internal market, aimed at elimination of remaining obstacles.

Unquestionably, for the national entities of the EU Member States, as they exercise their rights provided by the Treaty on the European Union, the differences of taxation because of their national affiliation, the place of their residence, or the risk of becoming subjected to double taxation in relation to the same income because of different, not coordinated provisions of the national tax legislation in EU present obstacles of due functioning of the internal market. Besides the above, in EU with 27 Member States there is a complex system consisting of more than 300 bilateral international tax treaties, which in many cases causes difficulties for taxpayers in exercising their rights following from the EU Treaty.⁷⁸

It is also important to note that the existing system of treaties between the Member States concluded for avoidance of double taxation is unable to fully eliminate all the types and grounds for double taxation on the internal market.

Relations between the EU law and international tax law in the field of direct taxation causes a huge number of disputes, as these two directions have independent goals and implement different approaches. While the goal of the law of international tax treaties is, substantially, the regulation of inter-country relations by means of re-distribution of taxation powers between the countries which are parties to the treaty, the EU tax law serves as the basic mechanism of creating and due functioning of the internal market.

⁷⁶ Primacy of EU law (precedence, supremacy), URL: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html>. (Accessed 11.11.2025.)

⁷⁷ Annual report on taxation, European Commission, 2025, p.14. Available at: <https://op.europa.eu/en/publication-detail/-/publication/998524d7-4fe5-11f0-a9d0-01aa75ed71a1/language-en> (Accessed 10.12.2025.)

⁷⁸ EC Law and Tax Treaties, European Commission, 5 July 2005. URL: https://taxation-customs.ec.europa.eu/system/files/2016-09/eclawtaxtreaties_en.pdf. (Accessed 04.11.2025.)

The EU Court of Justice has stated in its case law several times that, irrespective of the lack of directly defined harmonisation measures in the EU primary law⁷⁹ as well as considering that “the direct taxation is out of the scope of competence of the Union, the powers maintained by the Member States should be implemented in compliance with the Union law”⁸⁰. Along with that, the lack of systematic and coherent legislative work on the EU level in this field leads to emerging of the legal uncertainty, which presents the threat of restricting the use of advantages of the internal market by the EU taxpayers, as well as complications of performance of functions by the tax authorities of the Member States.

As pointed out above, the subject of legal regulation of the majority of international tax treaties is the tax on income and capital. As at present there is practically no legal regulation of this area on the EU level, the Member States enjoy freedom to a certain extent of their discretion as regards definition of necessary tax provisions. In this regard the EU Court of Justice has pointed out that the Member States have sovereign powers to define the linking factors on which taxpayers are categorised as belonging to their respective tax system based on exclusive authority of taxation.

⁷⁹ The EU primary tax law is deemed to include the relevant provisions of TFEU, based on which the tax policy is implemented. Secondary law is the collection of legislation adopted by the EU institutions on the basis of and by complying with the Treaty provisions.

⁸⁰ Finanzamt Köln-Altstadt v. Roland Schumacker, 14.02.1995. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61993CJ0279> (Accessed: 10.12.2025), G. H. E. J. Wielockx v. Inspecteur der Directe Belastingen. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99595&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3826756> (Accessed: 07.12.2018), Asscher v. Staatssecretaris van Financiën. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99724&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3828364> (Accessed: 10.12.2025.), Jessica Safir v. Skattemyndigheten i Dalarnas Län. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=43792&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1965540>; (Accessed: 10.12.2025.), .It should be noted that several comparatively recent rulings of the EU Court of Justice referred to cases of discrimination of taxation of residents and legal entities because the provisions of international tax treaties and the national procedure of their enforcement by the Member States contradicts the Treaty on EU (X AB v. Y AB Riksskatteverket. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=44847&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1966800> (Accessed: 10.12.2025.), F.W.L. de Groot v. Staatssecretaris van Financiën, 12.12.2002. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025.* URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47588&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3811867> (Accessed: 10.12.2025.); Metallgesellschaft Ltd. and Others v. Commissioners of Inland Revenue, 08.03.2001. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025.* URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=45879&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4128225> (Accessed: 10.12.2025).

These factors can vary even the “principle of nationality”, according to the opinion of the EU Court of Justice, can be used for redistribution of tax authorities without causing discrimination for the purpose of TFEU.⁸¹ Along with the above, existence of such obstacles may be justified by “persuading reasons of the public interest”.⁸²

Moreover, on the level of the case law of the EU Court of Justice, it is noted that signing of international tax treaties with the third countries containing provisions contrary to the EU law by the Member States after the Treaty on EU (Act of joining) has become binding for them, clearly evidences their failure to comply with their obligations within the framework of the Union.⁸³

On the whole, the EU Court of Justice, within the framework of functioning of the single integration space, began reviewing the issues of compatibility of bilateral international treaties with the EU law in the 1960-ies; however, only later, in the 1980-ies it started assessing the issues of compatibility of the international tax treaties in particular and their complex relations with the Treaty on EU. The matter of redistribution of the powers of taxation due to signing of international tax treaties where the Member States are parties was the subject of review by the EU Court of Justice in cases, like *Avoir Fiscal* (the ruling of the EU Court of Justice, dated 28 January 1986, case C-270/83)⁸⁴ and *Gilly* (the ruling of the EU Court of Justice, dated 12 May 1998, case C-336/96).⁸⁵

It is necessary to draw a narrow line between redistribution of taxation powers included in the scope of sovereignty of the Member States and implementation of taxation powers by the Member States which are responsible for respecting and following the freedoms provided by the Treaty of EU.⁸⁶ However, as the EU Court of Justice noted in case *F.W.L. de Groot v. Staatssecretaris van Financien* (the ruling of the EU Court of Justice, dated 12 December

⁸¹ See about this p. 24, 30 of the ruling of the EU Court of Justice, dated 12 May 1998, case C-336/96, p.56 of the ruling of the EU Court of Justice, dated 21 September 1999, case C-307/97, p.42-44 of the ruling of the EU Court of Justice, dated 11 March 2004, case C-9/02.

⁸² Futura Participations SA, Singer v. Administration des Contributions, 15.05.1997. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=1C49D20EE3204F1DB97683F6B0FFFA6D?text=&docid=100591&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4127395> (Accessed: 07.12.2025).

⁸³ Annunziata Matteucci v Communauté française of Belgium, 27.09.1988. InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1489757015649&uri=CELEX:61987CJ0235> (Accessed: 07.05.2025)

⁸⁴ Commission of the European Communities v. French Republic, 28.01.1986. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=46E7EE1EEA39457B2316507098296B03?text=&docid=92863&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3811061> (Accessed: 11.12.2025.).

⁸⁵ Mr. And Mrs. Robert Gilly, 12.05.1998. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=43844&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3811325> (Accessed: 11.12.2025.).

⁸⁶ Finanzamt Köln-Altstadt v. Roland Schumacker, 14.02.1995. [Electronic resource]// InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A61993CJ0279> (Accessed: 07.12.2025)

2002, case C-385/00), in the course of implementing their powers, the Member States are obliged: “to respect the principle of the national regime of national entities of other Member States and their own entities exercising the freedoms guaranteed by TFEU”.⁸⁷

The obligation to provide the non-discriminatory tax regime of regulation of permanent representative office of the European companies can be comparable to the same obligation in relation to resident companies as the Member States implement their taxation powers.⁸⁸ In the ruling of the EU Court of Justice in the case *Elide Gottardo v INPS* (the ruling of the EU Court of Justice, dated 15 January 2002, case 55/00)⁸⁹ regarding social security, the judges referred to the situation that when the Member State concludes a bilateral international tax treaty with the third country, the fundamental principle of provision of the equal legal regime requires the Member State to provide to the national of other Member States the same benefits which are analogous to the ones provided to its own nationals within the scope of such treaty, except cases when such a Member State can objectively substantiate its refusal to provide such benefits.

The issue of compliance of the provisions of international tax treaties with the provisions of the EU secondary legislation was also the subject of review by the EU Court of Justice,⁹⁰ which pointed out unconditional priority of the provisions of the EU law: “[..] the rights provided to subjects of economic activity... by the Directive are unconditional and the Member State cannot subject compliance with them dependent on the international treaty with another Member State.”⁹¹

⁸⁷ F.W.L. de Groot v. Staatssecretaris van Financien, 12.12.2002. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47588&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3811867> (Accessed: 11.12.2025).

⁸⁸ See Decision of the Commission of European Communities v French Republic, 28.01.1996. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=92863&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3813060> (Accessed: 11.12.2025.); *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt*. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997CJ0307> (Accessed: 11.12.2025).

⁸⁹ *Elide Gottardo v Istituto nazionale della previdenza sociale* 15.01.2002. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47013&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3817463> (Accessed: 11.12.2025.).

⁹⁰ *Athinaiki Zithopiia AE v. Greek state*, 04.10.2001. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46243&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3820623> (Accessed: 11.12.2025.), *Oce van der Grinten NV*, 25.09.2003. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48631&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3818063> (Accessed: 11.12.2025.), in relation to interpretation of Article 7.2 of Council Directive 90/435/EEC in conjunction with the provisions of bilateral international agreements signed by the United Kingdom.

⁹¹ *Athinaiki Zithopiia AE v. Greek state*, 04.10.2001. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46243&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3820623> (Accessed: 11.12.2025)

It should be noted that some bilateral international tax treaties contain provisions which restrict the application of advantages provided by such international treaties by the resident companies of the state parties, directly excluding permanent representative offices and even resident companies which are foreign in relation to the countries, having signed the treaty from the scope of application of the treaties.

It is clear that such provisions of international treaties are also contrary to the EU law which was confirmed by the case law of the EU Court of Justice in case *Compagnie de Saint-Gobain* (the ruling of the EU Court of Justice dated 21 September 1999, case C-307/97),⁹² in relation to which it stated that performance of obligations according to the EU law does not present a problem per se within the context of compliance with tax obligations with the third parties. In light of the rulings of the EU Court of Justice in the field of air transportation, it can be concluded that the Member State violates not only the provisions of Article 43 of TFEU as regards implementation of taxation powers, but also the provisions of Article 10 in relation to actions of re-distribution or the taxation sovereignty – the taxation powers (the obligation of good faith cooperation).⁹³

However, commonly, in the course of hearing of the category of cases on non-compatibility of the provisions of bilateral international tax treaties where the Member States are Parties with the provisions of the EU law, the Member States refer to persuading reasons of the public interest as the justification and excuse and, in particular, include there fighting against tax evasion, loss and the possibility of loss of state revenue, as well as inter-related and inter-linked fiscal agreement. However, the EU Court of Justice has been always rejecting such conclusions by the national tax authorities of the Member States.⁹⁴

Another set of the rulings of the EU Court of Justice consists of a group of acts on the issues of free movement of capital (Article 56 of the Agreement on European Union).⁹⁵ Thus, it can be concluded that the EU Court of Justice performs the most important functions of elimination of gaps and interpretation of the provisions of the EU foundation documents in the field of creating the single economic space and development of integration processes.

The emergence of the domestic market in the European Union (EU) has created a pressing need to eliminate indirect barriers and hindrances that impede the exercise of

⁹² *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen- Innenstadt*. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997CJ0307> (Accessed: 11.12.2025.).

⁹³ *Ibid.*

⁹⁴ *Commission of European Communities v French Republic*. Electronic data 2025. URL: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=92863&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3825909> (Accessed: 11.12.2025).

⁹⁵ European Union. (2016). Treaty on the Functioning of the European Union. Article 56. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016E056>

fundamental freedoms inherent to the market. To address this, the EU has embarked on a harmonisation process, aiming to establish uniform rules for a limited number of taxes and duties. This harmonisation primarily takes the form of directives, occasionally supplemented by regulations. However, it is crucial to acknowledge that direct taxation remains predominantly within the purview of individual Member States, which significantly limits the scope of harmonisation efforts in this domain.

The value-added tax (VAT) system, a critical component of the EU's tax framework, has encountered challenges that necessitate a well-informed response. Issues such as artificial transactions and unpaid taxes resulting from fraudulent activities have raised significant concerns, leading EU authorities to adopt stronger measures against tax avoidance and to improve collaboration among Member States to protect public funds.⁹⁶ Consequently, concerted endeavours have been undertaken to address these challenges and reinforce the VAT system, with the aim of mitigating their adverse impact on the functioning of the tax regime.

In recent years, the CJEU has addressed several cases concerning VAT. For instance, in the case *Novo Nordisk v Hungary*, the Court ruled that the EU VAT Directive prohibits national legislation that prevents a pharmaceutical company from reducing the amount of VAT on payments payable to the national health insurance agency on the basis of revenue from state-funded pharmaceutical products.⁹⁷ This judgment is significant, as it applies to all pharmaceutical companies across the EU that make similar statutory payments.

In the case *Commission v Ireland and Others* CJEU set aside the judgment of the General Court and gives final judgment involving Ireland's tax treatment of Apple – the State for multiple years had given tax exemptions to the company. In this case, CJEU ruled that the tax exemptions were unlawful, therefore Apple is obligated to pay back the amount of tax exemptions. The total amount of exemptions was approximately 13 billion euros.⁹⁸

In its ruling in the case *P sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Lublinie*, the CJEU ruled on the question who is the taxable person for VAT if fake invoices were issued.⁹⁹ In the case at issue, employees of a Polish petrol station collected discarded payment

⁹⁶ Combatting tax avoidance in the EU. Available at: <https://www.consilium.europa.eu/en/policies/combating-tax-avoidance-in-the-eu/>. (Accessed 10.10.2025).

⁹⁷ *Novo Nordisk*, 18.04.2023. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2023_235_R_0024 (Accessed: 09.05.2025).

⁹⁸ *Commission v Ireland and Others*, 10.09.2024 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=289923&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=132893> (Accessed: 09.05.2025)

⁹⁹ Engelhart, M. Compliance with the EPPO Regulation: Study Results on the 'Implementation' of Council Regulation (EU) 2017/1939 in the Member States// eucrim, no. 1, 2024, p.29. https://eucrim.eu/media/issue/pdf/eucrim_issue_2024-01.pdf

receipts and created new, false invoices for the quantities of fuel stated on them.¹⁰⁰ They then sold the invoices to entities that unduly received VAT refunds.¹⁰¹ The CJEU found that Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT must be interpreted to mean that, where an employee of a taxable person for VAT purposes has issued a fake invoice showing VAT using the employer's identity as a taxable person, without that employer's knowledge or consent, that employee must be considered to be the person who enters the VAT, within the meaning of Article 203, unless that taxable person did not exercise the due diligence reasonably required to monitor the conduct of that employee.¹⁰² The EU's commitment to harmonising tax legislation among Member States has yielded fruitful outcomes, as it seeks to foster harmonisation, eliminate tax barriers, and ensure the smooth movement of goods, persons, services, and capital. In this endeavour, the European Commission assumes a prominent role, spearheading the implementation and monitoring of EU tax policy, including the preparation of new tax initiatives and ensuring their effective execution.

Within the sphere of taxation law, the Court of Justice of the European Union (CJEU) plays a pivotal role in the integrated regulation of the single market. Endowed with the mandate to ensure the uniform interpretation and enforcement of EU law, including matters related to taxation, the CJEU's case law establishes the bedrock of legal certainty and consistency in the field of taxation within the EU. Notably, although direct taxation falls beyond the EU's competence, the CJEU consistently emphasises that Member States must exercise their taxation powers in full compliance with EU law. This resolute stance underscores the Court's main principles underpinning the internal market, safeguarding EU taxpayers against any form of discrimination.

Nonetheless, the absence of a systematic and coherent legislative framework at the EU level pertaining to direct taxation has engendered a climate of legal uncertainty, thereby impeding the optimal utilisation of the advantages conferred by the internal market upon EU taxpayers. This intricacy further complicates the functioning of national tax authorities in fulfilling their essential roles. Therefore, according due priority to the continued development and harmonisation of EU tax law is imperative. It is crucial to strive for a comprehensive and

¹⁰⁰ Engelhart, M. Compliance with the EPPO Regulation: Study Results on the 'Implementation' of Council Regulation (EU) 2017/1939 in the Member States// eucrim, no. 1, 2024, p.29. https://eucrim.eu/media/issue/pdf/eucrim_issue_2024-01.pdf

¹⁰¹ *Ibid.*

¹⁰² Dyrektor Izby Administracji Skarbowej w Lublinie (Fraude d'un employé). 30. 01. 2024. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=6734A843BE46E387FDAC7815598D8F71?text=&docid=282265&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3762820>. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62022CJ0442> (Accessed: 09. 05.2025).

robust framework that addresses the inherent complexities in this domain. The CJEU's case law concerning the compatibility of international tax treaties with EU law and their interplay with the Treaty on European Union exemplifies the Court's commitment to tackling the redistribution of taxation powers while striking a delicate balance between the sovereignty of Member States and the freedoms guaranteed by the EU. The Court endeavours to preserve the integrity of the internal market while duly respecting the legitimate powers vested in Member States in matters of taxation.

2 Tax planning in the EU Member States

2.1 Concept and characteristics of tax planning

The research explores tax planning within the EU legal framework, focusing on the EU Court of Justice's interpretation, particularly the landmark *Cadbury Schweppes* case. Key concepts, such as “wholly artificial arrangements” and “substance”, are central in assessing the lawfulness of tax manoeuvres by companies. The study aims to provide insights into the boundaries and legitimacy of tax planning within the EU, analysing the EU Court of Justice's methodology in evaluating tax planning. Concepts like “abusive practice”, “objective and subjective criteria”, “mailbox companies”, and “bogus company” are instrumental in understanding tax planning's context and legality within the EU.

2.1.1 Concepts, principles, boundaries of legitimate tax planning in the EU law and its interpretation by the Court of Justice of European Union

Crisis phenomena of the global economy present challenges for life and accentuate the importance of tax planning including systematic analysis of various tax alternatives aimed at minimisation of tax liabilities in the current and future periods. Traditionally types of tax planning include the classic tax planning, aimed at ensuring correct and timely payment of taxes, accounting systems and reports; the optimisation of tax planning (tax avoidance/tax mitigation); and unlawful tax planning (tax evasion).

The core principles of tax planning providing its actual efficiency under the conditions of difficult economic and legal situations include: compliance with legislation (lawfulness), application of knowledge, vision, consistency, individuality, cooperation in adoption of decisions, efficiency, the possibility of choice, fast response, clarity, and reliability.

The classic tax optimisation is characterised by compliance with the requirements of the legislative base; study of decisions of state authorities of the tax inspection, as well as case law regarding tax optimisation, prudence, gradualism and individuality. The above classic arrangement is also manifested by general efforts in decision making (tax optimisation is developed by a team of experts and includes accountants, lawyers and managers of the relevant undertaking); proportionality of the price and quality (tax planning should guarantee actual economic effect); variability (an undertaking should develop several arrangements of tax optimisation and choose the safest and most profitable option); timeliness (timely response to amendments of tax legislation); and comprehensiveness and effectiveness (the arrangement should be developed in a logic way, its components should be economically and legally effective).

The methods of the classic arrangement of tax optimisation are the use of tax benefits and gaps in the domestic legislation, choice of jurisdiction and the form of transactions, the accounting policy, use of low/special tax territories, holding, choice of the type of company and migration.

During the last 10–15 years the concept of tax planning has received both business and state interpretation which in essence, exclude any tax savings as such. Entrepreneurs become quasi slaves of states or there is still compromise between such submission and the freedom of founding companies in any jurisdictions and enjoying tax benefits. The key case for defining the position on this issue is the *Cadbury Schweppes* case, as in this case the competent opinion of supervisory nature was provided.

Tax planning comprises a range of concepts, however, it has been given the judicial interpretation of the EU Court of Justice in the *Cadbury Schweppes* case. In this particular case the Court was addressed the question of the freedom of establishment of undertakings and benefiting from tax benefits in the European Union.

At present the position according to which the rulings of this case create a separate line of the case law has developed in the special legal literature. This is, first, related to that a majority of issues of tax planning reviewed by the EU Court of Justice in other cases, similar to the *Cadbury Schweppes* case, were more accurately and comprehensively interpreted in the ruling Cadbury.

On 12 September 2006, the EU Court of Justice adopted ruling on the case *Cadbury Schweppes and Cadbury Schweppes Overseas v Commission tax authority*. In the result of hearing of this case, the EU Court of Justice supported the side of the company by establishing that the provisions of the EU Member State (in this case, the United Kingdom) cannot be enforced and restrict the rights and freedoms of the company having founded a foreign controlled subsidiary if it follows from all the circumstances of the case that, irrespective of enjoying tax advantages, this company is engaged in actual economic operations in any EU Member State. This precedent set the beginning of a whole direction of case law, as mentioned above, and which served as the grounds for discussion of application of ruling and concepts developed by the EU Court of Justice during hearing of the case, to other cases on tax disputes.

The litigation within the framework of the case under review referred to the compatibility of the tax legislation of United Kingdom with Articles 43, 49 and 56 of TFEU. This question was raised by the Special Authority of Administration of Profit Tax (London) in relation to *Cadbury Schweppes Treasury International*, the subsidiary of *Cadbury Schweppes* Group, performing its economic operations in the territory of the International Centre of Financial Services in Dublin (Ireland) where the taxation regime is more loyal than in

United Kingdom. The *Cadbury Schweppes* case presents a situation when the legal position of the EU Court of Justice concerning “wholly artificial arrangements” refers to the application of the imperative provision of the EU law that should be implemented in the national law and does not leave the possibility for the national legislator to issue provisions based on its independent decision, and there is no dispute that such case law should be implemented in the national law.

On the other hand, as noted in some sources,²⁶¹ if the case law concerning ‘wholly artificial arrangements’ contains an exception from the fundamental provisions of the EU law provided for by national legislation, the legislative body of every country decides independently on the correct action. And if the legislative body does not provide benefits to a foreign taxpayer or does not provide benefit for foreign income, but such benefits are usually provided to resident taxpayers as well as income gained within the country, this regulation does not violate the freedoms within the scope of review of the concept ‘wholly artificial arrangements’. However, if the national law is quite liberal and provides benefits in using “wholly artificial arrangements”, neither this is a violation of the provisions of the EU law. It follows from there that the national legislation may exclude wholly artificial arrangements by providing benefits; however, it does not have to do this.

The same applies to the situation when courts are forced to implement the rulings of the EU Court of Justice based on its preliminary ruling, however, if the argumentation of the EU Court of Justice does not allow resolving the case by any single possible way, the national court independently defines the resolution by creating the national law conforming with the requirements of the EU law in this process. The national legislator may adopt its own decisions that conform with the EU law equally to those of others. However, regarding the question which became the subject of examination in the *Cadbury Schweppes* case, as well as in other cases which cannot be resolved by applying the imperative mandatory EU provisions, the national court may, at its discretion, choose the best option which conforms with the constitutional or other requirements of the national domestic law of the EU Member State, as well as correlate best with other national provisions.

In conclusion, it can be firmly contended that the *Cadbury Schweppes* case has become the basis for the definition of the fundamental approach, understanding the actual existence of ‘lawful tax planning’ and method and extent to which it can be differentiated from tax avoidance; further, the EU Court of Justice detailed and elaborated on this approach, which even got referred to as the “concept” in the professional environment.

This study examines the two most frequently found arrangements of tax planning: arrangements of payment of dividends and transfers of loss and profit.

In addition, the arrangements of transfer of loss and profit, as they became the subject of examination by the EU Court of Justice, strengthened the positions of the concept in the *Cadbury Schweppes* case. In the beginning of the 2000s, the *Marks & Spencer* case heard in 2005 became one of the most well-known cases. This case, like its famous predecessor (*Cadbury Schweppes*), concerned the legislation of United Kingdom restricting the companies in writing off loss incurred by performing operations in other countries than United Kingdom.

In the *Marks & Spencer* case, the EU Court of Justice concluded that tax planning may be restricted if the restriction has a legitimate purpose compatible with the goal of TFEU and is justified by the public interest, adding that such measures should not exceed reasonable limits. The European Court of Justice in the *Marks & Spencer* case examined the issue of how the group of companies abuses the right to double write offs in different EU Member States, particularly merging into the boundaries of tax planning facilitating the scheme of writing off the loss. The resident parent company may deduct from its taxable profit the loss incurred by the subsidiary established in another country if, first, the non-resident subsidiary has used any possibility to account for the loss incurred in its country of establishment during the relevant fiscal year, and second, if it is not possible to account for the loss of the foreign subsidiary in the country of its establishment either independently or by the third parties, in particular, if such subsidiary was sold to third parties. In the contrary case, writing off of the company loss is considered not legitimate. Thus, the companies established in any EU Member State may deduct the tax paid by the company in another Member State through the subsidiary established in another Member State, as the business profit of the subsidiary is assessed based on the tax principles of the country of establishment by taking into account the loss incurred by the company and its subsidiary in another Member State of the European Union, upon the condition of compliance with the above-referred criteria.

In the result of examining the case, the EU Court of Justice concluded that United Kingdom may differentiate between cross-border transactions and transactions inside United Kingdom, in particular, if this is determined by the necessity of fighting the measures implemented by the companies for the purpose of tax evasion. In this dispute, the Court of Justice referred to similar argumentation as in the *Cadbury Schweppes* by using the concept of ‘wholly artificial arrangements’ and the limits of exercising the freedom of establishment of companies, including subsidiaries.

Another frequently applied arrangement of tax planning is the arrangement of payment of dividends. Among the largest cases there is the case involving the Swiss bank *Credit Suisse* which has been in the focus of attention by tax and investigation authorities of several countries, in particular, USA and United Kingdom, the Netherlands, Austria, Germany, Italy, and France,

on several instances during the last 10 years. At different times, the bank was accused of tax evasion and even enabling tax evasion by bank clients and money laundering.

In the case of *Credit Suisse*, the question was about whether the taxable profit which is taxable in the territory of the EU member state and gained by the company belonging to the multinational group may be reduced by distribution of debts between companies within the group.

The Supreme Court concluded that the deduction of interest could be rejected if the tax was deducted from the profit which already existed until acquisition of the taxpayer's business by the company *Credit Suisse*. On the other hand, the Dutch legal doctrine of abusive practice is not applicable to accumulation of income and profit after acquisition of business, which means that the taxpayers may legally rely on the Bosal case law ¹⁰³ of the case and demand the tax deduction.

Thus, it can be summarised that in the course of the identification of existence of abusive practice two criteria should be satisfied: (1) objective noncompatibility of the goal of the legislation with the results achieved by the company in the result of definition of the types of economic activity, and (2) the subjective intentions of the company manifested as abusing the right to receive benefits.

The approach of the EU Court of Justice was developed in the *Apple v. European Commission* case, in which the General Court concluded that, in addition to the above-listed factors, it is also necessary to consider the 'normal', that is, the usual tax regulation for any EU member state, by comparing them with those applied by any company when implementing the tax agreements of transnational business with the national tax authorities.

Finally, it can be concluded that at present there is an established position according to which all the listed markers of unlawful tax planning are described by a single characteristic of the company and tax planning named "substance" – the concept comprising all the key features allowing evaluation of the company operation from the point of view of actual economic activity and business independence.

In the context of the Model for Lawful Tax Planning Model (see Figure 2.1), the consideration of the reasons behind a company's actions is of utmost importance in assessing the lawfulness of tax planning practices. These reasons provide insight into the underlying motivations and intentions of taxpayers, shedding light on the justifiability and legitimacy of their tax planning strategies.

¹⁰³ The *Bosal* Case: Restrictions On Netherlands Participation Exemption Contrary to EU Law [Electronic resource] // The Global Treasurer. Electronic data 2025. URL: <https://www.theglobaltreasurer.com/2004/04/20/the-bosal-case-restrictions-on-netherlands-participation-exemption-contrary-to-eu-law/> (Accessed: 11.12.2025).

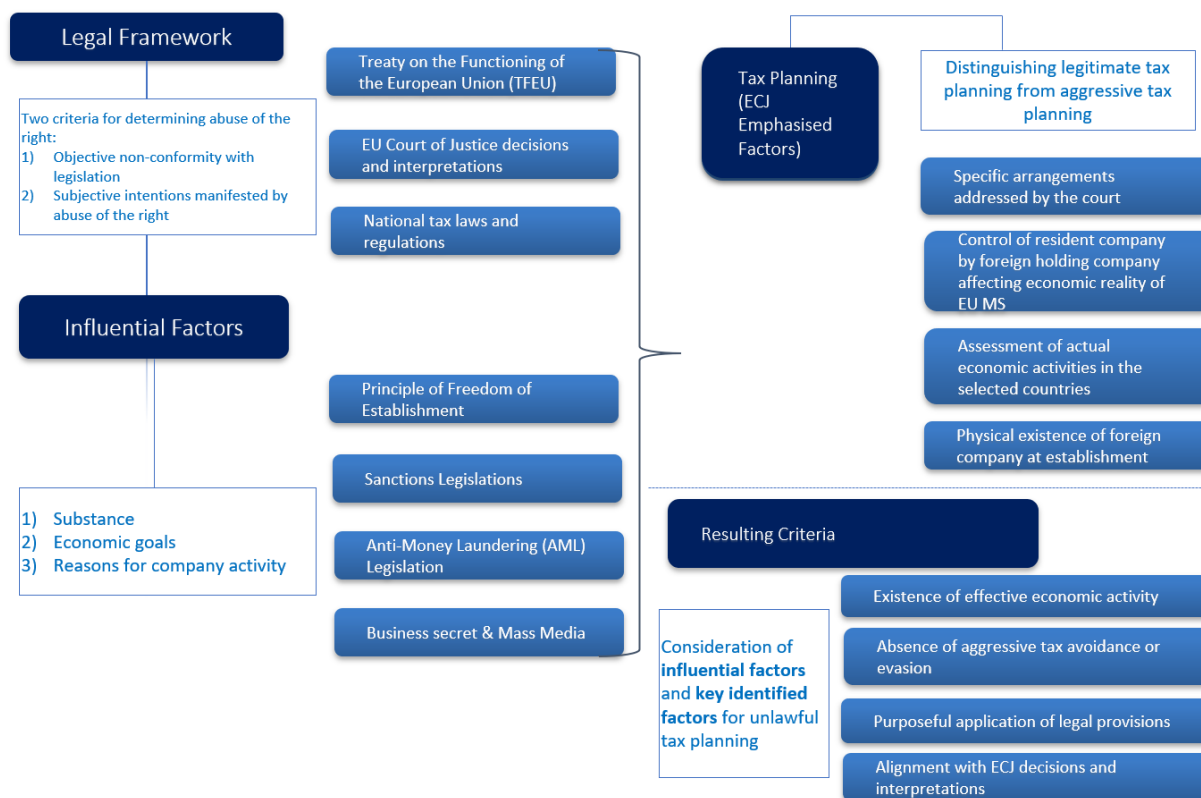


Figure 2.1 A Conceptual Framework for Legal Tax Planning

Understanding the reasons behind the actions of a company involves a deeper examination of the economic and commercial factors that influence tax planning decisions. Taxpayers may engage in tax planning for various legitimate reasons, such as maximising profits, managing risks, optimising cash flows, or achieving operational efficiency. These reasons often arise from the pursuit of sound business objectives and are essential for maintaining competitiveness and sustainability in the contemporary global business landscape.

In the concluding analysis of this doctoral research, it becomes imperative to assert that the conceptualisation of tax planning within the European Union should extend beyond the confines of traditional model cases, evolving into a more comprehensive and robust definition. This redefined construct should integrate the core jurisprudential insights derived from the landmark judgments of the ECJ, particularly those elucidating the parameters of aggressive tax planning and artificial arrangements. However, the development of a definitive and absolute construct would be antithetical to the very nature of tax planning, whereby a rigid, dichotomous definition would fail to address the multifaceted and dynamic nature of tax planning, leading to insufficiency when distinguishing between artificial and economically motivated arrangements. Thus, a more prudent approach would be to foster a dynamic, iterative definition, one that is continually refined through collaborative, multijurisdictional efforts within the EU. This approach would enable judicial bodies across the EU to apply this evolving definition effectively, post-consultation with the ECJ, thereby ensuring its congruence with

both the emerging trends in financial practices and the evolving corpus of national and international tax legislation. Such a theoretical framework, as proposed in this thesis, would act as a compass for judiciaries and legal practitioners across the EU, facilitating a transition from the current restrictive paradigm to a more permissive, adaptable definition.

It is worth paying attention to the fact that *Cadbury Schweppes* is a resident in United Kingdom and the holding company of the group consisting of subsidiaries managed by *Cadbury Schweppes Overseas Limited* (hereinafter–CSO). The group includes two subsidiaries which fully, however, indirectly are owned by Cadbury: *Cadbury Schweppes Treasury Services* (hereinafter – CSTS) and *Cadbury Schweppes Treasury International* (hereinafter – CSTI), which in turn are founded in the territory of the international finance centre of Dublin (Ireland). The entrepreneurial activities they perform are attracting financial resources and providing them to the group’s subsidiaries.

According to the circumstances of the case, the group of companies Cadbury includes CSTS and CSTI as indirect subsidiaries. Those companies are tax residents in Ireland, and during the litigation proceedings tax authorities were proving that these companies have been founded in Ireland exclusively for the purpose of using the regime advantages of existing and operating in the territory of the international finance centre in Dublin, for Irish financial companies in relation to granting loans within the group of companies. Considering the tax rate applicable to the companies established in the International Finance Centre, the tax authorities of United Kingdom were requesting CSO to pay the profit tax in the amount of GBP 8 638 633.54 from the profit of CSTI for fiscal year 1996.

The group Cadbury and CSO submitted the appeal against this claim to the special commission of United Kingdom; the entity stated that the legislation of United Kingdom regarding controlled foreign companies, was contrary to the provisions of TFEU regarding the free movement of capital. The national court referred the matter for review to the EU Court of Justice.

During the entire dispute the Court of Justice was resolving a range of the below listed questions:

1. Is the establishment of a subsidiary in any other EU Member State abuse of rights if, in comparison to the tax regime in force in United Kingdom, the tax regime in the other country is more loyal and provides benefits for the companies, and does *Cadbury Schweppes* violate the legal provisions in this regard?
2. If *Cadbury Schweppes* exercises its rights in a lawful manner, is it correct to consider that the legislation of United Kingdom on foreign controlled companies violates the rights and/or restricts the principles and freedoms established by the EU law?

3. Is it correct that, if *Cadbury Schweppes* cannot pay the amount of tax exceeding the amount of tax which would have been paid by CSTS and CSTI if they were founded in the territory of United Kingdom, there is no restriction of rights?
4. Is it of importance that for the subsidiaries founded by *Cadbury Schweppes* in United Kingdom there are taxation differences in comparison to the subsidiaries founded in other EU Member States?

Having heard the case on its merits, the EU Court of Justice drew the following conclusions regarding the above key questions:

1. According to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law.
2. If the provisions of the national legislation restrict the operation of the principle of the freedom of establishment and performance of economic activity, as well as the operation of the principle of free movement of capital, the actions of companies which may cause doubts by tax authorities are unavoidable consequences of any other restrictions of freedom of establishment and performance of economic activities.

The Court of Justice has elaborated in detail the concept of: “wholly artificial arrangements”, at the same time trying to follow the entire preceding line of logic of hearing the cases on tax disputes. Thus, in the argument part of its ruling, the Court of Justice points out: “The mere fact that a resident company establishes a secondary establishment, such as a subsidiary, in another Member State cannot set up a general presumption of tax evasion and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty.”¹⁰⁴

However, the most important conclusion regarding the entire question of lawful tax planning, drawn by the EU Court of Justice in the *Cadbury Schweppes* case, is the following statement: the fact that a company tries to gain profit and advantage under the tax regime of any EU Member State cannot deprive that company or any other entity of the right to rely on the conditions provided by TFEU.

In its ruling the EU Court of Justice has explained its standpoint also regarding the freedom of establishment of companies and performance of economic activities. It has determined that establishment of a company in the EU Member State, for the purpose of gaining profit in compliance with the tax benefit legislation, does not in itself suffice to constitute abuse

¹⁰⁴ *Cadbury Schweppes and Cadbury Schweppes Overseas*, 12.09.2006 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04> (Accessed: 11.12.2025).

of that freedom and accordingly, is not a violation. Article 43 of TFEU provides that freedom of establishment and performance of economic activities allows engaging in economic activities, founding and managing undertakings according to the conditions stipulated by the legislation, including for legal entities founded in the relevant EU Member State.

In compliance with Article 48 of TFEU, such establishment provides the company the right to exercise the activity through a subsidiary, a branch or an agency. The Court of Justice pointed out that the conditions of TFEU regarding the freedom of establishment and performance of economic activity aim to ensure that non-resident companies would be considered equal to the resident companies of the relevant country. These conditions prohibit the EU Member States to prevent legal entities to found companies in other EU Member States registered in compliance with the relevant legislation.

The EU Court of Justice also concluded that the legislation of United Kingdom, due to different approaches of taxation, causes damage to a resident company, in relation to which the legislation of foreign controlled companies is applied. The above legal provision makes it difficult to exercise the freedom of establishment and performance of economic activity and prevents establishment of subsidiaries in the EU Member State where such a subsidiary may enjoy more loyal taxation.

At the same time, Articles 43 and 48 of TFEU also provide for restriction of the validity of the freedom of establishment and performance of economic activity justified by the “general interest”, however, the EU Court of Justice established that the necessity to prevent reduction of the state tax revenue was not an element of such “general interest”, which would justify restriction of the freedom of establishment and performance of economic activity. Moreover, the EU Court of Justice emphasised that the fact that a resident company established a subsidiary in another EU Member State does not create the general presumption of tax evasion and cannot compromise exercise of the fundamental freedoms guaranteed under TFEU.

However, restriction of the freedom of establishment and performance of economic activity may be justified if it refers to artificial arrangements by using which a company is trying to circumvent the legislation of an interested EU Member State. The EU Court of Justice upheld the same arguments in the cases of *the Commission of the European Communities v Italy* (which related to tax on dividends)¹⁰⁵ and *Belgium v Truck Center SA*.¹⁰⁶

The key concept used by the EU Court of Justice in review of the case of *Cadbury*

¹⁰⁵ Commission of the European Communities v Italian Republic, 19.05.2025. [Electronic resource] // EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62007CJ0540>. (Accessed: 11.12.2025)

¹⁰⁶ Belgian State – SPF Finances v Truck Center SA, 18.09.2008 [Electronic resource] // EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62007CC0282> (Accessed: 11.12.2025)

Schweppes, was the goal of any economic activity or transaction of the company. At the same time the Court of Justice noted that such performance of economic activity in the territory of the country which encourages economic and social interaction within EU is lawful. The freedom of establishment and economic activity presents the basis for continuous involvement of a country and EU in the economic life of another countries, as well as presents the basis for gaining profit from this activity.

Thus, the EU Court of Justice has established in its case law that the freedom of establishment and performance of economic activity within the scope of TFEU provides for performance of economic activity by means of actual and effective of establishment for an unrestricted term in any EU Member State for the purpose of performing true and not fictitious economic activity.

Thus, for the purpose of adopting the decision on the case of *Cadbury Schweppes*, the EU Court of Justice defined the question: is the goal of the legislation of United Kingdom prevention of use of artificial arrangements and agreements? By answering the above question, the EU Court of Justice concluded on insufficiency of facts for stating that there were artificial agreements between the parties of the case aimed at tax evasion. The Court of Justice pointed out that it was necessary to establish objective circumstances: existence of real estate, personnel, the material part of the company. It has to prove that the foreign controlled company was actually established and engaging in effective economic activity. In other words, the EU Court of Justice has determined in its ruling which party has the burden of proof of non-existence of wholly artificial arrangements.

For the purpose of study and review of the precedent of *Cadbury Schweppes*, it is also necessary to refer to the opinion of Advocate General M. Leger.¹⁰⁷ According to his position, the legislation of United Kingdom concerning controlled foreign companies is compatible with the EU law only when it refers and is applied to artificial agreements and mechanisms used by companies for the purpose of circumventing the national legislation and tax evasion.

So as to counteract such tax evasion, the legislation of United Kingdom concerning controlled foreign companies provides for inclusion and accounting for the profit of the company resident in United Kingdom gained by its controlled subsidiary founded in another EU Member State in the taxable base, even if the relevant profit was not gained by the holding company. This legislation is intended for application in cases when the profit of the controlled foreign company is subject to more favourable taxation regime in the other country in

¹⁰⁷ Opinion of Advocate General Leger, delivered on 2 May 2006 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04> (Accessed: 12.12.2025).

comparison to the regime in force in United Kingdom. The legislation of United Kingdom provides for a range of exceptions and cases of their application.

By expressing his opinion on the case, Advocate General M. Leger points out that the very establishment of a subsidiary in another EU Member State by the holding company of the group of companies for the purpose of benefiting from more favourable taxation regime does not present abuse of the freedom of establishment. He states that the freedom of establishment exists for the purpose of encouraging economic activity in the accepting EU Member State. According to Leger's point of view, the protection provided by TFEU cannot be challenged if the condition of performance of economic activity is satisfied. The Advocate General also points out that the legislation of United Kingdom is not advantageous for the holding company to which it is applicable in comparison to a resident company having founded a subsidiary in United Kingdom, on one side, and a resident company of United Kingdom having founded a subsidiary in the EU Member State which does not have so advantageous taxation regime as the one applicable to this company, on the other side. Thus, the legislation of United Kingdom stipulates restrictions of the freedom of establishment.

Based on this, the Advocate General concludes that different tax regulation in this case will have a deterring effect on the resident company of United Kingdom from exercising the right to freedom of establishment in the EU Member States with lower tax burden.

Besides the above, the Advocate General states that the fight against tax evasion is justified by the necessity to defend the public interest of countries and therefore legitimise the resulting restriction of fundamental freedoms. However, the actual results of such justification should be limited by the strict framework of case law and precedents. In other words, restriction of any fundamental freedom may be justified by the fight against tax evasion only if the relevant legislation is specifically intended for preventing application of provisions on tax benefits in case of utilising wholly artificial arrangements for tax evasion.

M. Leger underlines that, in order to justify this restriction, the national legislation should not only be applicable to and not only refer to particular situations generally, but should also ensure and provide the possibility for the national court to refuse the privilege provided by the EU law to particular taxpayers or particular companies which have used or use such artificial arrangements for tax evasion. In this regard, M. Leger stated that, according to his opinion, the goal of the legislation of United Kingdom concerning foreign controlled companies in this case was the fight against the leaking of the profit of a resident company in United Kingdom having founded a subsidiary in the country with low taxes and performing transactions within the group of companies mainly aimed at transferring the profit to such subsidiaries.

By adding the profit of the foreign subsidiary to the taxable base of the holding company, the relevant legislation proves its compatibility with the goal for which it was adopted. However, according to the opinion of the Advocate General, in order to be able to dispute the presumption defined by the law: the taxpayer should have the possibility to submit evidence which would prove that the effectiveness of the EU law is not compromised by the company operations.

As the Advocate General has pointed out in Paragraph 67 of his opinion, the national legislation which ensures targeted review of objectiveness and reliability of the criteria of determination whether an economic operation is a wholly artificial arrangement implemented because of tax reasons, should not be viewed as being beyond the framework necessary for identification of such violations. It is about the legislation which provides the possibility to any taxpayer to present evidence of the commercial substantiation of such implemented tax arrangements without undue administrative restrictions.

Finally, M. Leger proposes the definite three factors which should be taken into account in order to prove that the company does not use wholly artificial arrangements:

- 1) the degree of physical presence of the subsidiary in the state of residence;
- 2) the true nature of the economic activity of the subsidiary;
- 3) the economic importance of this activity for the holding company and the group as a whole.

In the case of *Cadbury*, it was concluded that the taxable profit of the resident company includes the profit gained by the controlled foreign company in another Member State if this profit is taxed at a lower rate than that applied in the first country, unless this inclusion is applied by wholly artificial arrangements aimed at evading the national tax which is usually applied, including by referring to object facts which may be established by the third parties and which reveal that, irrespective of tax considerations, the controlled company actually, was founded in the accepting Member State and is engaged in actual economic activity.

According to the author's opinion, the conclusions of the courts concerning artificial arrangements are fair and lawful, as the degree of actual presence of the subsidiary in the accepting country, the true nature of economic activity of the subsidiary and the economic importance of this activity for the parent company and the group as a whole present reasonable for concluding actual business activity in the country and therefore can serve as the basis for taxation. However, such broad factors require further detailing in order to apply them in situations involving other companies, therefore calling for additional analysis of the case law of the EU Court of Justice.

Criteria for determining the lawfulness of tax planning

The concepts “wholly artificial arrangements” and “substance”

It is important to note that the arguments part of the ruling of the EU Court of Justice in the *Cadbury Schweppes* case has led to development of a separate line of concept of the case law in hearing of tax disputes. However, at the same time there is still an open question of whether there is actually a specific line of law concerning this case, and can the approach of the EU Court of Justice in the *Cadbury Schweppes* case be considered specific from the point of view of its relation to other tax cases. Irrespective of the discussion on the base-laying nature of the ruling of the EU Court of Justice in the *Cadbury Schweppes* case, attention should be paid to the concepts which the Court of Justice interprets and reveals in the arguments part of the ruling:

- 1) wholly artificial arrangements;
- 2) abusive practice;
- 3) objective and subjective criteria/ factors;
- 4) “mailbox companies”;
- 5) bogus company.

The above concepts are key ones for this ruling, and at present they form the basis of the methodology of evaluation of the lawfulness of tax manoeuvres of the companies by the EU Court of Justice. In this regard, the relevant concepts need to be analysed in more detail as used in the rulings of the EU Court of Justice.

Wholly artificial arrangements

This concept is cross-cutting for the entire field of tax law, as its definition, process of use by companies and reflection in the national legislation becomes the subject of review of the EU Court of Justice in cases concerning tax disputes. In the majority of importance cases it is about the provisions of the EU Member States aimed at fighting the application of any arrangements and special arrangements by companies and company groups, the implementation of which results in the companies enjoying either the right to a tax relief, or the company gaining export exemptions in the result of transfer and sale of shares, fictitious sale of any goods, in other words, gaining any tax advantage in comparison to the base situation where the company would act strictly within the framework of the tax legislation.

In some EU Member States there are special provisions concerning controlled foreign companies, and the legislation of United Kingdom, in the part of application of such provisions, has got into the continuous focus of attention of the EU Court of Justice. In most EU Member States, the principle of lawfulness allows and recommends tax authorities to devote a lot of effort for careful examination of facts. Obviously, tax organisations are performing their obligations within the scope of their operation in the entire EU.

Thus, in the *Cadbury Schweppes* case, the EU Court of Justice addresses the concept “wholly artificial arrangements”, to describe situations when a less advantageous tax regulation regime (a stricter regime) of a Member State within EU can be justified by referring to the goal of the tax legislation – minimising the risk and reducing the cases of tax evasion and tax avoidance. It is worth pointing out that the ruling of the *Cadbury Schweppes* case is not the first case where the EU Court of Justice refers to the concept “wholly artificial arrangement”, however, it is in this particular case where the EU Court of Justice has stated what should be understood under this concept. Earlier the EU Court of Justice has communicated that the national legislations of EU Member States were too broadened in their scopes of application; adding that subjects of regulations to enable speaking about their proportionality and adequacy regarding “wholly artificial arrangements”.

This wording was first applied in the case *C-264/96 Imperial Chemical Industries plc v Kenneth Hall Colmer*,¹⁰⁸ which concerned the tax provisions of United Kingdom prohibiting application of tax benefits in relation to loss of a subsidiary of the holding company which is the resident of United Kingdom. In this case, the EU Court of Justice concluded on the lack of justifying grounds for unequal and therefore unfair regulation of the situation of the subsidiaries of resident holding companies and non-residents of United Kingdom.

The EU Court of Justice used the same term in the cases *Lankhorst-Hoborst*,¹⁰⁹ *X and Y v Riksskatteverket*,¹¹⁰ *Lasteyrie du Saillant*,¹¹¹ as well as a range of other cases. All these cases refer to interpretation of the principle of the freedom of establishment and restriction of its operation by national provisions. In the first case, in compliance with the rules of FRG concerning categorisation of interest expenses as the type of expenses reducing the taxable base (thin capitalisation rules), more advantageous regulation was applied in relation to an intra-group loan, where the interest paid by the subsidiary to the holding company for tax credit was taxed as an expense, as both companies were the residents of FRG, however, at the same time, the interest paid by the subsidiary which was not the resident of FRG was considered by the tax legislation of FRG as hidden dividend. In the second case, less

¹⁰⁸ *Imperial Chemical Industries plc (ICI) v Kenneth Hall Colmer (Her Majesty’s Inspector of Taxes)?* 16/07/1998 EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0264> (Accessed: 12.12.2025).

¹⁰⁹ *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt*. 12.12.2002 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-324/00> (Accessed: 12.12.2025).

¹¹⁰ *X and Y v Riksskatteverket*, 21.11.2002 [Electronic resource] // InfoCuria – Case- law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-436/00> (Accessed: 12.12.2025.).

¹¹¹ *Hughes de Lasteyrie du Saillant v Ministère de l’Économie, des Finances et de l’Industrie*, 11.03.2004 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-9/02> (Accessed: 12.12.2025)

advantageous regulation and taxation was applied to companies of Sweden, which, according to its legislation, were controlled by foreign companies.

In all the listed cases, the EU Court of Justice concluded that by referring to the legal provisions whose application is justified by the fight against tax evasion, it should be remembered that such special legislation (for example, in Sweden, France, Germany, United Kingdom) does not provide for the goal of fighting against wholly artificial arrangements implemented by companies and aimed at circumventing the national tax law for the purpose of gaining tax benefits. This law is applicable to all the situations when subsidiaries of the group are founded outside the EU Member State irrespective of the reasons, and therefore this regulation is not special by nature.

By following the same logic also in the *Cadbury Schweppes* case, the EU Court of Justice pointed out that such establishment per se cannot evidence tax evasion, as the companies are still under the tax jurisdiction of the countries where they were founded, thus such provisions cannot be applied undisputed and in all instances.

On the other hand, national legal provisions that restrict exercising the freedom of establishment may be justified if they are aimed at combatting wholly artificial arrangements used by companies to circumvent the national legislation.

The EU Court of Justice maintained the same arguments and line of discussion in the *Test Claimants in the Thin Cap Group Litigation* case.¹¹²

The warning of taxpayers setting up ‘wholly artificial arrangements and mechanisms’ for the purpose of gaining profit under the Union law in general may cause difficulties, including the performance of the “proportionality test” in the course of discussion and work of the EU Court of Justice. As M. Leng has pointed out that it should be noticed that there are differences between the cases *Cadbury* and *Test Claimants*, on one side, and the case *Centros*,¹¹³ on the other side. In the latter, the national legal provisions whose application the parties were trying to avoid, include the provisions defining the process of establishment of companies and do not include the provisions of performing trade operations and concluding transactions.

Thus, recognition of the establishment of a legal entity in compliance with the EU law does not prevent the Court of Justice to view this establishment as wholly artificial arrangement, if the particular activity is performed through this legal entity. On the other side, if the Court of Justice does not recognise the legality of establishment of the legal entity which only has

¹¹² *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue*, 13.03.2007 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-524/04> (Accessed: 12.12.2025).

¹¹³ *Centros Ltd v Erhvervs- og Selskabsstyrelsen* 09.03.1999 [Electronic resource] // EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61997CJ0212> (Accessed: 07.05.2025).

a registered office in the EU Member State and which performs its operations in another EU Member State, this can prevent the Court of Justice from application of different approaches in hearing of the cases. Therefore, the analysis of similar arrangements may differ depending on the application of the provisions of the tax law or other fields of law.

As the argumentation of the court in the *Cadbury* case concerning objective circumstances is persuasive, the reference by the Court of Justice to subjective elements is less assuring. Although the EU Court of Justice in the *Cadbury* case does not focus a lot of attention to explaining what subjective criteria mean, it still mentions this additional requirement in relation to defining arrangements as “wholly artificial”. However, *the author believes* that it is objective and not subjective factors, in particular, the willingness to gain tax benefits, which are most important in the ruling, as the factor of trying to gain tax benefits, for concluding that the tax regime is more advantageous, has been identified objectively.

The Court of Justice is identifying and interpreting legal provisions not only in compliance with the legal wording (Article 43 of TFEU), but also with the goal and object of such provisions, which conforms with the general and traditional approach of legal methodology to interpreting provisions. However, as pointed out by the author, in the light of referred criteria and conclusions, it should be noted that the EU Court of Justice is resolving the cases concerning the artificial nature of arrangements and actions within the context of justification of their restriction in conformity with the principle of proportionality (adequacy), instead of relation to application of the principle of the freedom of establishment as such.

Contrary to that, as it was mentioned above, the Court of Justice has considered it necessary to point out the following: the fact that a natural or legal entity is looking for a possibility to gain benefit from tax benefits provided in another country than the one where this entity is a resident, cannot by itself deprive this entity of the rights provided by TFEU. The EU Court of Justice has already stated that, if a company is founded for the purpose of gaining benefit from a more acceptable and favourable legal regime, this fact by itself is not sufficient evidence of abusing the principle of the freedom of establishment (the case *Inspire Art C-167/01*¹¹⁴).

Although one can agree with M. Leng, on the unclearness as regards the restraint of the EU Court of Justice to consider the use of “wholly artificial arrangements” as a violation of fundamental principles, however, from the point of view of the Court of Justice the object and the goal of the freedom of establishment is important within this context.

¹¹⁴ Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, 30.09.2003 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-167/01> (Accessed: 12.12.2025)

Thus, as stated above, evaluation of existence of artificial arrangements should take into account the principle of proportionality instead of referring to the freedom of establishment; moreover, the conclusions only drawn from the case of *Inspire Art* are not sufficient for evaluating every case, as well as in every situation it is necessary to evaluate objective factors which may prove that, irrespective of tax considerations, the controlled company was actually founded in the accepting country and performs actual economic activity there, like signing of contracts with domestic operators providing services in this country, use of personnel or premises, etc.

On the other side, which relates to the consistency of distributions, LLM PhD. A. Sayde concerning the problem of economic reasonability of transactions and not actual transitions (for example, in the cases of *Thin Cap Group Litigation*, *Halifax*, *Emsland-Starke*),¹¹⁵ the author points out that the principle of economic reality allows dressing actual transactions in the artificial legal cover by using tax advantages.

At the same time, a merchant's decision to operate in another country, on the other side, may be affected by various, including subjective, considerations, not only of economic or "financial" nature, which is not readily apparent for the establishment or relatively easily demonstrated by the company, and not always economically reasonable actions, like delivery of goods to a particular location or purchase of goods from a business partner located geographically closer, can be implemented in the real life. Thus, it can be concluded that it is necessary to evaluate the circumstances of each individual case instead of following pure formal criteria, although this can lead to different conclusions in every case by itself, and merchants do not receive legal stability and cannot rely on uniform practice, as well as excluding the possibility of full scope tax planning.

Abusing the right

The next important concept applied by the EU Court of Justice in resolving tax disputes is the term "*abusing the right*". The standpoint of the EU Court of Justice concerning its interpretation has developed gradually and in the *Cadbury Schweppes* case, where the EU Court of Justice refers to the concept it has already applied in the cases *Emsland-Starke*¹¹⁶ and *Halifax*,¹¹⁷ where the essence of the disputes was not in the issues of direct taxation or

¹¹⁵ Sayde A. *The Fallacy of Economic reality. Abuse of EU Law and Regulation of Internal Market*. Hart Publishing: Oxford and Portland, Oregon, 2014.

¹¹⁶ *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas*, 14.12.2000. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-110/99> (Accessed: 12.12.2025).

¹¹⁷ *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise*, 21.02.2006. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?num=C-255/02> (Accessed: 12.12.2025).

exercising of fundamental freedoms. Based on these grounds it can be concluded that during several years since the hearing of these cases until adopting the ruling in the *Cadbury Schweppes* case, the EU Court of Justice has defined a particular concept of understanding what should be considered abuse and violation of rights.

The concept of abusing the right by the EU Court of Justice is closely linked with other key concepts, therefore they need to be reviewed in a systematic, interlinked way. Following the analysis of the case-law of the EU Court of Justice and its approach to argumentation within the process of adopting the decision on tax disputes, two main criteria applied by the EU Court of Justice as the basis can be distinguished:

- 1) the objective criterion providing that a set of objective circumstances evidences that a transaction or a deal carried out by the company, irrespective of official compliance with the provisions, does not conform with the goal of these provisions, in particular, presents abusing the right;
- 2) the subjective criterion providing for existence of characteristics evidencing the will of the parties to perform an act resulting from agreement between companies of the same group or different companies for the purpose of creating artificial circumstances resulting in the companies gaining the right to tax benefits and advantages.

The case *Emsland-Starke* was about export of goods to Switzerland, where the recipient entity was established in Switzerland. Based on the application of *Emsland-Starke*, and in relation to the Swiss customs clearance of the goods (issue of a special certificate and a delivery note of the goods), the customs authorities of FRG provided the right to export compensation to the company. Further investigation carried out by the customs authorities of FRG revealed that the goods exported to Switzerland had been returned to FRG immediately without modifying them in any way following receipt of the benefit by the same transportation within the scope of the procedure of internal transit within EU. Moreover, the goods were exempted from import duties because of their use for internal purposes (within EU). The customs authorities of FRG cancelled the decision on providing the export benefit concerning these goods and claimed payment of the duties.

In this case, the EU Court of Justice declared that from the point of view of the case law and application of the precedent law, the scope of validity of the Union rules should not be applied to violations by particular companies manifested by acts committed in agreement for the purpose of receiving tax benefits. Therefore, the fact that the transactions of import and re-export were performed for the purpose of unlawful gaining of benefits resulting from bad faith acts excludes the possibility of application of the provisions on export compensation.

The EU Court of Justice followed the same logic in the latter *Halifax* case, where the EU Court of Justice adopted its ruling in 2006. The subject of review by the EU Court of Justice in this case were the provisions of Directive 2006/112/EC of 28 November 2006 “On the common system of value added tax”. The EU Court of Justice ruled that the principles of prohibition of abuse are also applicable to relations concerning the collection of the value added tax. The above referred EU Directive contains provisions encouraging the fight against possible tax evasion and avoidance, as well as other violations in this field.

Because of this, the Court of Justice, by reviewing the actual circumstances of the case, concluded that in cases concerning the application of the VAT, for the purpose of identification of violations, it is necessary to verify that, first, irrespective of the official existence of the conditions defined by the Directive and incorporation of these conditions in the national law, the performed transactions actually resulted assessment and application of tax benefits in the situation which is contradicting to the conditions of provision of such benefits. Second, it should follow from a range of objective factors that the goal of such transactions was gaining tax benefits. Also, the Advocate General in this case shared the same opinion: according to the words by Mr. Maduro,¹¹⁸ the prohibition of abuse is neither relevant nor applicable when the economic activity has another explanation besides attempting to gain tax benefits.

In the *Cadbury* case, the EU Court of Justice referred to the cases *Emsland-Starke* and *Halifax* and pointed out that, in order to explain the concept of ‘wholly artificial arrangements’, it is necessary to establish objective circumstances that demonstrate that, despite a formal conformity with the conditions of the EU law provisions, the objective goals of the freedom of establishment (in compliance with the provisions of Articles 54 and 55) were not attained, in addition to the subjective element of the intention to gain a tax benefit.

It should be particularly pointed out that several subsequent cases, for example, in the case *Ministero dell’Economia e delle Finanze v. Part Service Srl*,¹¹⁹ the EU Court of Justice referred back to its ruling in the *Halifax* case when asked to provide clarifications on the following question: in the ruling on the *Halifax* case the concept of violation of the rights is defined as an act aimed at gaining tax benefits in compliance with the economic action performed for a non-commercial purpose, or within the context of adoption of tax decisions by companies, violation of the right – is it a broad concept, or to the contrary, a narrow one?

In the answer to the submitted inquiry, the EU Court of Justice explained that existence

¹¹⁸ Opinion of Advocate General Poiares Maduro delivered on 7 April 2005 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62003CC0446> (Accessed: 12.12.2025)

¹¹⁹ *Ministero dell’Economia e delle Finanze v Part Service Srl*, 21.02. 2008 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-425/06> (Accessed: 12.12.2025)

of practices of circumventing and violating tax provisions and their application by companies is possible in cases when (1) economic transactions resulting in gaining tax benefits, irrespective of formal compliance of the provisions of the Directive “On the common system of value added tax” and the national law implementing these provisions, are contrary to the goals of such provisions; and (2) a range of objective factors reveal that the actual goal of the transaction was gaining the tax benefit.

However, it is difficult to understand why legal consequences should depend on the intentions of taxpayers. This would mean that in another situation where transactions are not within the scope of the goal and object of the provision, the benefit will have to be provided, irrespective of the fact of artificial arrangements, solely because the taxpayer’s intention to evade payment of taxes (which is usually present) cannot be proven.

In relation to the above description, this conclusion can be drawn based on the case law of the EU Court of Justice that two criteria need to be considered when determining the abuse of the right: (1) objective non-conformity of the goal of legislation with the results attained by the company in result of performing relevant economic transactions, and (2) subjective intentions of the company manifested by abuse of the right for gaining advantage.

Within this context, there is an example from the case *Starbucks*,¹²⁰ where the EU Court of Justice takes into account the economic reality of transactions instead of the reasonableness of transaction and does not take into account the potential objective non-conformity between the law and the results achieved by relevant types of economic activity.

In this case, the company assured that the know-how of roasting coffee was paid for, thus benefiting from favourable tax regime, although, based on the considerations of reasonableness it could be concluded that the transaction was performed for the taxation purpose – a transaction with a related supplier, only Starbucks, the prices of the supplied goods in comparison to other companies seemed to be too high for roasted coffee beans. However, the EU Court of Justice ruled that the Commission failed to prove the contrary, in particular, that the licensed agreements and skills, thus concluding that the company acted in a lawful manner.

However, in a similar case of *Fiat*,¹²¹ the EU Court of Justice found that Fiat Chrysler Finance Europe was evading taxes by transferring a part of its assets to another country without

¹²⁰ Starbucks Corp., Starbucks Manufacturing Emea BV, 24.09.2019. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218101&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=1966759> (Accessed: 12.12.2025).

¹²¹ Fiat Chrysler Finance Europe, 24.09.2019. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218102&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=1980382> (Accessed: 12.12.2025)

sufficient economic justification, thus underlining the objective non-compatibility of the first goal resulting from relevant types of economic activity achieved the evaluation and potentially different result in the case under seemingly equal circumstances.

In the case of *Apple*, the behaviour of the subsidiary in Ireland and taxation of the entire European profit only in Ireland, which is the country with the most favourable taxation regime, was viewed as tax evasion, as the EU Commission considered this behaviour to be a violation (the ruling is not freely available) and the Deputy Chair of the EU Court of Justice rejected the appeal by *Apple* as not substantiated by joining the EU Commission's position.¹²²

The EU Court of Justice also considers the obligation of national courts in finding true intentions and arguments of performed transactions as an important factor. In performing the above analysis, the national courts should take into account the artificial nature of such transactions and the links between the legal, economic and personal characteristics between legal entities involved in tax evasion arrangements.

Along with the above, in the doctrine¹²³ and in the case law, it is obvious that the focus in the system of court precedents is shifted from subjective criteria to the objective approach in reviewing cases on violations. In the *Halifax* case, for example, both the Advocate General and the Court of Justice restricted the effect of the subjective criterion by focusing attention to the objective nature of the second part of consideration: the mental condition of the taxpayer is no longer considered important. Contrary to that, the true goal of a transaction or action should follow from a range of objective factors. As Leng has correctly pointed out¹²⁴, it is difficult to notice this shift of focus, since it is not possible to identify the true intent of a person, and smarter taxpayers thus prevail in a more financially favourable position.

As the importance of the subjective criterion is obviously contradictory and according to the viewpoint of M. Leng, the most correct conclusions can be drawn based on the analysis of objective criteria and facts of the case; the elements must be studied attentively as to their conformity with the object and goal of the legal provisions, which strongly persuades the absence of any separate line of precedent law created on the basis of the *Cadbury Schweppes* case.

¹²² Apple Sales International and Others, 24.10.2018. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=206984&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=173562> (Accessed: 09.04.2025).

¹²³ Michael Lang. Cadbury Schweppes' Line of Case Law from the Member States' Perspective [Electronic resource] // Wirtschafts Universität Wien. Vienna University of economics and business. Electronic data 2025. URL: <https://research.wu.ac.at/de/publications/cadbury-schweppes-line-of-case-law-from-the-member-states-perspec-12/> (Accessed: 12.12.2025)

¹²⁴ Michael Lang. Cadbury Schweppes' Line of Case Law from the Member States' Perspective [Electronic resource] // Wirtschafts Universität Wien. Vienna University of economics and business. Electronic data 2025. URL: <https://research.wu.ac.at/de/publications/cadbury-schweppes-line-of-case-law-from-the-member-states-perspec-12/> (Accessed: 12.12.2025)

Leng's final argument affirms that in the EU law there is no special concept of violation of tax provisions. Attempts to circumvent legislation in this field are identified in the same way, as they have been identified for centuries in other fields of law: by means of correct and due interpretation. However, if one does not agree with the above-described position and considers there to be a special concept of violations, then it is most probable that this concept affects the national law of the EU Member State.

It follows from the general case law of the EU Court of Justice that, as M. Leng has written, that there is no general understanding and concept of abuse and violations within EU and its application by the EU Court of Justice. Rather, when a general line is followed, a conclusion can be drawn on the effect of the common ideas of the EU law (both precedent, and other) on the national practice of hearing cases by courts within the EU Member State.

The author shares Leng's motivations and beliefs regarding the necessity to evaluate objective criteria, in particular because, as mentioned above, existence of subjective criteria as such in any case follows from the objective point of view, including whether there was economic substantiation for the tax assessment. However, contrary to Leng's conclusions, the concept of abuse has been developed and is applied in the case law of the EU Court of Justice.

The central question, regarding application of the concept and presentation of the arguments part of the ruling of the EU Court of Justice in the *Cadbury Schweppes* case is the obligation of the national legislative bodies regarding implementation of the **concept of abusive practice**. An example of the mandatory application of this concept by the EU Member States can also be the *Halifax* case where the EU Court of Justice used the phrase "practice of violations or harmful practice", but not the concept "wholly artificial arrangements", which the Court of Justice referred to in the *Cadbury Schweppes* case. In the *Halifax* case, the Court of Justice concluded that the abusive practice emerged when, first, the relevant transactions provided tax advantage contrary to the goal of these rules, and second, based on a range of objective factors it follows that the main goal of the relevant transactions was gaining of tax advantage.¹²⁵

In the *Halifax* case, the national court which applied for explanations to the EU Court of Justice wanted to find out under what circumstances VAT can be reimbursed if the fact of abusing the right was identified. The EU Court of Justice pointed out that in the EU Directive "On the common system of value added tax" there are no provisions on reimbursement of the value added tax and this Directive in its Article 20 only defines the conditions which have

¹²⁵ Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise, 21.02.2006 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?num=C-255/02> (Accessed: 12.12.2025).

to be satisfied for adjusting the assessment of the export VAT concerning of a particular entity to which goods and services were provided. In this regard every EU Member State has the right to define the conditions according to which tax authorities may reimburse such VAT by following the limit values defined by the Union law in §28 of the Directive.

By this the EU Court of Justice allowed the national authorities to apply the concept of abusive practice developed by it, as the provisions concerning VAT in the Directive do not provide the possibility for the national legislation to independently resolve the issue about who will bear damage and who will benefit from application of the provisions on VAT. In this regard, the provisions and recommendations of the EU Court of Justice should be implemented in the national law of the EU Member States in some way, for which it is necessary to create the legal base.

In the result of detailed study of the arguments of the EU Court of Justice the question arises as to what is the preference of the Court of Justice in the process of adoption of the decision: the degree of justification of application of the provisions on wholly artificial arrangements or proportionality of application of measures of response of such provisions. The analysis of the practice in tax disputes shows that the answer to this question will be compromise combination of both approaches. First of all, this is related to that there are not so many versions in cases concerning tax disputes: wholly artificial arrangements are either used or there are no such arrangements. In the first case there are basis for application of the least favourable regime; in the second, however, there are no such basis, unless the EU Court of Justice, having heard the case, concludes that relevant arrangements are actually used and therefore the least favourable regime should be applied.

In the result of the most detailed analysis of the EU Directive “On the common system of value added tax”, it can be noticed that the issue of the mandatory incorporation and implementation of the rules and provisions is much more difficult and complex. This Directive contains provisions which allow the national legislator to act at its free discretion in the area of tax policy. Therefore, construction and interpretation of the relevant provisions falls within the exclusive competence of the national court and the regulation is not affected by the EU law. Thus, there are no basis and necessity to apply the concept of abusive practice developed by the EU Court of Justice.

There are also other situations when the EU Member States are not obliged to implement the concept of abusive practice. This refers to, for instance, the EU Directive on mergers and acquisitions. In the case *Hans Markus Kofoed v. Skatteministeriet*,¹²⁶ the Court of Denmark

¹²⁶ Hans Markus Kofoed v Skatteministeriet, 05.07.2007. [Electronic resource] // Case-law of the Court of Justice. Electronic data 2025. URL: <https://www.trans-lex.org/382800/> (Accessed: 12.12.2025).

requested the ruling and opinion of the EU Court of Justice about if tax authorities may respond to possible violations even if the national legislator has not adopted special measures on incorporation of Article 11 of Directive 90/434/EEC: “On the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States”.

The EU Court of Justice has stated the following concerning this question: in compliance with Article 11 (1) (a) of the Directive as a rare exemption and exclusively in relation to special cases the EU Member States may refuse to apply or withdraw the benefit or advantage provided by the Directive or any part thereof, in particular, when exchange of shares has as its principal objective or one of the principal objectives tax evasion or tax avoidance. The same Article also provides that the fact that the relevant transaction is not carried out for valid commercial reasons may constitute the evidence of such an objective.

Thus, this Article includes the main principle of the Union law: prohibition of abusing the right. Individual entities are prohibited to gain the advantage provided by the Union law in an unlawful or fraudulent manner. The EU legislation may not be applied in relation to situations of abusive practice, or in other words, to transactions and actions which are beyond the boundaries of standard economic activity and are implemented exclusively for the purpose of unlawful gaining of advantages provided by the Union law. The EU Court of Justice followed this argumentation also in the *Cadbury Schweppes* case.¹²⁷

According to the logic of the EU Court of Justice in the case *Kofoed*, the lack of the relevant provision in the Danish legislation providing for refusal of providing the benefits (in compliance with Directive 90/434) in relation to particular abusive practices is not a violation of the EU legislation. One cannot disagree with Michael Leng as regards the substantiation of this position: Article 11(1)(a) of the above referred Directive does not request the EU Member States to exclude cases of abusive practice from the field of application of the benefits granted by it. In compliance with this provision, the EU Member States may refuse to grant or withdraw benefits, which is guaranteed by the provisions (or their parts) of Section 2, 3 and 4 of the Directive, when it is obvious that merging, division, transfer of assets or exchange of shares has as its main objective (or one of the objectives) tax evasion or tax avoidance or avoidance of payment thereof.

EU Member States are not obliged to implement this exemption. Such cases, as referred to in Article 11, are outside the scope of operation of the Directive. In compliance with

¹²⁷ Paragraph 35 in case *Cadbury Schweppes and Cadbury Schweppes Overseas*, 12.09.2006 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04> (Accessed: 12.12.2025).

the Directive, no country is prohibited to be more loyal than provided by the provisions of the Directive. Thus, there is no violation if any EU Member State refrains from implementation of exemptions applicable to the situation involving abusive practice. However, if the EU Member State applies the rights provided by the Directive, it should consider the interpretation of the Article by the EU Court of Justice. At the same time, it does not follow from the above that using the case law of the EU Court of Justice is the only way to include the provisions in the national law. Legislators may exclude or apply just particular cases of abusive practice; however, they should not go beyond the scope of the provision of Article 11 (1) (a).

The same applies in relation to fundamental freedoms. In the *Cadbury Schweppes* case, the EU Court of Justice explained that the EU Member States may regulate wholly artificial arrangements by means of provisions concerning foreign controlled companies, however, in this case the concept “wholly artificial arrangements” should be interpreted according to the interpretation given by the EU Court of Justice. However, the country is obliged to introduce the regime for foreign controlled companies as a whole. In the best case, in compliance with the EU law, when there is no re-distribution/ transfer of foreign passive income through a legal entity established in the jurisdiction with more loyal tax regime within EU, in the interests of shareholders in another EU Member State.

Neither do the provisions of the national law violate the EU law if their content is close to satisfaction of a minimum set of criteria which allow determining that relevant transactions of companies are performed by using wholly artificial arrangements. However, such provisions concerning foreign controlled companies should be interpreted in compliance with the EU law, in particular, in compliance with the case law of the EU Court of Justice, as in the contrary case the scope and scale of regulation can go beyond the framework of the concept “wholly artificial arrangements”.

One of the ways of interpreting the provisions concerning foreign controlled companies in compliance with the EU law is interpretation beyond the boundaries of evaluation of “wholly artificial arrangements” as disputed presumption. As it is known from the case *Test Claimants in the Thin Cap Group Litigation*, the referred presumption does not definitely violate the fundamental freedoms until “the taxpayer is given the possibility to present evidence to substantiate the commercial necessity of the transaction performed by it, without imposing administrative restrictions in relation to such a taxpayer”.¹²⁸

Thus, in compliance with the EU law, national provisions concerning controlled foreign companies can be applied and adopted if such provisions can be interpreted as means of shifting

¹²⁸ Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, 13.03.2007 [Electronic resource] // InfoCuria– Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-524/04> (Accessed: 12.12.2025).

the burden of proof to the taxpayer in the situation related to acting beyond the boundaries of allowed action. These provisions are also valid if they only regulate wholly artificial arrangements.

However, the question of whether the methods and ways of interpretation allow modifying and supplementing the provisions concerning controlled foreign companies in such a drastic manner, or whether such provisions should not be applied and later modified—this is still the question of the national law and not the EU law. The latter is neutrally applicable to the methods of implementation in the national law. If the national law should be disregarded until it contradicts the Union law, there is also the question of application of the provisions concerning controlled foreign companies or refraining from their application within the framework of solution of the problem of wholly artificial arrangements, as there is no legal base for application of these provisions only in relation to wholly artificial arrangements.

It is not thoroughly clear, if reference to the case law of the case *Cadbury* is justified when it is about wholly artificial arrangements. The concept of the EU law concerning abusive practice developed by the Court of Justice, as stated above, puts the object and the goal of the provision in the centre of focus, and in compliance with the EU law it is prohibited to apply the provisions allowing the benefits also to a situation when, in compliance with the literal interpretation of the provision, application is possible irrespective of that the object and goal of regulation does not allow application of this benefit.

Concept of the ‘mailbox company’ and the bogus company within the context of interpretation by the EU Court of Justice

In the *Cadbury Schweppes* case, the EU Court of Justice is addressing the terms ‘mailbox company’ and ‘bogus company’. On one side, their use can be misleading, as it can create the impression that a legal entity not possessing premises, personnel, equipment (and therefore liable to be described as the ‘mailbox company’) can be subjected to less favourable regulation in a cross-border situation. However, the instructions and recommendations of the EU Court of Justice do not mean that legal entities without premises, personnel and equipment can be completely disregarded. The size of premises, the number of personnel and the quantity of equipment cannot be determined without taking into account the type of business activity the company is performing.

It is undisputed that a medium size holding company or a group of financial companies do not need a large number of personnel. Within the scale of a single country, such legal entities without offices or personnel are clearly not disregarded by tax authorities. However, on the other side, in many jurisdictions such companies are subject to taxation of the company income of the minimum level, even if they receive non-taxable dividends.

Therefore, it cannot be presumed that establishment of such a legal entity is definitely a wholly artificial arrangement. The above conclusion is confirmed by the case “*Eurofood IFSC*”,¹²⁹ where the EU Court of Justice pointed out that the mailbox company is not a company which does not have office and personnel, instead, it is a company “which does not perform economic activity in the territory of the EU Member State where it is located”.

The fact that the economic choice can be controlled by the holding company established in another EU Member State is not sufficient for disregarding the existence of such a company as a resident of another country. The key words in this regard are the “economic substance”, “effective (actual) establishment”, “effective economic activity” and the “degree of the physical existence of the foreign dependent company”.

If the arrangements do not correspond to the economic reality, do not conform with the criterion of effective establishment, these can be disregarded. And this is not surprising: tax authorities are well organised in the area of finding actual facts and models – and this refers to not only application of the fundamental freedoms.

Substance

The concept of substance is extensively common among tax doctrines of many countries and inseparably linked with the concept of permitted tax optimisation. At present these two concepts are key ones within the process of evaluation of a transaction as regards lawfulness of any tax manoeuvre.

The above concept finds its application also within the framework of the Russian tax law. First, it is related to that the supreme court instances in the Russian Federation¹³⁰ use the practice of law enforcement of the common law (first, USA and United Kingdom) as the basis for the approach of distinguishing between lawful and unlawful tax planning (which is referred to as “permitted optimisation” in the Russian tax law). At the same time, the USA practice is based on five doctrines: the doctrine of economic substance, business purpose, step transaction), substance over form and sham transaction.

The interest of global countries to increase collections on the account of finding “suspicious” transactions should be seen as the primary reason for promotion of the use of “substance”, as the more stressed the economic situation, the more subjects of business operations tend to choose maximum tax optimisation, which was finally considered as tax evasion.

¹²⁹ *Eurofood IFSC Ltd v Bank of America N.A.*, Pearse Farrell, Official Liquidator, Director of Corporate, 02.05.2006 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-341/04> (Accessed: 12.12.2025)

¹³⁰ Resolution of the Plenum of the Supreme Arbitration of the Russian Federation dated 12.10.2006 No 53 “Concerning evaluation of the justification of receipt of the tax benefit by the taxpayer at arbitration tribunals”. Electronic data 2025. URL: http://www.consultant.ru/document/cons_doc_LAW_63894/ (Accessed: 12.12.2025).

Within the context of international tax planning, the substance means a set of particular features of performing economic activity characteristic for a relevant country. These features create the impression of independent performance of business activity, in particular, comprehensive business.

“Substance” comprises everything – the criteria of existence of the office, personnel, executive bodies, bank accounts. This term has been seen increasingly often in cases heard by the EU Court of Justice, starting from the *Cadbury Schweppes* case, it was indirectly confirmed in BEPS (Base erosion and profit shifting),¹³¹ developed by the Organisation for Economic Cooperation and Development. The assessment of a company according to the criterion of “substance” is based on the following principle: if it is not possible to confirm the “substance” of the company performing activity in the territory of a foreign country, the probability of declaring the operation of the company as a tax manoeuvre aimed at tax evasion increases considerably.

Court litigations during which the economic substance of a transaction was identified took place as early as in the first half of the 20th century in the USA and the courts of the USA declared that subjects of business operations have the right to reduce tax expenses on lawful basis, however, only in the case if transactions had lawful corporate goals.¹³²

As it was mentioned above, the specific meaning of the substance is directly related to the activities of OECD. In 2013 OECD developed an action plan for countering base erosion and profit tax evasion. These statements affected the importance of the substance in the global practice. A range of the measures of OECD affect the above concept: effective countering of non-legitimate tax practice taking into account transparency (exchange of information) and substance; countering use of treaties for avoiding double taxation in a bad faith manner (refusal to grant tax benefits in the case when one of the companies (beneficiary of the benefit) does not act independently; countering of avoiding the status of permanent representative office of a legal entity in another country.

In relation to international treaties this means, first, that they will comprise the provision on the substance, also on transparency, so that the countries will implement special provisions linking granting of benefits to companies to the substance, such provisions have already been incorporated in some jurisdictions, while in the European Union they exist and operate on the level of the case law. In practice this would mean that checking of the company will not include only verification of its existence and management, but also finding out if this company

¹³¹ Base erosion and profit shifting. Organisation for Economic Cooperation and Profit Shifting. [Electronic resource] // Electronic data PwC. 2025. URL: <https://www.oecd.org/tax/beps/about/> (Accessed: 12.12.2025).

¹³² Gregory v. Helvering. 07/01/1935. [Electronic resource] // InfoCuria – Case-law of the US Supreme Court. Electronic data 2025. URL: <https://supreme.justia.com/cases/federal/us/293/465/> (Accessed: 12.12.2025).

has the substance; additionally, the first way of obtaining such information will be based on another principle which was also mentioned above, in particular, the transparency.

2.1.2 Definition of aggressive tax planning

At present the concept “aggressive tax planning” is a substantial and important criterion for evaluation business operations of legal entities on the global scale. Starting from the 2000s, major global tax authorities shifted their attention to non-standard tax behaviour of taxpayers, resulting in decrease of tax collections into the budget. All the practice of cooperation of countries on the international arena on this matter sponsored the development of aggressive tax planning, an approach whose definition remains unscrutinised due to its absence in both national legislations and international treaties. Although, the term “aggressive tax planning” implores for a clear definition in legislative literature, its actual nature is revealed through its widespread and active application, more so on an international level, with evidenced in relevant cases of corporate enforcement and reporting requirements.

It is worth mentioning that a large part of studies in tax planning are devoted to unlawful tax planning and liability thereof, or, strictly speaking, the criminal aspect of tax evasion. However, this topic has been broadly presented and elaborated in the European Union where a range of books, as well as scientific articles have been written on a similar theme—direct and indirect tax regulation in Europe, comparison of the international tax law and European tax law, legal issues concerning the so called “leaks” of information (Kristiana N. L. Panayi, Verner Haslener, Edoardo Traversa, Mariana Helminen). Yet the degree of theoretical elaboration of the matter of the institute of legitimate tax planning in the EU remains sparse.

Unlawful tax planning is characterised by a single characteristic of the company and tax planning referred to as the ‘substance’ – the concept comprising all the key features that allow evaluation of the company operation from the point of view of actual economic activity and business independence.

If the legislator does not provide benefits for a foreign taxpayer or relief to foreign income, however, such benefits are usually provided to a resident taxpayer, as well as the domestically gained income in the country, such regulation is not violating the EU law, and if the national law is sufficiently liberal and provides benefits at implementing “wholly artificial arrangements”, neither is this a violation of the EU legal provisions, additionally national legislations may exclude artificial arrangements in their entirety in providing benefits, but are not obliged to do this.

In cases which cannot be resolved by applying imperative EUR provisions, the national court may, at its discretion, choose the best option which conforms with the constitutional or

other requirements of the national domestic law of the EU Member State, as well as correlates best with other national provisions.

The tax practice within the European Union is following the same approach, and new rules which disclose information on transactions and possess the features of “aggressive tax planning” are entering into force in its territory starting from July 2020. The above rules are provided by Directive EC No 2018/822 dated 25.05.2018.¹³³ (the Directive amended the provisions of Directive of year 2016¹³⁴ concerning administrative cooperation in the field of taxation), this Directive is also often referred to as the Directive on tax agents according to the text of which the companies will have to report all such transactions performed starting from June 2018, as regards transaction performed from July 2020, there will be the rule concerning submission of report within thirty days as from performing it. These provisions have to be implemented in the legislation of the EU Member States still in 2019, which is due to happen, however, with some differences in each individual country.

Thus, in compliance with information of PwC, the services of which analysed the process of implementation of the Directive in the EU Member States, according to the situation in December 2019, specific countries had not submitted legal amendments, these countries being Greece, Malta, Romania and Latvia. Austria, France, Belgium, Slovakia, Slovenia and Bulgaria have already adopted relevant acts. Poland has expressed more confident attitude towards the amendments—soon after having adopted the provisions, they entered said legislation into force in 2019 and introduced maximum sanctions on the scale of the European Union, amounting to several millions of euros, for violating the Directives, followed by United Kingdom until Brexit, with the Netherlands concluding TOP 3 leaders.¹³⁵

In relation to the above, the question as to what exactly should be understood by “aggressive tax planning” needs careful examination and subsequent interpretation, reason being the extensiveness of its application. Although the issue affects operations of companies in the European Union and all over the world it still misses an unambiguous definition.; moreover, for the purpose of effective operation in the field of tax planning, the identification of what can be considered aggressive tax planning, its indicators, and their development, has become more important than ever.

For the purpose of the present study, the concepts “aggressive tax planning” and “unlawful tax planning” are interchangeable, which is justified by the interpretation of unlawful

¹³³ Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 25.05.2018. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0822> (Accessed 12.12.2025).

¹³⁴ *Ibid.*

¹³⁵ Galceva A., PwC. New EU rules of the mandatory reveal of information (Directive DAC6). PwC. 2018.

tax planning not as a fact subject to criminal investigation, but just as a tax strategy deviating from the standard from the point of view of tax authorities.

The concept of aggressive tax planning is applicable within the international legal context. It should be started with summary of the experience of foreign countries concerning the issues of aggressive tax planning which was defined by adoption of Seoul Declaration at the third forum of OECD on tax administration in 2006. Then the declaration established the main principles of fighting aggressive tax planning by inviting not only the state bodies, but also taxpayers to follow and to comply with tax standards, although the very concept “aggressive tax planning” was introduced by OECD only in 2011 in the report on fighting aggressive tax planning on the account of improvement of transparency and information sharing,¹³⁶ and in 2012 the recommendations of the Commission of the European Union concerning fighting this phenomenon in tax practice were published.¹³⁷

The results of the work of OECD in the field of tax administration can be generally summarised in several important items: factors causing such planning, mechanisms of response by state authorities, definition of the role of tax agents who contribute to implementation of such strategies, the role of finance and credit institutions.

At present quite a fair opinion has developed that aggressive tax planning is not possible without tax agents, advisers who, on one side, help to understand tax legislation and, on the other side, develop strategies for the more efficient taxation for the business.

Because if this, still back in 2008, the OECD working committee on tax administration accepted for review and analysis tax strategies of the biggest companies for the purpose of analysing their legitimacy. However, it should be understood that the strategy of aggressive tax planning was implemented in life by the business which needed minimisation of taxes, as well as efficient taxation, or in other words, the demand encouraged the offer.

In order to provide an up-to-date and justified definition of the concept “aggressive tax planning”, a range of important factors need to be considered. First, the concept of unlawful planning or lawful planning cannot be found in any law or code of the European Union Member States or the Russian Federation, and the main reason for this is the lack of the definition of tax planning as such. Second, this term is only applied in relation to large scale transactions, as tax authorities do not manage to respond to small transactions.

¹³⁶ Tackling aggressive tax planning through improved transparency and disclosure. [Electronic resource] // OECD [Electronic data] 2011, URL: <http://www.oecd.org/ctp/exchange-of-tax-information/48322860.pdf> (Accessed: 12.12.2025).

¹³⁷ European Commission recommendation on aggressive tax planning. [Electronic resource] // European Commission [Electronic data] 2012, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H0772&from=EN> (Accessed: 12.12.2025)

Nonetheless, the definition of unlawful tax planning can be found indirectly in several sources and working documents. For example, in the rules of OECD, in the reports of the European Commission 2015 and 2017, which are worth paying attention to in analysing this issue, as these materials on the results of the work of working groups are the primary sources which contain the essence of the definition, even if the definition itself is not there. Thus, the European Commission provides quite brief and strict definition of aggressive tax planning: aggressive tax planning is gaining advantage thanks to formalities, technical aspects and non-conformance between two or more taxation systems for the purpose of reducing tax liabilities.¹³⁸

In the report 2017 the European Commission uses analysis for detailing the boundaries between lawful and aggressive tax planning (ATP) without returning to the concept as such. Below Figure 2.2 shows the arrangement, based on which the European Commission distinguishes two directions of tax planning.¹³⁹

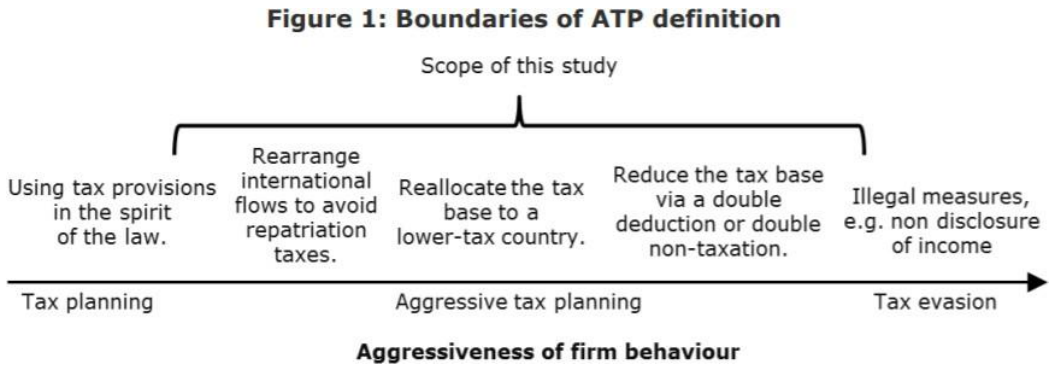


Figure 2.2 Boundaries of ATP definition

After the adoption of the above referred Directive EC¹⁴⁰ aimed at fighting aggressive tax planning, the European Commission obliged tax planning subjects to perform automated information sharing in the field of taxation of cross-border transactions, resulting in the agents involved in such transactions being obliged to submit reports concerning potentially aggressive arrangements and methods applied in tax planning. The report of the European Commission

¹³⁸ European Commission recommendation on aggressive tax planning. [Electronic resource] // European Commission [Electronic data] 2012, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012H0772&from=EN> (Accessed: 12.12.2025).

¹³⁹ Aggressive Tax Planning Indicators. Final report. [Electronic resource] // European Commission [Electronic data] 2017, URL: https://taxation-customs.ec.europa.eu/system/files/2018-03/taxation_papers_71_atp_.pdf (Accessed: 12.12.2025), 23 of the report.

¹⁴⁰ Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 25.05.2018. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0822> (Accessed: 12.12.2025).

“Aggressive tax planning indicators”¹⁴¹ allows distinguishing three groups of aggressive tax planning methods:

1. methods through payment of interest;
2. methods through payment of royalties;
3. methods through strategic transfer pricing.¹⁴²

Tax authorities will focus particular attention to companies where the taxable base is reduced by transferring funds to companies established in the territories of the countries where favourable tax regimes are applied, and attention will be paid to both reduction and increase of the taxable base.

Also, companies performing the functions of intermediaries will be in continuous focus of attention. Ordinarily, it is difficult to notice effect on the taxable base of the entire group of companies behind such companies, such companies may serve as a tool for simplifying the tax procedure.

By the new introduction the obligation to report concerning tax planning methods is imposed on agents – any natural or legal entity, establishment without the status of a legal entity, which provides services of management of cross-border transactions, marketing to taxpayers, upon the condition that such an agent has sufficient presence in the EU territory. However, if such an agent does not satisfy the required criteria and its actions are restricted by professional confidentiality, the obligation to provide the report is imposed directly to the taxpayer.

The agent as a subject will be analysed separately. In compliance with the text of the Directive,¹⁴³ an agent is any entity dealing with development, implementation, organisation of a cross-border transaction and also implementing or managing a cross-border transaction subject to checking. Also, any entity which, considering relevant facts and circumstances and according to existing information and suitable experience and understanding, provides such services or can assume the obligation to provide such services directly or through other entities by providing consultations, developments, provision of marketing services, organisation and direct implementation or assistance at implementation of cross-border transactions, which should be reported for the purpose of the Directive.

¹⁴¹ Aggressive Tax Planning Indicators. Final report. [Electronic resource] // European Commission [Electronic data] 2017, URL: https://taxation-customs.ec.europa.eu/system/files/2018-03/taxation_papers_71_atp_.pdf (Accessed: 12.12.2025)

¹⁴² The transfer pricing method is setting prices for intra-group sale of mutually related entities, allowing accumulation of profit in the country where it is possible to use favourable taxation.

¹⁴³ Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 25.05.2018. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32018L0822> (Accessed: 12.12.2025)

Agents and taxpayers are obliged to provide information concerning cross-border arrangements known to them, possessed or controlled by them to competent tax authorities within 30 days as from the moment of starting their implementation or when they are ready for implementation. In case of market arrangements, the agent is obliged to submit a periodic report every three months including updates referred to in Paragraph 14.

In cases where an agent or taxable entity is required to report on cross-border arrangements subject to reporting to tax authorities of more than one Member State, they should only submit this information to the Member State in which they are resident for tax purposes, have a permanent establishment, or are subject to legislation. In the case of an agent, this is the Member State in which they are registered with a professional association engaged in legal, tax or advisory services. Any interested taxable entity is exempted from the obligation to provide the above information only to the extent regarding which it can prove, in conformity with the national legislation, that the same information referred to in Paragraph 14 was already submitted by another relevant taxable entity. Member States define fines applicable to violations of these obligations.¹⁴⁴

It is worth paying attention to establishing the procedure of reporting by tax agents on cross-border transactions in Latvia. Thus, in 2020 Cabinet Regulations No 210 “Regarding Automatic Exchange of Information on Reportable Cross-border Arrangements” were published. The goal of these Regulations is to govern the process of provision of information necessary for control of payment of taxes in cases when taxpayers use aggressive cross-border arrangements of tax planning, within the scope of mandatory implementation of Directive (EC) 2018/822 in the national legislation¹⁴⁵.

It should be noted that the Directive itself does not contain a strictly contained concept “methods of aggressive planning”. Earlier, in a study of 2012 the European Commission provided the following definition of aggressive tax planning: “Use of advantages of technical characteristics of a tax system or non-conformities between two or more tax systems for the purpose of reducing tax liabilities. Often use of such gaps allows gaining income which is not taxed anywhere, in any of the involved countries.”¹⁴⁶ As stated above, this approach is incomplete because it does not provide a strict answer to the question where there is the boundary between lawful and unlawful tax planning.

¹⁴⁴ Council Directive (EU) 2018/822 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 25.05.2018. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/eli/dir/2018/822/oj/eng> (Accessed: 12.12.2025)

¹⁴⁵ Cabinet Regulations.

¹⁴⁶ European Commission, Study on Structures of Aggressive Tax Planning and Indicators, 2016. [Electronic resource] // *EUR-Lex. Electronic data 2019*, URL: https://taxation-customs.ec.europa.eu/system/files/2016-09/taxation_paper_61.pdf (Accessed: 12.12.2025)

The Directive systematises the typical features of the mechanisms of aggressive tax planning which indicate potential tax evasion or abuse of the corporate tax and introduce the obligation to submit information to tax authorities concerning any cross-border transactions conforming to one or several indicators of aggressiveness defined by the Directive and involving minimum one EU Member State.

The practice has developed several indicators of aggressive planning which can be briefly described as follows:¹⁴⁷

- 1) standardised documents of transactions,
- 2) transactions without objective commercial goal, or in other words, the lack of substance,
- 3) transactions where gaining of tax advantage is an expected outcome of the transaction, and where the agent's remuneration is made dependent on the successful attainment of the tax advantage,
- 4) transactions with a resident of off-shore or low tax jurisdiction or a jurisdiction not participating in the automated information sharing or not cooperating on tax matters,
- 5) payments address to stateless legal entities,
- 6) transactions where agreement on confidentiality does not allow disclosing information on payment of taxes,
- 7) transactions providing for transfer of "loss" of the result of the fiscal year to another jurisdiction for the purpose of reducing the tax base,
- 8) transactions providing for re-qualification of profit into other categories taxed at lower rates,
- 9) transactions allowing several taxpayers to claim exemption from double taxation concerning the same income in several jurisdictions.

It can be concluded that the essence of the concept "aggressive tax planning" is that any unpaid tax, in particular, a high amount of it, combined with unusual tax behaviour of the taxable entity amounts to unlawful tax planning. From the practical viewpoint, in order to prove the fact of aggressive and unlawful tax planning, the following is needed: (a) large business turnover, (b) actually unpaid taxes or minimum taxes paid, (c) lack of the substance of business and economic goal. Therefore, there is the concept, on one side, however, it is in indirect regulations which do not have direct effect (this is not a part of the provisions of Lisbon Treaty, these are not Directives or Regulations or even case law). From the practical point of view, OECD is a club of developed countries which adopt rules they undertake to comply with, and it is the political will of the member states as regards payment of taxes.

¹⁴⁷ Indicators of aggressive planning. [Electronic resource] // European Commission [Electronic data] 2025, URL: https://taxation-customs.ec.europa.eu/system/files/2018-03/taxation_papers_71_atp_.pdf (Accessed: 12.12.2025).

In other words, there is no imperative provision concerning unlawful tax planning, instead there are only interpretations. At the same time, the analysis of the global practice of tax planning leads to the idea about paradoxicality of the taxation policy as such – taxation subjects should pay as much tax as possible, which leads to hyper control of the banking system and the system of payments. Moreover, at present a draft Directive is being developed for the European Union Member States containing provisions obliging tax advisers to coordinate their tax strategies and solutions for clients with tax authorities. Finally, this will lead to the situation when tax authorities prefer tax arrangements which take into account national interest to maximum extent, thus ignoring the interests of other countries.

If the provisions concerning tax planning are stepped up to certain maximum, the taxpayer is obliged to apply to the tax authority and request paying attention to a transaction and to clarify that all taxes are paid at performing any transaction or any settlement.

On one side, there is the provision: if a tax advantage and tax savings are obvious, this is not a criminal offence or a reason for paying a higher tax, however, there should be a business goal and substance.

Theoretically, this is nothing more than the basis for checking, however, at the same time it does not strike as an encouraging motive for business, as tax authority will interpret it any reduction of tax being tax evasion, and when such tax evasion is proven, this will be named as aggressive and unlawful tax planning, and the interest of a tax authority concerning the transaction can emerge without any objective grounds thereof.

In the particular case it is about whether the opinion of any tax authority can be used as the basis at resolving the issue of permitted tax planning, as this approach will inevitably lead to impossibility of any tax planning because of the risk to be declared as unlawful. In this regard it should be noted that within the framework of the European law unlawful tax planning is considered neither a criminal offence and nor a legitimate reason to initiate criminal proceedings, as for tax authorities it is important that the tax is paid or a fine or interest is collected along with that.

2.2 Presentation of the approaches of the Court of Justice of the European Union on matters of tax planning in court rulings

Traditionally, on the EU level the tax planning was considered lawful having satisfied the criteria noted by the Court of Justice in the case *Cadbury Schweppes* (C-196/04). Thus, a tax structure can be declared as abusing legal provisions (abusive structure) and is a wholly artificial arrangement if the below 3 criteria are satisfied:

- 1) existence of the main intention to gain tax advantage,
- 2) the structure does not reflect the economic reality,

3) the company is not engaged in effective economic activity.

At the same time CFC rules do not contradict the freedom of establishment.

Regulation concerning fighting of tax avoidance and artificial profit shifting in the practice of the EU Court of Justice includes regulation BEPS for prevention of tax base erosion and profit shifting; introduction of the European Directive concerning countering of tax avoidance (Anti-tax avoidance directive – ATAD)¹⁴⁸; update of the European Directive on administrative cooperation encouraging development of information exchange between Member States on international tax matters; international information exchange about beneficiary owners of companies and beneficiaries; the international standard for automated exchange of information on financial accounts (Common Reporting Standard, CRS).

It is important to note that the main principles of ATAD include the rule of controlled foreign companies (CFC) to prevent transfer of profit to jurisdictions with low or zero tax rate; the rule of diversion to prevent double tax avoidance concerning particular profit; avoidance of taxation to prevent transfer of assets by companies exclusively for the purpose of avoiding taxation; restriction of interest payments to discourage companies from signing artificial agreements on restructuring of loans aimed at minimisation of taxes; hybrids to prevent the use of national differences in tax legislation by companies for the purpose of tax evasion; and GAAR to counter aggressive optimisation of taxation if other rules are not applied.

As further measures of de-offshoring, there is in-depth audit of the company structures and ownership structures, risk identification; transfer of companies from offshore jurisdictions to jurisdictions with acceptable taxation and transparent reporting; substance: a domestic director, competent personnel, an account in a local bank, etc.

Generally, the analysis of the case law of the EU Court of Justice on matters of tax planning allows distinguishing three groups of arrangements used by groups of companies within the European Union and arising questions as regards permissibility of their use:

1. Arrangements for payment of dividends (*Credit Suisse*).
2. Arrangements for redemption, merging and restructuring (*Belgium v Truck Center SA*).
3. Arrangements for shifting loss and profit (*Marks & Spencer*).

¹⁴⁸ Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, 12.07.2016. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: Directive - 2016/1164 - EN - EUR-Lex (Accessed: 12.12.2025).

2.2.1 Arrangements of payment of dividends

Case *Credit Suisse*

The issues of tax planning and practice of economic activity of the EU Member States are important at present. In the case involving the company *Credit Suisse*,¹⁴⁹ which later became the subject of hearing by the EU Court of Justice, the Supreme Court of the Netherlands attempted to strike a balance between tax planning and tax evasion in its ruling.

The case of *Credit Suisse* is related to the arrangements of payment of dividends. The Swiss bank, via a chain of transactions, by accounting interest purchased a company possessing a considerable amount of free financial assets, this chain of transactions was performed by using intra-group loans, the interest for which was used to cover expenses and ultimately a company was purchased in the Netherlands. Following acquisition of the title, dividends started flowing “upwards” along the chain and all the outstanding loans were repaid. Thus, on the account of taxpayers the purchase of a profitable company was financed by using lawful arguments for not paying taxes on interest.

The dispute is about whether the group of the Swiss bank was aware of the expected results of this chain of financing, in other words, whether this outcome resulting from all the actions was expected. Therefore, the first question addressed to the EU Court of Justice was about the possibility of using this arrangement, as well as about its permissibility and lawfulness. On one side, the bank artificially used the opportunity, as according to the European regulation, dividends transferred by a subsidiary to the holding company are exempted from taxation, however, they assumed artificial expenses, as well as performed transactions too soon (according to the viewpoint of tax authorities).

According to the Dutch law, companies belonging to multinational groups of companies may finance their operations in two ways: through debt obligations and shares of stock. Essentially all the EU Member States tax interest paid on debt obligations, contrary to payment of dividends for shares of stock, which are usually exempted, although interest presents a usual form of remuneration for provision of financial resources for financing the capital of the company.

The choice between those two arrangements used within a group of companies depends on the tax regime, which is different according to the arrangement, which finally leads to over-financing through debt obligations. Following from the above, taxable profit which is taxable in the territory of one EU Member State at a high tax rate and received by the company which is a part of a multinational group, can be reduced by distributing debts between firms

¹⁴⁹ Credit Suisse Securities (Europe) Limited, Credit Suisse International, Credit Suisse (UK) Limited, Credit Suisse AG, 19.07.2019. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=\(Credit\)+AND+\(Suisse\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=(Credit)+AND+(Suisse)) (Accessed: 12.12.2025).

inside the group. Additionally, taxation of relevant interest on debtors' debt may be avoided by transferring such profits to jurisdictions with low taxes or tax-free rates.

The taxpayer distributed debt obligations of the group in the newly purchased profitable companies in the Netherlands (these are non-affiliated, profit-generating companies). In essence, this was taxable profit from the Netherlands "received" from the third parties, and intra-group interest was deducted and withheld from it without justification and at an elevated rate. Financial transactions present true financial need for the group of companies; however, the complexities, related to redistribution of debt obligations by using purchased and profit-generating Dutch companies, depend on the Dutch tax policy. In this case, the question was about whether the right of deduction of interest of such debt obligations be restricted following the adoption of strict Dutch legislation concerning fighting against erosion of the tax base (Article 10a of the Act on Corporate Income Tax of Corporations of the Netherlands). It is the answer of the Supreme Court of the Netherlands to this question that strikes a balance between lawful tax planning and unlawful tax evasion, which became the subject of detailed analysis carried out by experts.

The ruling on *Credit Suisse* includes references to four different cases in which a considerable number of taxpayers were involved.

During the period from 2005 to 2008, the taxpayer, in particular, the group of companies *Credit Suisse* acquired non-affiliated Dutch companies. Within the shortest possible term following acquisition, these companies divested all business assets and continued existing only on the basis of cash flows and shares. In the result of the above referred divesting of assets and following capital increase, the tax on corporate profit was assessed in the Netherlands.

The considerable debt of the third party incurred due to the financial and business activities in United Kingdom within the framework of the group of companies following acquisition of the Dutch company was transferred via such a recently acquired "profitable" company leading to expenses related to payment of interest in the Netherlands, and such expenses had to be deducted from earlier gained capital from the Netherlands. On the other side, the foreign profit to which such payment of interest is related was excluded from the taxable base in compliance with the legislation of the Netherlands.

In this regard, there was non-conformity between interest expenses (taxable) and the relevant foreign profit (exempted from taxation), which led to reduction of the taxable base in the Netherlands. The resulting disputed situation can be presented graphically within the framework of a scheme by indicating a range of stages of development of financing (see Figure 2.3):

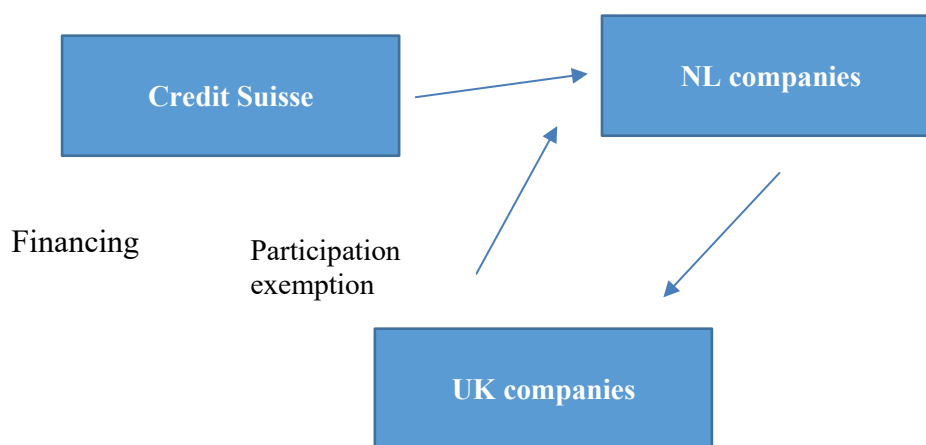


Figure 2.3 Content of the *Credit Suisse*

1. Purchase of Dutch companies with accumulated profit at *Credit Suisse*.
2. Financing of UK companies through loans in NL.
3. Interest from UK companies is not taxed in NL (participation exemption).
4. Interest for the bank loan is paid on the account of the accumulated profit in NL companies.
5. Reduction of the taxable base in Holland.
6. Shifting of loss within the European group.

Before the EU Court of Justice had adopted its ruling in the case *Bosal*,¹⁵⁰ the legislation of Holland conversely provided that interest expenses incurred by the Dutch holding company in relation to operation of its subsidiaries can be subtracted, only if such expenses have indirect effect on gaining profit which is taxable in the Netherlands. This legislation affects mainly the principle of territoriality. However, in the case *Bosal* the EU Court of Justice pointed out that the principle of territoriality cannot justify such legal provisions of the Netherlands and would be required to accept deduction of the interest even if such deduction exempts foreign profit in relation to which interest was paid from taxation. In the literature such asymmetric regulation concerning expenses exempted from taxation and relevant income exempted from taxation is referred to as “*Bosal gap*”.¹⁵¹

In the *Credit Suisse* case, it was concluded that the taxpayer reports deduction of interest expenses in relation to the “received” profit of the Dutch company, even irrespective of that, these expenses did not affect gain this profit in the Netherlands, but instead contributed to that of the foreign profit (in United Kingdom). However, this

¹⁵⁰ *Bosal Holding BV v Staatssecretaris Financien*, 18.09.2003. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-168/01> (Accessed: 12.12.2025)

¹⁵¹ Weber, D. 2003. The *Bosal* Holding Case: Analysis and Critique // *EX Tax Review*. No 4., p. 220–230.

deduction was not accepted by the tax authorities of the Netherlands, therefore eliciting a compulsory re-assessment which was based on the doctrine of abusive practice.

In compliance with the Danish doctrine of abusing the right, the economic transaction can be re-assessed or modified due to tax reasons for revealing its true goal. Conclusions of the doctrine are applied if the basic or the only reason of the taxpayer to perform a transaction or a set of such transactions is avoidance of payment of taxes (the reason is subject to verification by the conducting of a “test of subjectivity”) and, if at examining any consequences, it is obvious that the transaction contradicts the object and the goal of the legal provision (the test of objectivity).

The Supreme Court of the Netherlands stated that, a deduction of interest can be refused on the basis of the above doctrine in the case, when interest is deducted from the profit which was there before purchase of the companies – the taxpayers by the company *Credit Suisse*. In the result, deduction of the interest was eliminated within the scope of the amount of the “gained” profit and, accordingly, transfer of resources found to be impossible. As regards the assessment of income and obtained profit after acquisition of the company by the group *Credit Suisse*, the Dutch doctrine on abusive practice is not applied, which means that taxpayers may lawfully refer to the ruling in the case *Bosal* and claim deduction of the interest.

Hence, the Supreme Court of the Netherlands did not consider such acts as violation of the free movement in compliance with TFEU.

At resolving the dispute in the case, the Supreme Court of the Netherlands defined the company “making” profit (within the framework of the corporate tax obligations) in a very detailed manner. This definition is based on the concept of “gaining profit” by referring to the Dutch tax provisions (which is the main business principle). Interest expenses may be reimbursed by hidden benefits and advantages which have not been implemented for the time being in compliance with the provisions of the Dutch tax law until the moment when the shares of stock of such a company bringing profit were transferred to the banking group.

The Dutch Court, by following the above referred approaches of the EU Court of Justice, confirmed the difference between gained and implemented profit by referring to the difference from the point of view of economic risks assumed by the new owner following such acquisition. In this case, the implemented profit is an accurate and clear category, while the gained profit may or may not be implemented in future. Thus, the Supreme Court demonstrated a practical criterion of differentiation between lawful tax planning and unlawful tax evasion.

The boundary between gained and implemented profit is a valuable difference also from the technical point of view. For quite a long time the Dutch law included provisions which defined trade of profit and loss of companies, according to which the loss of companies until acquisition by another company cannot be regulated (written off) following such acquisition.

However, transfer of profit and loss within a year following acquisition was allowed until 2011 because of operation of the provisions of countering abusive practices stipulated by Article 20a of CITA. This legislative gap was eliminated in 2011, which meant that the Dutch legislation no longer allowed establishment and operation of this type of structure of the bank *Credit Suisse*, at least while the company transfers interest expense to the implemented profit. The question is about whether the same applies to payment of interest on the account of received, still not implemented profit and whether Article 20a applies to trade of the so-called hidden income, as well as loss.

Restriction of deduction of the interest was not applied until 2008. As mentioned above, the Supreme Court of the Netherlands also analysed the question about whether deduction of the interest can be refused based on the special rule on countering erosion of the taxable base in the Netherlands as defined by Article 10a. This Article refers to the special rule of countering erosion of the tax base and it was published in 1996.

From the broad viewpoint, this provision is aimed at preventing situations when within the same group of companies shares of stock are converted into debt obligations, while from the point of view of the group of companies as a whole, the amount of debt in relation to the equity capital does not change because the internal loans are not taken by the group of companies as the inter-group loans are used. To some extent these provisions may be viewed as codification of the case law of the Netherlands which was developed on the basis of application of the basic doctrine concerning fighting abusive practices. Until now this has been an important restriction of deduction of interest within the system of corporate tax law of Holland.

Article 10a of the Corporate Income Tax (CITA)¹⁵² provides that interest expense incurred by the Dutch company in relation to a loan for the benefit of another company are generally exempted from taxation if this loan is categorised as a measure of financing of intra-group transactions, in other words, the so-called tainted transactions.

Such transactions can be divided into three categories:

- 1) distribution of profit or return of capital by the taxpayer within the group of companies or related third party;
- 2) capital contribution or financial resources of the taxpayer within the group of companies;
- 3) acquisition by the taxpayer which provides for purchase of another company which becomes a related party.

The *Credit Suisse* case is an example of the second category. At present two types of tax evasion are distinguished for taxpayers; the first one, is related to deduction of interest which

¹⁵² Staatsblad van het Koninkrijk der Nederlanden. [Electronic resource]. Electronic data 2025. // URL: <https://zoek.officielebekendmakingen.nl/stb-1996-651.html> (Accessed: 12.12.2025).

is not prohibited if the taxpayer can prove that the received interest was duly taxed by the creditor – this is appropriately verified through the test on checking the reason. The second, on the other hand, concerns the deduction of interest allowed under the condition that the taxpayer can prove the contingency of the intra-group loan and the suspicious transaction on the planning of business operations.

The first type of tax evasion may be applied if the creditor of the group which provides the loan to the taxpayer pays a considerable compensation duty against the profit to be gained in the form of interest. This arrangement was a safe “harbour” until 2008. This type of compensation duty is provided if the interest income corresponding to it was taxed in relation to the creditor within the group at least on the level of 10 %.

Taking into account the fact that the creditor of the group conforms with the condition of compensation payment in the *Credit Suisse* case, the tax inspector did not have the legal basis to act like this regarding deduction of interest based on Article 10a. Accordingly, until 2008 restrictions on deduction of interest were not applied when the creditor acted in compliance with the rule concerning the compensation payment.

The described evasion arrangement related to compensation taxation is no longer the “safe harbour”. The statutory law provides the possibility for the tax inspector, in case of sufficient taxation in relation to the interest income of the creditor, to demonstrate that the loan or another transaction was performed for the purpose of economic justification. This evaluation is close to the second type of arrangement where the taxpayer has to prove that the loan or the transaction has mainly business-related justification. However, if the creditor conforms with the condition concerning the compensation payment, the burden of proof lays with the tax authorities.

This is pertinent to the amendment of legislation, and the main question is whether the Dutch taxpayer may deduct interest of the intra-group loan when the third party, being in the same circumstances, provides payment (group fund) to the creditor of the group.

The Supreme Court of the Netherlands decided that the loan which was lawfully issued by a related party is within the scope of restriction of deduction of the interest. Accordingly, the taxpayer was forced to resort to the scheme of “appeal”. The Court also pointed out that the taxpayer can always successfully resort to the arrangement when the third party has provided the loan. In order to assess if the loan was provided by the third party, it is necessary to consider the term of providing the loan, the schedule of repayment, the interest, the amount and the date of repayment.

The tax inspector does not have sufficient legal basis for qualification of tax planning measures as going beyond the scope of lawfulness if the intra-group loan was issued based on

the same conditions as the loan provided by the third party. Therefore, in compliance with the test on business purpose provided by Article 10a, the parallel between the intra-group loan and the loan from the third party is the “safe harbour”. There is no necessity to evaluate the reasons of such transactions in similar cases.

However, according to the situation in 2018, the legislative bodies of the Netherlands had proposed a range of new tax provisions. In response to the ruling in the *Credit Suisse* case, proposals on amendment of taxes led to legislative proposals for making Article 10a of the Act on Corporate Tax stricter. There were proposals according to which, if there was a loan from the third party, the taxpayer should (contrary to the court’s ruling) conclude that the transaction had effective economic substance since the beginning. However, the ruling of the court concerning the “safe harbour” cancelled the validity of the proposed legislation.

Starting from 2018 there is a different approach to the situation when a loan is provided by the third party directly to the Dutch taxpayer, and the situation where such a third party provides this loan indirectly through a group of companies. The Dutch taxpayer will not face the effect of Article 10a of the Act if it receives the loan directly from the third party, as long as the group of companies acts as the guarantor of this loan.

In case of an intra-group loan which has directly arisen from a loan of the third party the taxpayers in the Netherlands have to persuade the tax authority that the term of the loan, the method of payments, the interest amount, the amount and the date of entry into force of the intra-company loan and the loan of the third party have enough similarities. Moreover, the taxpayer in the Netherlands has to demonstrate that the suspicious transaction has more important economic reasons. At the same time, the taxpayer will generally be able to satisfy this requirement easily if there was acquisition of the third party as the subject of economic activity.

However, the situation is much more difficult if there was a suspicious transaction. It can also be expected that the case law based on the above referred resolution of the Supreme Court of the Netherlands will mainly focus on the issued about what business reason is deemed to be permissible and related to the case by substance as regards the suspicious transaction.

In other words, the conclusions of the *Credit Suisse* case require from companies serious revision of the justification of cross-border transactions, in particular, detailed assessment of whether the relevant justification of the transaction is considered economically viable externally, in particular, in the situation when it is about directly or indirectly related companies.

For example, the *Credit Suisse* case was pronounced to be in connection the tax legislation within the context of the tax regime for banks which was potentially contradictory to the EU legislation. Conclusions in this case can be useful in the situation when, within the context of tax planning, the company wishes to refer to the tax regime not compatible with the EU legislation. *Credit*

Suisse stated that introduction of the tax was unlawful on the basis of the state aid described in Articles 107 and 108 of the Treaty on Functioning of the European Union. The company assured that the tax was imposed within a restricted period amounting to approximately four months, and this means that it was actually imposed only to the banks which, according to the practice, policy or expectations received bonuses during this particular period.¹⁵³

In the situation when the court notes that companies in this case did not establish selective advantage, the bank tax was not a measure of the state aid within the scope of Article 107 (1) of TFEU. In the situations when the state aid is provided in relation to a tax measure, the general rule is that companies not providing the aid cannot return the paid tax which they have paid, but from which others were exempted on the basis that the effect of allowing them to act in this way would be extension of the aid.¹⁵⁴

Thus, the entities that are obliged to pay the mandatory duty cannot rely on the conclusion that the exemption used by other entities is the state aid aimed at avoiding payment of this duty. The aid is conditional on the existence of direct competition between the companies and the introduced bank tax was only applicable to one category of banks; it should be noted that the state is not liable for introduction of this tax in this case, and in tax planning it should be taken into account that the state-imposed taxes affecting only a part of the companies within a sector are not always unlawful, which may be exempt them from payment of such taxes.

For example, according to the courts, it is clear from the case *Banks and Boiron* that the key basic principle is that any granting of legal protection should not have the effect of expanding or increasing of the state aid as benefits, and that paid amounts will only be returned if the tax exemption in this case presents due means for restriction of the aid. In the case *Boiron*¹⁵⁵ the introduction of the tax not only amounted to the aid as such, it was so much as developed for this very purpose. Also, in the case *Van Calster*¹⁵⁶ the duty was materialised for financing subsidies.¹⁵⁷

¹⁵³ Credit Suisse Securities (Europe) Limited, Credit Suisse International, Credit Suisse (UK) Limited, Credit Suisse AG, 19.07.2019. [Electronic resource] // The High Court of Justice. Electronic data 2025. URL: [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=\(Credit\)+AND+\(Suisse\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=(Credit)+AND+(Suisse)) (Accessed: 12.12.2025).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Laboratoires Boiron SA v Union de Recouvrement des Cotisations de Securite Sociale et d'Allocations Familiales*. 14/12/2004. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 12.12.2025. URL: <https://op.europa.eu/en/publication-detail/-/publication/3ea61aad-c611-4403-9cbc-51c5cb1940d6/language-en> (Accessed: 12.12.2025).

¹⁵⁶ *Belgische Staat v Eugène van Calster and Felix Cleeren*, 21.10.2003. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=E03DF39BEAB455B4DFA310FF6CC93881?text=&docid=48339&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3375378> (Accessed: 12.12.2025).

¹⁵⁷ *Ibid.*

However, in this case, as it was noted at the court, the intent of the tax was not to of an advantageous nature to the non-taxed banks, as the special tax was not intended for providing advantage to the banks whose bonuses were not taxed because they were outside the period of its validity, it was rather intended for taxing the banks conforming to its conditions following the financial crisis, trying to improve the financial position of the government. Although it might have been better for these banks not to pay the tax, this, as the court has pointed out, does not differ in any way from the usual situation, and thus the court concludes that the complaints of the companies are not justified. Thus, the court rejected the applicant's claim concerning reimbursement of loss of the paid tax, and the litigation was terminated with a negative outcome for the *Credit Suisse* group of companies.

It looks that this court ruling is justified because the introduced tax was aimed at attracting additional funds to the state budget after the global financial crisis and not exempting some banks from the relevant tax, while other banks were taxed. However, as the tax was only applied during a short period of time and in relation to a particular group of entities paying bonuses during the relevant period, without causing damage for other banks, the situation emerged when payment of tax could be scheduled to another period of time without paying the tax.

B Skatteministeriet v T Danmark, Y Denmark Aps company was presented the requirement to pay the income tax based on the dividends distributed to non-resident companies which are not viewed by tax authorities as beneficiaries of these dividends and which, accordingly, are not entitled to the exemption from the income tax in compliance with the legislation of the European Union. The Taxation Ministry of Denmark appealed against the resolutions whereby the National Tax Appeal Council considered that the companies should be exempted from the tax on dividends distributed by the organisations established in another Member State.

In this case, the European Union Court of Justice concluded that: “[..] exemption from withholding of the profit tax paid by a subsidiary to its holding company should be rejected by state authorities and courts in relation to taxpayers in case of fraud or abusive practice, even if there is not national provision or treaty provision providing for such rejection.”¹⁵⁸

Thus, it should be noted that, although national legislations do not provide for exemption from tax benefits based on non-compliant behaviour, the legislation under European Union still ensures this right under the condition that abusive practice is in fact established. However, in this case disputes arise regarding the concerning criteria of establishment of abusive practice, including those in relation to lawful tax planning.

¹⁵⁸ Skatteministeriet, T Danmark, Y Denmark Aps 26.02.2019. [Electronic resource] // *Electronic data 2025*. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0116> (Accessed: 12.12.2025)

In order to prove disproportional practice, it is necessary to refer to a range of objective factors which demonstrate that, although the conditions defined by the legislation of the European Union, were formally satisfied, the goal of the law was not attained. Presence of a range of features may present abusing the right upon the condition that these features are objective and successive. Such features may include, inter alia, presence of non-economic agents, as well as the purely formal nature of the group of companies, financial arrangements and loans.¹⁵⁹

Thus, the rules of exemption from the income tax of dividends distributed by a company resident in one Member State to a company resident in another Member State are not applied in the situations when fraud or abusive practice has been found, and in this case the company may not rely on application of the freedoms recognised by TFEU for doubting the legislation of the first Member State governing taxation of such dividends.¹⁶⁰

It can be concluded that in this case not only the objective factor—the conditions of receiving tax benefits – was taken into account, but also the regulatory goal was not achieved; additionally, the subjective factor—the circumstances evidencing that the company is artificially creating the conditions for receiving tax advantage, which generally defines the concept of non-compliant behaviour.

However, according to the author's opinion, in this case there may be problems as regards establishment and proving that the conditions, at which the company is entitled to tax credit are “artificial”, in particular, the only goal is gaining the tax credit, and the possibility of tax planning is excluded. If the most favourable type of taxation is selected from among several alternatives, such behaviour will be viewed as a violation and tax avoidance.

Besides the above, the EU Court of Justice does not demand the state authority to identify the subject, which at its opinion is the beneficiary owner of such dividends, evidence of tax authorities regarding presence of such circumstances can be quite indirect.

In the case *Skatteministeriet v T Danmark, Y Denmark Aps* the criteria of establishment of unlawful behaviour were also used by the EU Court of Justice. In this case, the Taxation Ministry of Denmark required the companies to pay the income tax upon payment of interest to non-resident companies which were not viewed by the tax authorities as beneficiaries of this interest and which, due to this reason, could not use any exemptions provided by Directive 2003/49 for exercising the possibility of not paying the tax.¹⁶¹

¹⁵⁹ Skatteministeriet, T Danmark, Y Denmark Aps 26.02.2019. [Electronic resource] // *Electronic data 2025*. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0116> (Accessed: 12.12.2025)

¹⁶⁰ *Ibid.*

¹⁶¹ N Luxembourg 1, X Denmark A/S, C Danmark, Z Denmark ApS v. Skatteministeriet. 26.02.2019. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211053&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=2441950> (Accessed: 12.12.2025).

Besides the above, the EU Court of Justice concluded that exemption from payment of the tax for interest on received loans of the associated company established in another Member State (in compliance with the obligation to withhold the tax for interest) is only applicable to the beneficiaries of such interest, i. e. to the entities who gain benefit from payments from the economic point of view and which therefore may decide on the use of relevant amounts, by analogy to the conclusion made in the case T Denmark and Y Denmark Aps concerning dividends. According to the opinion of the EU Court of Justice, exemption from payment of the tax for interest on received loans should be refused to the taxpayer in cases of fraud or abusive practice, even if there are no national provisions or treaty provisions providing for such refusal.¹⁶² Thus, in this case also the subjective criterion of the wish was taken into account, in particular, whether the undertaking has created artificial conditions under which the tax exemption should be implemented exclusively for receiving the exemption from payment of the tax. The criteria of existence of this subjective criterion include also the presence of companies-intermediaries without economic substantiation, as well as purely formal nature of the group of companies, financial arrangements of loans.¹⁶³

However, it can be said that the above referred conditions should be viewed as objective criteria, as the transactions of the company and their possible fictitious nature is reviewed critically instead of the subjective opinions of the company board members. Therefore, tax planning by using actual transactions by selecting business partners should not be viewed as a violation, taking into account the possibility of selecting the most favourable tax regime as one of the factors.

On the other hand, at the hearing, the cases on distribution of dividends in tax disputes with the countries not subject to the Danish legislation, the EU Court of Justice in its ruling dated 13 November 2019 in case C-641/17 heard the litigation between the *Pension Plan of the British Columbia (in compliance with the legislation of Canada) v. Finanzamt München Abteilung III* concerning reduction of the taxable profit on the account of deduction of pension reserves.

In this case, the goal of the pension fund amounted to provision of old age pensions to former state officials in the province of Canada, which is a constituent part of technical reserves on its Balance Sheets corresponding to the liabilities under pension guarantees. The fund was fully exempted from the income tax in Canada. The fund indirectly held shares in the portfolio

¹⁶² N Luxembourg 1, X Denmark A/S, C Danmark, Z Denmark ApS v. Skatteministeriet. 26.02.2019. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211053&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=2441950> (Accessed: 12.12.2025).

¹⁶³ *Ibid.*

of mutual funds which constitute the capital of public companies in Germany, up to maximum 1 % of the capital of these companies. Dividends received from these shares are taxed for the capital growth in Germany at the rate of 15 % according to the provisions of the tax treaty between Germany and Canada.¹⁶⁴ The fund applied to the tax authorities of Germany and submitted a request to exempt it from payment of the capital growth tax and to reimburse it as the paid tax, by stating that its treatment as the non-resident pension fund has been less favourable than that applicable to resident pension funds which could receive dividends without paying the tax as they could deduct the capital profit tax from the withheld capital growth tax at assessing the tax amount or receive almost full reimbursement of the latter, however, the tax authority refused to satisfy this claim.¹⁶⁵

In the light of these considerations, the Finance Court of Munich sent questions to the European Court of Justice regarding reduction of the taxable profit and possible restriction of the free movement of capital in the situation when the provision of the pension of the non-resident is not exempted from the capital growth tax while the relevant distribution of dividends by the domestic pension fund do not increase the corporate income tax or increase it only relatively little, different from the domestic pension funds who can considerably reduce the taxable profit.¹⁶⁶

In this case, the Court of Justice of European Union concluded that the legislation of European Union does not allow taxation of dividends distributed to the non-resident pension fund for the purpose of further pension savings, without applying the same tax advantages as those in relation to the dividends distributed to the resident companies.

Thus, in compliance with the above referred considerations, *the author points out* that within the framework of tax planning it is possible to apply the principle of equality concerning received tax benefits and reduction of the taxable profit for foreign pension funds (or social insurance funds) when, in compliance with the national legislation, such benefits are provided for the resident funds.

Besides the above, this conclusion was drawn by an earlier ruling of the EU Court of Justice dated 8 November 2012 in the case C-342/10 between the European Commission and the Kingdom of Denmark, the Netherlands and Sweden, the Republic of France and United Kingdom of Great Britain), where the Court of Justice of European Union stated that the Member State of the European Union has violated the legislation of European Union by

¹⁶⁴ College Pension Plan of British Columbia v. Finanzamt Munchen Abteilung III. 13/11/2019. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=220611&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=4177794> (Accessed: 12.12.2025)

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

maintaining discriminatory taxation of pension funds.¹⁶⁷

On the other side, in its ruling dated 8 March 2017 in the case *C- 448/15 Belgische Staat v Wereldhave Belgium Comm*, VA court heard the dispute between the parties concerning taxation of dividends at zero rate.

In this case, the Belgium limited liability company *Wereldhave Belgium* holds 35 % and 44 % of the companies *Wereldhave International and Wereldhave* registered in compliance with the legislation of the Netherlands. *Wereldhave*, in turn, owns *Wereldhave International*. *Wereldhave Belgium* distributed dividends to *Wereldhave International and Wereldhave*, and the companies submitted an application for being exempted from the advance tax for dividends by stating that they were “parent companies” and 0 % tax rate is applicable. However, as no reply was received from tax authorities for several months following receipt of the application, the companies applied to the court and the Appeal Court of Brussels submitted questions to the Court of Justice of European Union for adoption of the preliminary ruling.¹⁶⁸

The Court of Justice of European Union concluded that the legislation of the Member State, according to which the withholding tax for capital growth and the right to movable property is assessed from dividends paid by a subsidiary established in the Member State, within the framework of the taxable collective investment undertaking established in another Member State for the purpose of taxation of corporation is withheld at zero rate, does not violate the European Union law.¹⁶⁹

However, in its ruling dated 31 January 2020 in the case *Köln Aktienfonds Deka v. Staatssecretaris van Financiën* the Court of Justice of European Union analysed the dispute between *Köln fund* and the Minister of Finance of the Netherlands concerning the dividends received by the Fund and paid to the companies established in the Netherlands whose shares were held by it.

The Fund considered that the distributed dividends are not taxable, as until amending the law, natural entities were allowed to deduct the income tax in the Netherlands from dividends distributed by the general fund in the Netherlands if these dividends were subject to the corporate tax in Germany. The amendment restricted the scope of application of the tax to maximum one half of the income tax in the Netherlands and could no longer be applied if the general fund decided to deduct the income tax from its profit. Therefore, the Fund applied

¹⁶⁷ European Commission v. Republic of Finland. 08/11/2012. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129468&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=4188893> (Accessed: 12.12.2025).

¹⁶⁸ *Belgische Staat v. Wereldhave Belgium Comm*. VA, *Wereldhave International NV, Wereldhave NV*. 08.03.2017. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188663&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=4180270> (Accessed: 12.12.2025).

¹⁶⁹ *Ibid.*

to the tax authorities of the Netherlands by submitting the request to reimburse the tax on dividends, however, it was rejected and the Fund submitted the claim to the Supreme Court of the Netherlands which submitted the questions to the Court of Justice of European Union for adoption of the preliminary ruling.¹⁷⁰

The Court of Justice of European Union stated that the national scheme according to which the non-resident investment fund does not reimburse the tax withheld from dividends received from the companies established in this Member State, as no evidence was provided that the shareholders are entitled to reimbursement of the tax, conforms with the legislation of European Union if the condition of reimbursement of the taxes for non-resident investment funds are less favourable.¹⁷¹

Based on the above it can be concluded that the Court of Justice of European Union is applying the rules according to which the tax authorities may require non-residents to submit evidence concerning compliance with the conditions of reimbursement, however, such rules should not be discriminatory in comparison to the requirements applicable to the residents. Accordingly, within the context of tax planning an undertaking may rely on the principle of the equality of the parties, freedom of establishment and free movement of capital and prohibition of discrimination for the purpose of receiving tax advantage or benefits for residents and demand application of the same evidence and conditions and criteria as applicable to residents.

Tax evasion in transactions involving real estate

In the case *Edward Cussens, John Jennings, Vincent Kingston v. Entrepreneurs* referred to by Mr. Brosnan were co-owners of the development area in Ireland where they built 15 recreation houses for sale. Until their sale, several transactions were performed with the related company *Shamrock Estates Limited*. Following this, two lease agreements were signed with *Shamrock Estates Limited* which leased the real estate for 20 years and signed the lease agreement whereby *Shamrock Estates* leases the same real estates to entrepreneurs for a period of two years.¹⁷²

One month later, both agreements were terminated by mutual agreement of the parties and the entrepreneurs resumed full title to the above real estate which they in turn sold to

¹⁷⁰ Köln-Aktienfonds Deka v. Staatssecretaris van Financiën. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <https://curia.europa.eu/juris/liste.jsf?num=C-156/17> (Accessed: 12.12.2025).

¹⁷¹ *Ibid.*

¹⁷² *Edward Cussens, John Jennings, Vincent Kingston v. T. G. Brosnan*, 22.11.2017. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=197003&pageIndex=0&doclang=lv&mode=lst&dir=&occ=first&part=1&cid=6932071> (Accessed: 12.12.2025).

the third parties who acquired full title to it. In compliance with the Irish legislation, this sale is not taxable by VAT, as the relevant real estate was first leased for a long term by assessing VAT.

The tax authorities asked the traders to pay additional VAT at the sale of the real estate, as they considered that the relevant lease agreements providing for lease and return of the property were the first transfer which was performed artificially, i. e. in order to avoid further taxation of the sale. However, the parties involved objected to the authorities' request, stating that these conclusions did not align with those drawn in the *Halifax* case.¹⁷³

In this case, the European Union Court of Justice concluded that the principle of non-compliance should be interpreted as follows: regardless of the national legislation, the tax authority has the right to refuse exemption from the tax on the sale of real estate until the ruling in the *Halifax* case (C 255/02 dated 21 February 2006), which does not contradict the principles of legal certainty and the protection of legitimate expectations.¹⁷⁴

Moreover, the Court of Justice states that the principle of non-compliant use should be interpreted as meaning that for the purpose of identifying the main goal of the relevant transactions leading to receiving tax advantage (based on Paragraph 75 in the *Halifax* case), the subject of reviewed lease agreements should be considered separately in each particular case.¹⁷⁵ Thus, it can be concluded that the principle of non-compliance use should be interpreted as meaning that this transfer of real estate can lead to tax advantages contradictory to the goals of the legislation if the owner or the lessee did not use this real estate until its sale to the third parties. In this regard the court again took into account both objective and subjective criteria, meaning that the traders complied with all the conditions for exemption, however, at the same time there was evidence that the traders complied with the conditions formally, just for avoiding payment of taxes by circumventing the true goal of the legislation, leading to exemption from the tax.

Danish cases

The opinion of the EU Court of Justice concerning the results of hearing of a range of the so-called Danish cases, in the beginning of 2019, is most active. On 26 February 2019 two joined cases C- 116/16 and C-117/16 were heard.

The central question in this case was the interpretation of Council Directive 90/435/EEC “On the common system of taxation applicable in the case of parent companies and subsidiaries

¹⁷³ Edward Cussens, John Jennings, Vincent Kingston v. T. G. Brosnan, 22.11.2017. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=197003&pageIndex=0&doclang=lv&mode=lst&dir=&occ=first&part=1&cid=6932071> (Accessed: 12.12.2025).

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

of different Member States” considering amendments made by Directive 2003/123/EC of 2003, as well as the interpretation of Articles 49, 54 and 63 of TFEU. The parties applied to the court regarding the actions of the Danish Ministry concerning taxation within the relations of two Danish companies (*T Danmark and Y Denmark Aps*)¹⁷⁶ and their obligation to pay the withheld tax because the relevant companies distributed dividends to non-resident companies of Denmark which, according to the opinion of the Danish tax authorities, are not the beneficiary owners of these dividends, accordingly, the companies were not entitled to application of the provisions of Directive 90/435 allowing tax exemption in such situation. In order to resolve the case, the EU Court of Justice analysed both the general terms of the Model Tax Convention¹⁷⁷ and Directive 90/435, as well as the legislation of Denmark concerning dividends and the treaties of Denmark with other EU Member States for avoiding double taxation.¹⁷⁸

Opinion of Advocate General J. Kokott. Case 117/16 concerns the so called “avoidance” of payment of the withheld tax within the group of companies in relation to distribution of dividends. Within the group the dividends were distributed by the Danish “operational” company to the shareholders in Cyprus, which, in turn, transferred them (as loan interest) to their shareholders in the Bermuda Islands, which, in turn, distributed them also as dividends to the holding company of the group which is the USA resident. These arrangements were used for receiving the benefit provided by the USA legislator for dividends repatriated by the holding company which is the USA resident to the USA and used for particular goals. The key question concerns the boundaries of lawfulness of this type of tax planning. Further in the text several arrangements will be presented which were analysed as to the lawfulness of tax planning by the EU Court of Justice (see Figures 2.4, 2.5, 2.6, 2.7, 2.8 and 2.9).

¹⁷⁶ Skatteministeriet, T Danmark, Y Denmark Aps 26.02.2019. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2441148> (Accessed: 12.12.2025)

¹⁷⁷ OECD Model Tax Convention on Income and On Capital. [Electronic resource] // OECD. Electronic data 2025, URL: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1 (Accessed: 12.12.2025).

¹⁷⁸ Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark (the Luxembourg-Denmark Tax Convention 1980). [Electronic resource] // The Schengen acquis, Electronic data 2025, URL: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922\(08\)&from=SK](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(08)&from=SK) (Accessed: 12.12.2025)

1) T Denmark arrangement:

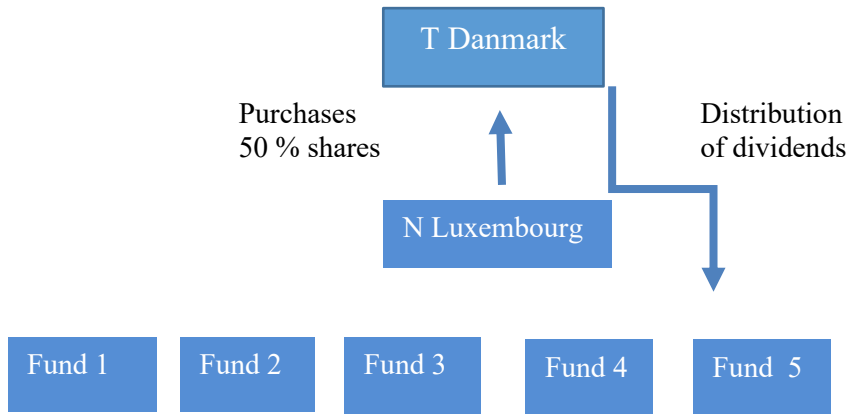


Figure 2.4 T Denmark arrangement

1. Five funds of capital investment which are not residents of the Member State or the state with whom the Kingdom of Denmark has signed the convention for avoidance of double taxation established several companies in Luxembourg, including the Northern Luxembourg;
2. *N Luxembourg* bought 50 % shares of *T Denmark*;
3. *T Denmark* distributes dividends to *N Luxembourg* which, in turn, transferred them to the funds (non-residents).

2) Y Denmark arrangement:

Bermuda Islands

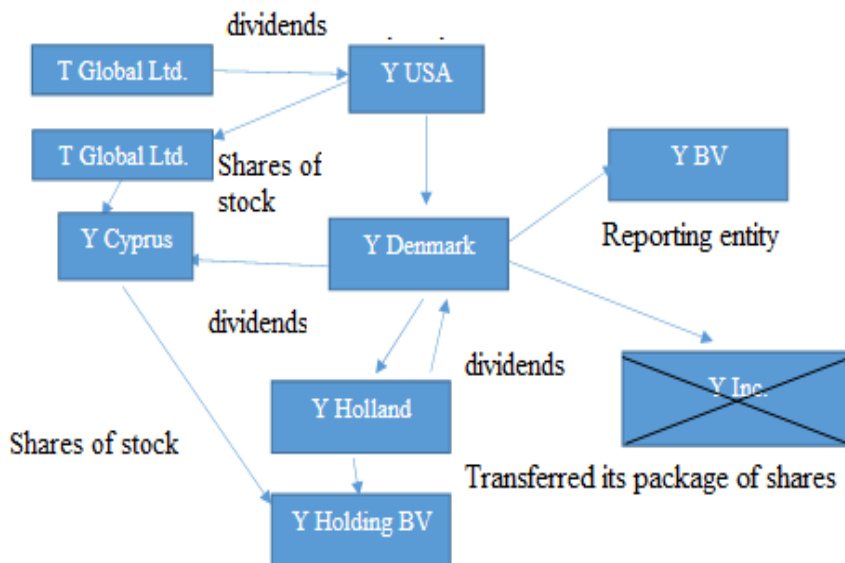


Figure 2.5 Y Denmark arrangement

1. *Y Inc.*, registered in the USA, is the leading listing company of *Group Y*.
2. *Y Inc.* holds foreign subsidiaries through *Y Global Ltd.*, the company registered in the Bermuda Islands.
3. Denmark established *Y USA* in Denmark in 2000, *Y Denmark* is the parent company of the European division of the *Group Y*, which is subordinated to *Y BV*.
4. The European division of the *Group Y* was restructured and *Y Bermuda* established *Y Cyprus* in Cyprus, the Bermuda Islands transferred its share in *Y Denmark* to *Y Cyprus*.
5. *Y Holland* decided to distribute dividends to *Y Denmark*.
6. On 21 October 2005 *Y Cyprus* established a company in the Netherlands under the name *Y Holding BV*, and *Y Denmark* transferred its package of shares to *Y Holland Holding*.
7. *Y Bermuda Islands* distributed dividends to *Y USA*, *Y Denmark* distributed dividends to *Y Cyprus*.

The Danish tax authorities concluded that *Y Denmark* should be taxed with the income tax for two distributions of dividends made by its parent company *Y Cyprus* in 2005 and 2006, and that *Y Denmark* should assume liability for payment of this income tax.

The Court of Justice of European Union concluded that the exemption for companies (subsidiaries) distributing dividends to parent companies within EU is not applied if the actual owners are organisations established outside the borders of EU. If it is found that the exemption from the tax was used by means of establishing an intermediary for the purpose of exemption from payment of the tax, the state authority is not obliged to identify the beneficiaries of dividends and may refuse recognition of the company as the actual owner.

The case law of the European Court of Justice which excludes other beneficiaries of dividends from using tax benefits does not seem to be justified. In the situation when the parent company has established several subsidiaries due to commercial and also other reasons, and at the same time for using additional tax advantages, the company should receive tax advantages instead of refusing them. Besides the above, the requirement to the company to prove existence of the circumstances (i. e. the goal of the company was not to receive tax benefits, but there were commercial and other objective considerations) may hinder obtaining such evidence.

If in the situation of *X Denmark A/S, C Danmark, Z Denmark ApS v Skatteministeriet* the Court of Justice of European Union concludes that any offered exemption from payment of interest is only applicable to the beneficiaries of the interest, in particular, to the entities who actually receive benefit from this, how should the taxpayer waive the exemption from

payment of taxes in case of fraud or abusive practice, even if there is not national provision or the provision of the agreement providing for such a waiver.¹⁷⁹

The set of objective circumstances from which it follows that, although the conditions defined by the legislation of the European Union were formally complied with, the goal of the legislation was not attained, and the subjective element is the willingness to receive advantage in accordance with the legislation of European Union by artificially creating circumstances for receiving the benefit.¹⁸⁰

The resident from whom the tax on interest paid by it to the non-resident company should be withheld may be not required to pay the interest by default in case of late payment of the withheld tax according to the rate above the rate of late payment of the corporate tax for the interest received by the resident company from another resident company. There is also a contradiction between the national legislation providing that in the cases when the resident company is taxed with the income tax from interest paid by it to the non-resident company, the interest expense directly related to the transaction of the relevant loan is not taken into account.¹⁸¹

3) N Luxembourg 1 arrangement:

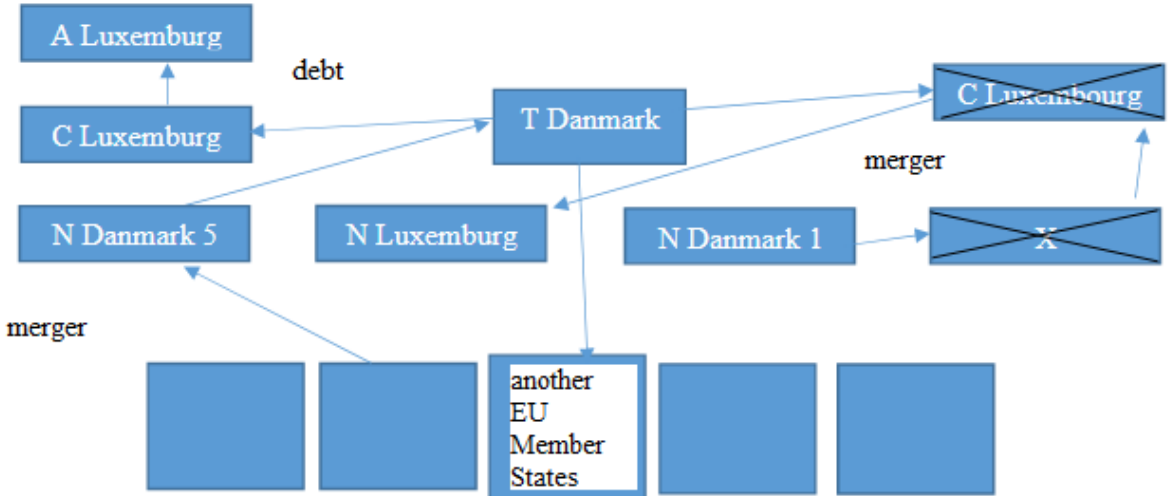


Figure 2.6 N Luxembourg 1 arrangement

¹⁷⁹ N Luxembourg 1, X Denmark A/S, C Danmark, Z Denmark ApS v v. Skatteministeriet. 26.02.2019. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211053&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=2441950> (Accessed: 12.12.2025).

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

In 2005 five funds of direct investment, none of which was the resident of the Member State or the state with whom the Kingdom of Denmark has signed the convention for avoidance of double taxation established a group of companies aimed at acquisition of *T Danmark*;

1. The funds of direct investment established companies in Luxembourg, including *A Luxembourg Holding*, as well as companies in Denmark, including *N Danmark I*. Acquisition of *T Danmark* was funded by the loans provided by the funds of direct investment to *N Danmark I* and by increasing the equity capital of the company.
2. *N Danmark I* merged with another Danish company which was liquidated in 2010 in the result of the cross-border merger with *C Luxembourg*. *C Luxembourg* later changed its name and was liquidated by transferring the right of claim to *N Luxembourg I*.
3. *N Danmark 5*, acquired by *T Danmark*, and shares were transferred to *C Luxembourg*.
4. The funds of direct investment transferred debt securities related to the loans provided by investment companies to *A Luxembourg Holding*, which transferred them to *C Luxembourg* on the same day.
5. *C Luxembourg* became the debtor of *A Luxembourg Holding*.
6. The operation of *N Danmark I* was restricted to holding debt securities issued by *C Luxembourg*.
7. *C Luxembourg* and *A Luxembourg Holding* are located at the same address and are also used by the companies directly related to one of the funds of direct investment.

Thus, *C Luxembourg* and *A Luxembourg Holding* did not receive the benefit of holding the shares, instead they acted as simple intermediaries, and the Danish group transferred interest to the funds of direct investment through these two Luxembourg companies. Therefore, the court concluded in the case that in this situation the assessed interest and the withheld tax have to be paid.

4) X Denmark A/S arrangement:

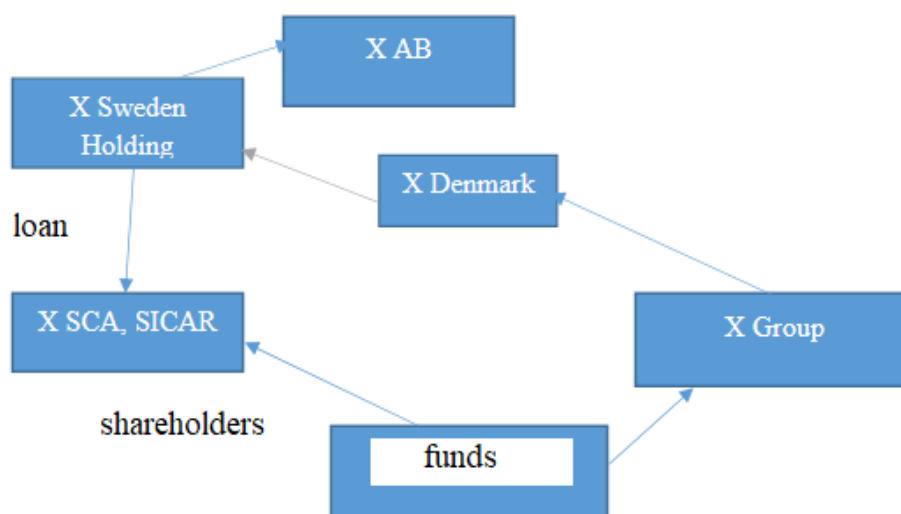


Figure 2.7 X Denmark A/S arrangement

1. *X Denmark* is a part of *X Group*, the companies of this group were purchased by the funds of direct investment.
2. The funds are direct shareholders of the parent company of the group, in particular *X SCA, SICAR*, established in Luxembourg.
3. *X Sweden Holding* signed a loan agreement with its parent company *X SCA, SICAR*.
4. *X Sweden Holding* assumed the operation of *X AB* established in Sweden.
5. At calculating the taxable income *X Denmark* deducted the interest paid to *X Sweden Holding* by using the loan agreement and considering that *X Sweden Holding* is the beneficiary, did not withhold the tax of this interest at the source.

The tax authority considered that *X Sweden*, *X Sweden Holding* and *X SCA, SICAR* did not have the status of the beneficiary owner of the share and considered that *X Denmark* is obliged to withhold the tax at the source from the interest paid by *X Sweden Holding*. The court stated that the exemption from payment of the tax for the interest is applied only to the receivers of this interest, in particular, the beneficiaries, but the exemption from the interest should be refused in case of abusive practice by the company (if the company wishes to receive tax benefits in another country via artificial arrangements).

5) C Denmark:

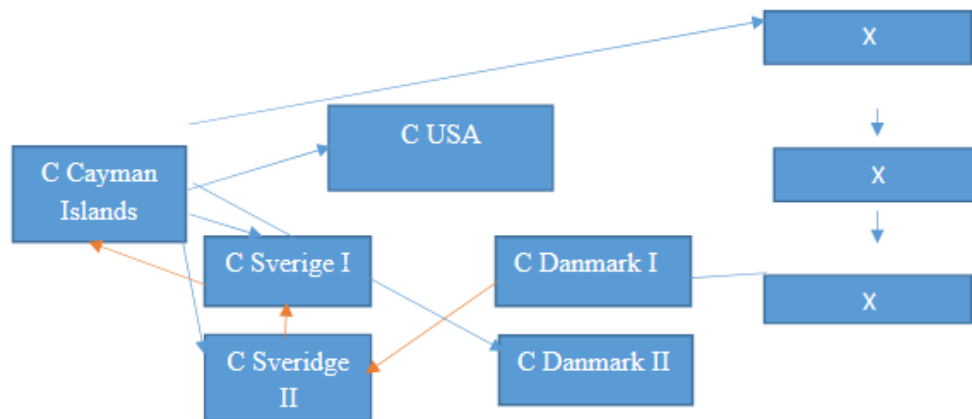


Figure 2.8 C Denmark

1. *C USA* is established in the United States and is owned by *C Cayman Islands* the company established in the Cayman Islands which was holding *C Danmark II* registered in Denmark until 2004.
2. The Group was restructured and Swedish companies *c Sverige I* and *c Sverige II* and the Danish Company *C Danmark II* were merged in group with *C Cayman Islands* and *C Danmark I*.
3. The Danish Ministry of Taxation considered that placement of two new Swedish companies above the Danish division of the group was performed for the purpose of taxation.
4. In the result of the restructuring three start-up were established between *C Cayman Islands* and *C Danmark II*, and in the result *C Cayman Islands* was owned by the Swedish holding company which hold also another Swedish company, which, in turn, hold *C Danmark I*.
5. Lendings were coordinated between *C Cayman Islands* and *C Sverige I*, as well as between *C Sverige II* and *C Danmark I*.
6. *C Sverige II* transferred the interest it had received from *C Danmark I*, *Sverige I* by using the Swedish rules on intra-group transfers, and *C Sverige I* transferred these funds to *C Cayman Islands*

As the net income in Sweden is not taxed according to the valid Swedish rules, the interest payments due from *C Danmark I* were transferred to the Cayman Islands in full amount through Swedish companies. However, according to the Danish legislation the interest is taxed. The tax authority of Denmark resolved that *C Sverige II* and *C Sverige I* cannot be considered as the beneficiaries of the interest paid by *C Danmark I*, as none of the companies established in the course of the restructuring was performing any operations, except the activity of the holding company.

6) Z Denmark ApS arrangement:

Shares of stock

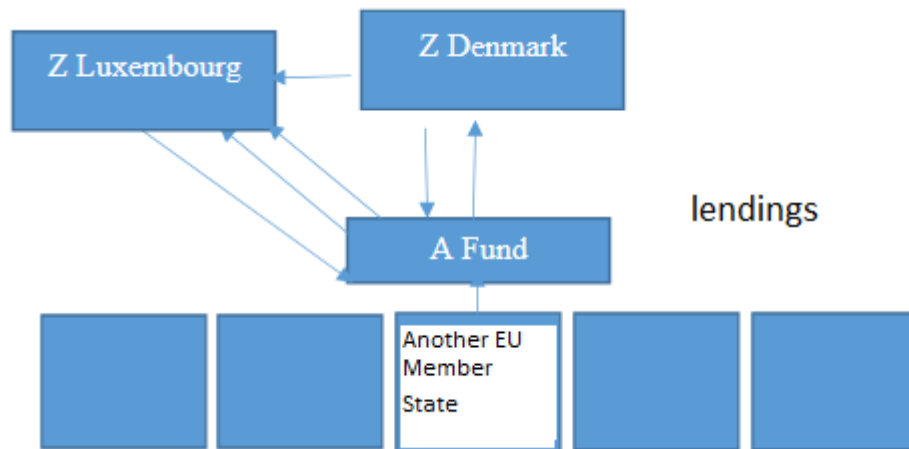


Figure 2.9 Z Denmark ApS arrangement

1. *Z Denmark* – a Danish production company. The investment fund *A Fund* purchased 66 % shares of *Z Denmark*.
2. The fund consists of five funds, four of which were established in the form of limited liability companies in Jersey. *A Fund Limited Jersey* is a form of a non-tax transparent company.
3. *The Fund* provided a loan to *Z Denmark*.
4. *The Fund* transferred all its claims against *Z Denmark* to *Z Luxembourg*, the company established by it in Luxembourg on the same day.
5. *The Fund* issued a loan to *Z Luxembourg* for the same amount as to *Z Denmark*;
6. The accounts of *Z Luxembourg* reveal that in 2007 the company did not perform any activities, except holding the shares of *Z Denmark*, and that the loss of *Z Luxembourg* in 2006 turned into profit in 2007.
7. *Z Denmark* repaid the loan provided by *A Fund*, and *Z Luxembourg* repaid the loan of *A Fund* on the same day, the payment consisting of the capital and interest.

However, the tax authority did not recognise the status of *Z Luxembourg* as the beneficiary concerning the interest paid to it by *Z Denmark*, by stating that the Luxembourg company should be viewed as the company – intermediary.

The conclusion that the exemption from taxation of interest payment is applicable only to the beneficiaries of such interest is justified. On the other hand, if it is concluded that the funds are transferred to shell companies (entities which do not perform any other business operations) based on the loan or another agreement, however, without any effective business explanation, and it can be concluded from the chain of deliveries that the cash flow returns to

the same entity by only reducing the amount by payable taxes, one can agree with the conclusions of the Court of Justice that in this case abusive practice can be established as an attempt of tax evasion or reduction of the tax amount.

2.2.2 Schemes of Transfer of loss and profit

The *Marks & Spencer* case¹⁸² which was resolved by the EU Court of Justice in 2002 and was related to transfer of loss within the group of companies is of fundamental importance for understanding the approach and the logic of the Court of Justice is resolving the issue of the boundaries of what is permitted within the tax planning process.

The actual circumstances of the case were as follows: in compliance with the legislation of United Kingdom, the resident companies belonging to the same group of companies have the right to transfer losses and profits to companies within the group, however, only if those companies are also residents of United Kingdom, and the company *Marks & Spencer* applied to United Kingdom for the losses of its subsidiaries, which are not UK residents, to be written off. The tax authorities refused this application. In this regard the company applied to the EU Court of Justice asking it to resolve the issue concerning the contradiction of the tax legislation of United Kingdom to the EU law, in particular, the fundamental principle of freedom of establishment.

In this case, the company applied to the tax authorities of the United Kingdom for granting of the tax credit for the purpose of deducting the loss of the subsidiaries established in Belgium, Germany and France from its taxable profit in United Kingdom. Business loss may be deducted from the profit of the British company and within a group of resident companies it is allowed to compensate their profit and loss. However, the tax authorities of United Kingdom refused this application based on the provision asserting that group aid can only be provided in the situation when the loss was incurred in United Kingdom.

In compliance with the conclusions of the Court of Justice of European Union, contrary to the legislation of the European Union there is the legislation prohibiting the resident parent company to deduct from its taxable profit the loss incurred by the subsidiary established in another country if, first, the non-resident subsidiary has used any possibility to account for the loss incurred in its country of establishment during the relevant fiscal year by applying for provision of aid, as well as during preceding fiscal years, and, second, if it is not possible to account for the loss of the foreign subsidiary in the country of its

¹⁸² Marks & Spencer plc., 13.12.2005. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=73A7CA4B8513E87B2F02479EB9017EA5?text=&docid=57067&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&par t=1&cid=2168558> (Accessed: 12.12.2025).

establishment either independently or by the third parties, in particular, this subsidiary was sold to such third parties.¹⁸³

Thus, the companies established in United Kingdom and also in another Member State through a subsidiary, if the profit of this subsidiary is taxable in United Kingdom, deduct the tax paid in the other Member State by assessing the financial result of operation of the subsidiary in the country of registration. The business profit of the subsidiary is assessed based on the tax principles of the country of establishment. Accordingly, conclusions in this situation reveal that it is possible to plan taxes payable by the company and its subsidiary in the light of the loss incurred by the company and its subsidiary in another Member State of the European Union, in particular, if all the possibilities have been exhausted for accounting for the loss, so that the loss of the foreign subsidiary can be accounted for in the country of its establishment during next fiscal years.

In the result of the performed analysis of the actual circumstances of the case and the legislation of United Kingdom, the EU Court of Justice concluded as regards this dispute, that United Kingdom may differentiate between cross-border transactions and domestic transactions, in particular, if this is necessitated by the efforts to dissolve any arrangements made by companies for the purpose of tax avoidance.

The arguments of the EU Court of Justice are based on the premise that the EU Member States should use their powers of direct taxation in compliance with the EU law. By applying the taxation regime to loss incurred by foreign subsidiaries different from the regime applied to the loss incurred by subsidiaries which are residents of United Kingdom, it hinders the practice of establishment of subsidiaries in other EU Member States by restricting the principle of freedom of establishment.

The EU Court of Justice noted that this restriction is only permissible if there are the following two necessary and sufficient conditions:

1. The restriction should have a legitimate purpose compatible with the goal of TFEU, and it should be justified on the basis of the public interest. Within this context it is of particular interest that in other cases the EU Court of Justice used the public interest as the justification and approval of the permissibility of the restriction of operation of the freedom of establishment.
2. Following establishment of the first condition, it is necessary to identify the possibility of satisfying the public interest by permitted means, in particular, by the measures which are not outside the set framework defined by the EU law and TFEU.

¹⁸³ Marks & Spencer plc., 13.12.2005. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=73A7CA4B8513E87B2F02479EB9017EA5?text=&docid=57067&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&par t=1&cid=2168558> (Accessed: 12.12.2025).

The EU Court of Justice, by hearing this case and taking into account the arguments of United Kingdom supported by a number of EU Member States, like FRG, Greece, France, Ireland, the Netherlands, Finland and Sweden, confirmed presence of the first above named condition – the legitimate goal which is achieved by operation of the legal provisions of United Kingdom.

In the result of the performed analysis of the legal provisions of United Kingdom, the EU Court of Justice concluded that its goals were: (1) protection of the balanced system of division of powers of collection of taxes between the interested EU Member States and (2) necessity to exclude the possibility of situations when loss is used, in particular, written off by the group of companies twice.

Countering tax avoidance

However, although the EU Court of Justice agreed to the conclusions regarding protection of the system of balanced tax withholding, it stated that the second required condition had not been complied with. According to the opinion of the EU Court of Justice, the legislation of United Kingdom generally does not conform with the principle of subsidiarity, as minimum in the following situations:

1. When subsidiaries which are non-residents of United Kingdom have exhausted all the possibilities of writing off the loss in the country of their establishment for the reporting period (including several preceding reporting periods), or
2. when there are no possibilities for foreign subsidiaries to account for their loss in their country of establishment for future periods (both for the subsidiary and any third party if this third party acquires the subsidiary).

Accordingly, when in the EU Member State, the resident company proves to the tax authorities that both conditions defined by the EU Court of Justice are complied with, it will be considered contrary to the principle of freedom establishment to prevent deduction of the loss of the subsidiary which is not the resident of the relevant country from the taxable profit of the holding company which is the resident of the relevant country. Irrespective of the above, it should be noted that already in this case the EU Court of Justice upheld that the EU Member States have full discretion to implement and apply provisions aimed at excluding from operation of tax benefits transactions of companies which are wholly artificial arrangements and the application of which results to the companies having the possibility to avoid payment of tax in compliance with the national tax law.

It should be noted that according to the opinion of Advocate General. Mr. Maduro¹⁸⁴ in the *Marks & Spencer* case the arrangement of writing off within the group which does not allow the holding company to deduct the loss of its subsidiaries established in another EU Member State under any circumstances is contrary to the legislation of the Union.

However, Mr. Maduro pointed out that this arrangement would be compatible with the principle of freedom of establishment of legal entities valid within the framework of EU if the entitlement of the holding company to deduct the loss of foreign subsidiaries from its taxable base complies with the condition that such loss is not subject to equivalent tax regulation in the EU Member State where such subsidiaries are established. In other words, deduction of the loss in the EU Member State where this company is established is the only possible way for deducting the loss for the group of companies.

Thus, the Advocate draws attention to the actual circumstances of the case. The corporate tax legislation of United Kingdom provides for and stipulates a special regime, in particular, the arrangement for writing off the loss within a corporate group. According to this tax arrangement, the company belonging to such a corporate group may transfer it loss to another company within the group, and thus the company, to which the loss was transferred, may deduct this loss from its taxable profit. The transferring company loses the right to use the transferred loss for tax purposes, in particular, cannot deduct it from its profit. Such deduction is only possible if the transferring company is the resident of United Kingdom or performs economic activity in United Kingdom.

In compliance with the opinion of Advocate General, the refusal of the tax benefit by the court of United Kingdom is a violation of the provisions of TFEU if this refusal leads to violation of the principle of freedom of establishment. In compliance with the legislation of United Kingdom, the resident company is deprived of the possibility to deduct its loss, i. e. is deprived of certain advantage if it decides to establish a subsidiary in another EU Member State.

The law of United Kingdom provides for a restriction which contributes to the prevention of the process of establishment of foreign subsidiaries, and this leads to violation of the principle of freedom of establishment, regarding which the Advocate General pointed out that it is necessary to establish if the operation of these provisions of the legislation of United Kingdom can be justified by the public interest as any other measure which is implemented for attaining a legitimate goal.

In presentation of his opinion on this case, the Advocate General denies and refutes also

¹⁸⁴ Opinion of Advocate General Poiares Maduro delivered on 7 April 2005 [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62003CC0446> (Accessed: 12.12.2025)

the argument of the government of FRG that the countries where companies are trying to write off loss may not be allowed to take into account the loss of foreign subsidiaries, as this will inevitably lead to reduction of the tax revenue of this country and will cause serious difficulties for the budget of the state where such loss will be written off.

As regards the justification on the basis of the territorial principle, Mr. Maduro explained that this principle does not require the provided tax advantage to be affected and supervised by the relevant tax authority. In this regard it is important to establish whether provision of such tax advantage is a compromise under full sovereignty of all the EU Member States in tax matters.

At the same time, as the Advocate General has justly pointed out, nothing prevents United Kingdom from expanding the scope of operation of the right of writing off loss for companies with subsidiaries in other EU Member States. As the resident company of United Kingdom is subject to full tax control by the relevant British tax authorities, accordingly, the principle of territoriality could not justify the restriction.

In conclusion the advocate stated that the necessity to maintain the unity of the tax system should be tested against the goal which such tax legislation is supposed to attain. In other words, there should be direct link between the provision of the tax advantage and this advantage by the special tax regime.

Mr. Maduro concluded that the goal of application of the arrangement of writing off within the group of companies in United Kingdom is provision of the “tax neutrality” resulting from emerging of groups of companies, and this arrangement allows transfer of loss, however, at the same time prohibits the transferring company to use this loss for tax purposes. If the foreign subsidiary can use deduction both according to the arrangement of deduction within the group, as well as according to the legislation of the country where it is established, the above referred advantage and deduction may be double, i. e. it can be taken into account twice for the benefit of the group of companies, which would amount to double privilege and abusing the right. However, on the other side, the prohibition operating according to the general rule considerably exceeds the necessary level of protection of the unity of the arrangements, and the interested EU Member States should take into account regulation of the loss of foreign subsidiaries in the countries where they are established.

One should also agree with the statement of the advocate that arguments regarding the necessity to maintain the unity of the arrangement of writing off can only be accepted if the loss incurred by foreign subsidiaries can be regulated in an equivalent way in the country where they were incurred, at the place where such a subsidiary actually performs economic activity.

In the conclusion, Mr. Maduro suggests that use of the benefit of writing off should be

provided and justified by existence of conditions under which the loss of the foreign subsidiary cannot benefit from favourable tax regulation in the country where it is established. If the legislation of the EU Member State where such a subsidiary is established creates conditions of allocation and transfer of loss to other entities within the group, the EU Member State to whose company loss is attempted to be transferred has the right to object against the application on the cross-border transfer of such loss, as the company can write off the loss where it was incurred. Writing off in this case should happen in the country where the subsidiary which incurred the loss is established, and accordingly, the company will not have the right to choose the country of writing off the loss. Based on the above, the Advocate General draws a key and justified conclusion that this regulation and approach allows preventing the risk of situations when the group of companies is trading loss, i. e. transfers it illegally by abusing its right on the level of the entire Union.

By resuming the above, it should be noted that this case is related to the case of *Cadbury Schweppes* according to several parameters.

First, in the *Marks & Spencer* case, the EU Court of Justice touches upon the question of abusing the right by the group of companies by double writing off loss in two EU Member States, which is the follow up of the development of own concept of abusing the right by the EU Court of Justice which was presented in the *Cadbury Schweppes* case.

Second, in the *Marks & Spencer* case, the EU Court of Justice, as it was mentioned above, referred to the concept of wholly artificial arrangements by marking the basis and boundaries of reasonable restriction of operation of particular freedoms and principles of the EU law by the national law for the exclusive purpose of protecting the interest necessitated by the fight against tax avoidance.

One of the most recent cases which can be included in this group of planning, is the case *Apple Sales International, Apple Operations Europe v European Commission*¹⁸⁵, which was heard by the General Court at the end of 2020.

The central issue in the case was the tax treaty between Ireland and the company of *Apple group*, which was disputed by the European Commission because of declaring the state aid of Ireland received by the group of companies as non-justified.

Apple Group is managed centrally from the United States of America. *Apple Operations International* is the subsidiary of *Apple Inc.* *Apple Operations International* fully owns the company *Apple Operations Europe (AOE)* which, in turn, fully owns the subsidiary *Apple*

¹⁸⁵ *Apple Sales International, Apple Operations Europe v European Commission*. Cases T-778/16 and T-892/16, 15.07.2020. [Electronic resource] // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9702955> (Accessed: 19.12.2025)

Sales International (ASI). *ASI* and *AOE* established subsidiaries in Ireland. *ASI* and *AOE* are companies registered in Ireland, however, they are not tax residents in Ireland. The Irish subsidiary *ASI* is in charge of performance of procurements, sales and distribution related to sale of the products of *Apple* brand to correspondent parties and external clients. *Apple Inc.*, *ASI* and *AOE* were associated based on the agreement on joint financing. *Apple Computer Inc.* became a party to the agreement by which the parties agreed to share costs and the parties also agreed that *Apple Inc.* stays as the official legal owner of the intellectual property of *Apple Group*. *ASI* signed an agreement on marketing services with *Apple Inc.*, and *Apple Inc.* agreed to provide marketing services to *ASI*, including creation, development and production of marketing strategies, programs and advertising campaigns. *ASI* assumed the obligation to pay for these services to *Apple Inc.*

Irish tax authorities assessed the tax for *Apple Group* and for the new company *Apple Computer Accessories Ltd.* based on the conditions proposed by *Apple Group*. The EU Commission asked Ireland to submit information concerning the practice of tax decisions in its territory, in particular, about the subject of tax decisions which were adopted for relevant companies in *Apple Group*, and the Commission started the official procedure of investigation. According to the data possessed by the Commission, the agreement with the Irish tax authorities deviated from the conditions which were established between independent companies (the arm's length principle), and it concluded that the state aid was unjustly provided to *Apple Group*. The Commission considered that the licences for intellectual property held by *ASI* and *AOE* for purchase, production, sale and distribution of the products of *Apple Group* outside the North and South America provided considerable contribution to the income of these two companies, and due to this, the Commission expressed criticism to the Irish tax authorities for incorrect distribution and interpretation of assets, functions and risks for the headquarters *ASI* and *AOE*, although in the headquarters of these companies no personnel or management was physically present (in particular, the main principle of qualification of tax planning as lawful was not complied with as the offices were bogus and possessed the features of the "mailbox companies"). The Commission pointed out that the methods of assessment of the tax by the Irish tax authority for *Apple Group* have led to reduction of the tax amount due from *ASI* and *AOE* in comparison to other companies. The Commission concluded that, as *ASI* and *AOE* belong to *Apple Group*, which is multinational by its nature, this group should be viewed as a unified economic unit for the purpose of both the case law and the tax law, and therefore, according to the Commission's conclusion, the group *Apple* received general benefit from the state aid provided by Ireland. Ireland submitted a claim against the decision of the Commission and Luxembourg and Poland joined this claim.

The General Court heard the case and concluded that the European Commission should have had the possibility to analyse the tax regime of *ASI* and *AOE* arising from the tax benefits provided in relation to the tax regime which would have been applicable to both companies in compliance with the general rules of taxation. Thus, the General Court did not agree with the decision of the Commission that there was selective advantage, first, in the result of non-issue of licence of *Apple Group* to Irish subsidiaries *ASI* and *AOE* on the basis of subsidiary resulting from wrong choice of the methods of distribution of profit in these Irish subsidiaries. As the General Court has pointed out, existence of the tax advantage can only be established by comparison to the so-called “normal” taxation, in particular, by comparing special tax rules applied in the relevant situation to the normal tax regulation in the relevant country which is Ireland in this case. Resident and non-resident companies trading in Ireland through a subsidiary are in a comparable situation regarding taxation of income. At determining what profit belongs to the Irish subsidiary of the company, which is not a tax resident of Ireland, the property belonging to this company cannot be transferred to the Irish subsidiary if it was not established that this property is effectively controlled by this subsidiary.

European Commission stated in its decision it is obvious that without personnel beyond the boundaries of their Irish subsidiaries, *ASI* and *AOE* would not be able to monitor the risks referred to in the agreement on sharing the expenses of *Apple Group*. However, the Commission made a mistake as regards evaluation of the provisions of the Irish tax legislation related to taxation of the profit of companies which are not residents of Ireland, but trade in this country through their subsidiaries. The fact that remuneration for intellectual property developed specially within the context of production operations of the Irish subsidiary of *AOE* was allocated to this subsidiary does not mean that licences covering all the intellectual property of *Apple Group* should also be allocated to it. The Commission may not base its conclusion that the profit from all the intellectual property of *Apple Group* should be assigned to the Irish subsidiary of *AOE* exclusively for involving this subsidiary for creation of specific processes and development of the experience of production of products, and the Commission also made a mistake when it concluded that IP of *Apple Group* is definitely managed by the Irish subsidiaries *ASI* and *AOE* which hold licensed for the intellectual property. Thus, the General Court concluded that the Commission failed to prove that within the actions and functions performed by the Irish subsidiaries *ASI* and *AOE*, and strategic decisions adopted and implemented outside these subsidiaries, the licences of *Apple Group* to intellectual property had to be allocated to the Irish subsidiaries in assessing the annual profit of *ASI* and *AOE* in Ireland.¹⁸⁶

¹⁸⁶ Apple Sales International, Apple Operations Europe v European Commission. Cases T-778/16 and T-892/16, 15.07.2020. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9702955> (Accessed: 12.12.2025).

The EU Court of Justice also added that simple non-compliance with the methodological requirements of OECD management regarding transfer pricing is not sufficient justification for concluding that the assessed profit is not reliable approximation of the market result, as the Commission also has to demonstrate that methodological errors which were found led to reduction of the assessed profit. Thus, the General Court annulled the decision of EC arguing that the Commission had failed to demonstrate the selective advantage provided to *ASI* and *AOE* by signing the tax agreement with the tax authorities of Ireland.¹⁸⁷

It can be concluded from the above case that “normal” taxation should be taken into account at determining existence of potential tax advantage, and resident and non-resident companies trading in the same country through a subsidiary are in a comparable situation as regards taxation of profit and determination of what profit is allocated to the relevant subsidiary of the company which is not a tax resident, and the property owned by this company may not be transferred to the subsidiary if it was not established that the property is actually controlled by the group. The Commission cannot conclude that the profit of all the intellectual property of the company *Apple Group* should be allocated to the subsidiary of the company exclusively on the basis of involvement of this subsidiary in creation of particular methodologies which were licensed in the result, and which are results of the intellectual activity, and non-compliance with the methodological requirements of OECD management regarding transfer pricing is not sufficient justification for concluding that the assessed profit is not equal to the market profit, as it is also necessary to demonstrate that methodological errors which were found led to reduction of the assessed profit.

Generally, as regards tax planning, compliance by the EU Member States with the principle of the freedom of establishment of legal entities and refraining from application of provisions leading to unequal taxation of the income of companies has been the subject of review by the EU Court of Justice within the framework of tax disputes numerous times.

In in the case *Belgium v Truck Center SA*¹⁸⁸, resolved in 2008, the EU Court of Justice was asked to provide clarifications whether the national legislation of Belgium deters its residents from taking loans from companies established in other EU Member States and whether this legislation creates obstacles for investing capital by taking loans by non-resident companies in companies established in Belgium. The applicant taxpayer, which is a resident in

¹⁸⁷ *Apple Sales International, Apple Operations Europe v European Commission*. Cases T-778/16 and T-892/16, 15.07.2020. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9702955> (Accessed: 12.12.2025).

¹⁸⁸ *Belgian State – SPF Finances v Truck Center SA*, 18.09.2008 [Electronic resource] //EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62007CC0282> (Accessed: 12.12.2025)

Belgium, borrowed funds from its holding company which is a resident in Luxembourg according to the conditions providing for payment of interest. In compliance with the legislation of Belgium (the Act of 1992), the interest paid by a resident company in Belgium to the holding company resident in another EU Member State is subject to taxation by assessing the income tax. The applicant in this case objected against assessment of the income tax the amount of which was assessed by the tax authorities of the respondent country.

Based on the outcome of examination of all the circumstances of the case, the EU Court of Justice concluded that the national legislation of Belgium providing for obligation to pay tax for the interest paid by the resident company of one EU Member State to another company which is the beneficiary and not a resident of this country, does not violate the principle of freedom of establishment, irrespective of that this legislation exempts the beneficiary company from payment of the same tax if established in the same country as the interest-paying company. The Court of Justice arrived to this conclusion because two beneficiaries of interest were in non-comparable situations.

The author believes that the logic of ECJ that fostered this decision is structured as follows: although the EU Member States maintain the right to define the criteria of distribution of powers of taxation by means of a treaty or unilaterally, in particular, for the purpose of avoiding double taxation, the countries may not disregard the Union rules: so, it is not allowed to apply discriminatory measures which are contradictory to the EU provisions. The national provisions applied to the groups of companies of the EU Member States having financial interest in companies established in other EU Member States are covered by the provisions on freedom of establishment provided by TFEU.

In this case, the EU Court of Justice, similarly to the *Cadbury Schweppes* case, focuses its attention to the manifestation of the principle of freedom of establishment and the dynamic between this freedom and engagement in business in compliance with the law of the EU Member State, as well as the registration of the office or location of the headquarters in this country, the performance of economic activity within EU, including by establishment of subsidiaries and branches without incurring the risk to become the subject of discriminatory taxation or other discriminatory provisions based on the principle of the place of establishment.

The general conclusion of the Court of Justice is that any measure or provision which prohibits, hinders or creates less favourable circumstances for exercising the right to freedom of establishment should be viewed as a measure leading to discrimination. In this case, the national regulation in Belgium had led to the situation that the process of collection of the tax differs and depends on the place where the company receiving the interest had been registered. However, according to the opinion of the Court of Justice, as regards direct taxation, the positions of the resident and non-resident companies, as a rule, cannot be objectively comparable, and differences in regulation

applicable to the resident and non-resident taxpayers cannot be defined as discriminatory within the framework of interpretation of TFEU.

Moreover, the Court of Justice pointed out that differences in regulation in this case do not necessarily provide advantage for the beneficiary of interest who is a resident, as this company is obliged to make advance payments of the corporate tax, and such advance payments are much higher than the income tax withheld from the interest paid to the companies non-resident in Belgium. It follows from this that, considering all the circumstances, such national regulation does not prevent freedom of establishment.

By this the EU Court of Justice confirmed its assurance of the concept of understanding of freedom of establishment developed by it earlier as reviewed in the cases *Cadbury Schweppes*, *Marks & Spencer*, *Halifax* and many others, however, still taking the side of the tax authorities of the respondent country.

In the case law of the EU Court of Justice there are cases where the subject of the dispute was not only the principle of freedom of establishment of companies, but also the principle of free movement of capital. One of such cases is the case *Commission of the European Communities V Italy (Case C-540/07 Tax on distribution of dividends)*,¹⁸⁹ heard by the EU Court of Justice in 2009, where the essence of the dispute was payment of the tax on dividends (income tax) by companies which are non-residents in Italy, this tax amounting to 27 %, while this tax was 95 % lower for the resident companies of Italy. Italy substantiated application of this tax regime by the necessity to fight tax evasion, as well as the operation of the entire taxation system in the country and operation of the Convention on avoidance of double taxation, in compliance with whose provisions an entity is exempted from payment of taxes in other countries after it has paid taxes on one member state of the Convention, and accordingly, dividends paid to non-resident companies were not regulated, different from dividends paid to resident companies.

In this case, the EU Commission was trying to achieve adoption of the ruling by the EU Court of Justice providing that, by maintaining and keeping in force the less favourable tax regime concerning payment of dividends to non-resident companies, the respondent country (Italy) failed to comply with its obligations under TFEU (Article 56) and Treaty on the European Economic Area (Articles 31 and 40)¹⁹⁰. This finally led to that the Italian legislation contains provisions hindering investment in Italy by non-resident companies and thus preventing free movement of capital.

¹⁸⁹ Commission of the European Communities, 19.11.2009. [Electronic resource] // EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli%3AECLI%3AEU%3AC%3A2009%3A717> (Accessed: 12.12.2025).

¹⁹⁰ Agreement on the European Economic Area. [Electronic resource] // Joint Declaration, [Electronic data] 1992, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21994A0103%2801%29> (Accessed: 12.12.2025).

Considering all the facts of the Case, the EU Court of Justice concluded that Italy had failed to comply with its obligations under TFEU by providing a less favourable tax regime concerning distribution of dividends to companies established in other EU Member States than the resident companies of Italy in its legislation. However, the Court of Justice noted that the situation when the resident company receives dividends is objectively difficult to compare with the same situation where distribution is made to the non-resident company, even if they were comparable, the difference in regulation is justified, *inter alia*, also by the necessity to prevent tax evasion.

In the result, the EU Court of Justice granted the EU Commission's claim in a part. There is no doubt that the legislation of Italy provides for a higher level of taxation applicable to dividends distributed to non-residents, and Italy has made a mistake in its justification of this taxation by the possibility of compensation under the Convention on avoidance of double taxation¹⁹¹. Such differences of regulation exist, until the payable profit tax is not fully included in the payment in another EU Member State, in the contrary case the legislation of Italy does not guarantee the setoff. And in the situation when dividends are received from Italy and not taxes in another EU Member State or were not duly taxed, the amount of the withheld profit tax in Italy cannot be setoff, and the difference in regulation cannot be compensated by application of the provisions of the Convention.

Thus, the review of the Italian tax system as a whole includes comparison of both regimes and situations which are difficult to compare, as well as the position of natural entities receiving dividends which are subject to a special tax regime and companies receiving dividends from another company, and Italy cannot deny that there are no differences of regulation. The lack of such differences can obviously lead to deterring companies which are residents of other EU Member States from investing in Italy and, consequently, to setting a restriction on implementation of the principle of free movement of capital.

Moreover, the Court of Justice concluded that the general presumption of fight against tax evasion and tax avoidance is not sufficient for justifying the tax measures negatively affecting attainment of the goals of TFEU. In this case, all the dividends payable to the company which is non-resident in Italy were subjected to less favourable tax regime. This less favourable tax regime may not be justified by the fact of fighting against tax evasion.

According to the opinion of the EU Court of Justice, Article 40 of the Treaty¹⁹² has the same goal as Article 56 of TFEU. Hence, the less favourable tax regime provided by the legislation of Italy

¹⁹¹ Commission of the European Communities V Italy, 31.01.2010. [Electronic resource] // InfoCuria – Case-law of the Court of Justice. Electronic data 2025. URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:024:0005:0005:EN:PDF> (Accessed: 12.12.2025)

¹⁹² Agreement on the European Economic Area. [Electronic resource] // Joint Declaration, [Electronic data] 1992, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21994A0103%2801%29> (Accessed: 19.12.2025).

to dividends distributed to the residents of the Member States of the Treaty leads to the Italian legislation setting the conditions which restrict free movement of capital stipulated by Article 40 of the Treaty. However, in this case the restriction was justified by the priority of the reason – the public interest in fighting tax avoidance. The case law related to restrictions of exercising the right to free movement of capital within the framework of EU cannot be applied to movement of capital between the EU Member States and states which are not EU Member States as a whole because such movement takes place under different legal circumstances.

Therefore, the EU Court of Justice comes to a justified conclusion that Italy has not breached its obligations under Article 31 of the Treaty, as this type of regulation is justified by prevention of tax avoidance.

In compliance with the logic of the EU Court of Justice, in resolution of disputes related to taxation and application of the provisions restricting freedom of establishment and free movement of capital within EU by the EU Member States, it is necessary to analyse a range of factors, where the key ones are both the object and the goal of applied provisions, the motivation of companies, as well as the subjective analysis of their actions (i.e. the intention), and in the course of examining the above, the courts should take into account the position of the EU Court of Justice regarding abusing the right, as well as interpretation of the concept “wholly artificial arrangements”, which is an inevitable consequence of such abuse.

Thus, in the *Credit Suisse* case, the court concluded that the temporary tax on dividends (bonuses) of the company (the bank) cannot be viewed as selective advantage, even if it was only applicable to the companies distributing bonuses during a particular period of time and not to other companies.¹⁹³ In the case *Skatteministeriet v T Danmark, Y Denmark Aps and Luxembourg 1, X Denmark A/S, C Danmark, Z Denmark ApS v., Skatteministeriet* relied on objective and subjective criteria by assessing whether the company was acting unlawfully, and concluded that the company is not entitled to exemption from tax in case of abusive practice. Moreover, these cases indicate the importance of the subjective criterion confirming that it is necessary to take into account the circumstances which may indicate that the criteria of exemption were attained in an artificial manner, in particular, exclusively for the purpose of receiving exemption from payment of taxes.¹⁹⁴

¹⁹³ *Credit Suisse Securities (Europe) Limited, Credit Suisse International, Credit Suisse (UK) Limited, Credit Suisse AG*, 19.07.2019. // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=\(Credit\)+AND+\(Suisse\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2019/1922.html&query=(Credit)+AND+(Suisse)) (Accessed: 19.12.2025.)

¹⁹⁴ *Skatteministeriet, T Danmark, Y Denmark Aps* 26.02.2019. // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2441148> (Accessed 19.12.2025.); *N Luxembourg 1, X Denmark A/S, C Danmark, Z Denmark ApS v. Skatteministeriet*. 26.02.2019. // *InfoCuria – Case-law of the Court of Justice. Electronic data 2025*. URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=211053&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=2441950> (Accessed: 19.12.2025).

2.2.3 Practice of hearing of cases on tax planning in the EU Member States in the Baltic region by the Court of Justice of the European Union

In its ruling dated 10 July 2019 in the case C-273/18, the European Union Court of Justice heard the dispute between *SIA “Kuršu zeme”* (Ltd.) and the State Revenue Service of Latvia concerning deduction of VAT as an input tax. “*Kuršu zeme*” is a company established in Latvia and it reported transactions of purchase of goods from another company registered in Latvia, namely, *KF “Prema”*, and deducted the input tax related to these transactions.¹⁹⁵

During inspection, the State Revenue Service of Latvia noticed that the transactions took place at the end of a chain of transactions. *UAB “Baltfisher”* which is a company registered in Lithuania sold these goods to two companies established in Latvia which later resold said goods to another Latvian-established company. The goods were further resold at multiple cycles first to *KF “Prema*, then to “*Kuršu Zeme*”, to finally transport them from Klaipeda to its factory in Latvia.¹⁹⁶

The State Revenue Service of Latvia considered that, first, the intermediaries did not perform any effective actions for purchasing the relevant goods, and second, that “*Kuršu zeme*” must have known about the artificial nature of the chain, and concluded that “*Kuršu zeme*” actually purchased the goods directly from *Baltfisher* and, accordingly, the relevant acquisitions were classified as “intra-Community acquisitions”. Because of the above, the State Revenue Service increased the assessed VAT, simultaneously reducing the input tax reported by “*Kuršu zeme*” by the same amount.¹⁹⁷ “*Kuršu zeme*” submitted a complaint against this decision to the Administrative District Court which rejected the claim, and the Regional Administrative Court upheld the decision of the first instance court. Within the framework of the cassation complaint, the Supreme Court submitted the question to the European Union Court of Justice for issue of the preliminary ruling about whether the rules of the European Union concerning deduction of the input tax prevent deduction based exclusively on the informed participation of the taxpayer in simulation of transactions. The loss was incurred in the form of unpaid or unjustly repaid Value Added Tax in comparison to the situation if the transactions were performed in compliance with their actual circumstances.¹⁹⁸ The Court of Justice of the European Union concluded that in order to refuse the right of deduction of the input VAT, the fact that the goods were purchased at the end of sequential chain of sales between several

¹⁹⁵ *SIA “Kuršu zeme” v. State Revenue Service of Latvia* [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216043&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051158> (Accessed: 19.12.2025)

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *SIA “Kuršu zeme” v. State Revenue Service of Latvia* [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216043&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051158> (Accessed: 19.12.2025)

entities and the taxable entity purchased the goods at the warehouse owned by one of the entities within the chain who was not the entity having issued the invoice as the supplier, is not sufficient for establishing the fact of abusive practice by the taxpayer or other entities involved in this chain because the competent tax authority has to prove existence of unjustified tax advantage gained by the taxable entity or other entities through this act.¹⁹⁹

In compliance with the ruling of the Court of Justice of the European Union concerning deduction of the input tax, if the tax authority has doubts regarding truthfulness of transactions, the company should prove that it received justified tax benefit and, accordingly, was not using other companies and bogus transactions. It is necessary to underline that in compliance with the ruling of the Court of Justice of the European Union concerning deduction of the input tax, if the tax authority has doubts regarding truthfulness of transactions, the company should prove that it received justified tax benefit and, accordingly, was not using other companies and bogus transactions.

There is another cogent precedent –the Court of Justice of European Union in its ruling of 29 June 2017 in case C 288/16, hearing the tax dispute between the individual merchant “L.Č.” and the State Revenue Service of Latvia, drew a different conclusion.

In this case, SIA *Atek* was obliged to transport goods subject to a transit procedure from the Port of Riga (Latvia) to Belarus. According to another agreement, *Atek* subcontracted *L.Č.* to carry out the transportation of the cargo. The transportation was performed using vehicles owned by *Atek* and leased to *L.Č.*, and in relation to the senders of these cargoes, *Atek* acted as the forwarder. In turn, *L.Č.* provided management of the transportation, as well as the repair and filling of the vehicles. They also cleared customs documents at border crossings, guarded the goods and delivered them to the receiver, as well as carrying out any necessary loading and unloading work. Considering that her services were related to transit, *L.Č.* applied a 0 % VAT rate.²⁰⁰ However, the State Revenue Service of Latvia performed tax inspection in relation to *L.Č.*, assessed additional VAT, collected late payments and fines to the state budget by stating that, first, in the absence of a legal relation with the sender or receiver of transported goods, these services cannot be considered equal to forwarding of goods or transportation of goods; as *L.Č.* does not hold the licence required by the Latvian legislation, it cannot be regarded as

¹⁹⁹ SIA “*Kuršu zeme*” v. State Revenue Service of Latvia [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216043&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051158> (Accessed: 19.12.2025)

²⁰⁰ IK “*L.Č.*” v. State Revenue Service of Latvia [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=192246&doclang=LV> (Accessed: 19.12.2025.)

possessing the status of a forwarder, consequently, it did not have the right to perform transportation of the cargo.²⁰¹

The Administrative District Court rejected the complaint of the company regarding annulment of the decision of the State Revenue Service, however, the appeal instance court, in particular, the Administrative Regional Court satisfied the complaint in part. Following submission of the appeal concerning the right to receive the tax benefit, the Supreme Court decided to suspend the litigation and to apply to the Court of Justice of European Union regarding a range of questions, including the question if the relief is only applicable in the situation when there is a direct legal link or business relations between the supplier and the receiver or the sender, as well as the criteria to which the direct obligation should comply in order to consider a service related to import or export of goods as exempted.²⁰²

In this case, the Court of Justice of European Union concluded that the exemption is not applicable to the services like the disputed issues in the main proceedings, which include transportation of goods to a country which is not the European Union Member State, unless these services are provided directly to the sender or the receiver.²⁰³

Thus, the author concludes that for the purpose of establishing the direct link and application of the VAT exemption two following criteria should be satisfied: first, provision of the relevant services contributes to the actual export or import transaction under review, and second, they are provided directly to the exporter, importer or receiver of the delivery of the relevant goods. Thus, tax planning through an intermediary is excluded. Accordingly, the services in this particular case were provided not directly to the receiver or the exporter of these goods, but their business partner *SIA "Atek"*.

On 14 March 2013 the European Court of Justice heard the case C-527/11 in the dispute between *the State Revenue Service of Latvia and SIA "Ablessio"*, by analysing the issue of assigning VAT identification numbers and rejection of assignment of the VAT identification number in light of the principle of proportionality. In compliance with the legal regulation of the Republic of Latvia, the authority has the right to reject registration of a company and assigning of the VAT identification number to it (Paragraph 2 of Part 1.1 of Section 3 of the Law on Value Added Tax of 09.03.1995, in force during the relevant period) only in cases when the entity to be registered cannot be reached at the registered address or the reported location, or upon the inquiry by the State Revenue Service, the entity does not submit

²⁰¹ IK "L.Č." v. State Revenue Service of Latvia [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=192246&doclang=LV> (Accessed: 19.12.2025.)

²⁰² *Ibid.*

²⁰³ *Ibid.*

information or submits false information concerning its material-technical capacity for performing the reported economic activity.²⁰⁴

In the above referred case the *Latvian Limited Liability Company SIA “Ablessio”* applied to the State Revenue Service to be registered in the register of VAT payers and to be assigned the VAT identification number. The State Revenue Service rejected this application on the basis that the company does not have material and financial resources and possibilities to perform the reported economic activity specifically the construction services due to an absence of fixed assets; the company was only in possession of a single office of 4 m² in a non-residential building, was not registered with the register of construction merchants, had not been performing any business operations since its establishment, and its only employee was the chairman of the board of the company.²⁰⁵

During the litigation proceedings, the Court of Justice of European Union concluded that the legislation of the European Union does not allow the tax administration of the Member State to refuse assigning the Value Added Tax identification number to a company just because it has received this number from companies which did not perform actual economic activity and whose owner disposed of them soon after assignment of this number, unless there is reliable evidence thereof.²⁰⁶

Accordingly, if the tax authority has earlier identified tax violations, including unlawful tax planning by the board members of earlier founded companies, it does not have the right to refuse assigning of the VAT identification number, based on such considerations, including also the small size of leased premises, if the authority cannot prove unlawful behaviour of the board members of the company indicating that the VAT number will be used contrary to its purpose.

In its ruling of 6 September 2021 in case C-487/11 concerning the dispute between Mr. Treimanis and the State Revenue Service, the Court of Justice of European Union analysed the issue of import customs duties in relation to exemption from taxes.

According to the exemption provided by Article 2 of the Resolution of the Council of European Union No.918/83 dated 28.03.1983.²⁰⁷, MR. Treimanis imported his car to the Republic of Latvia from the United States without paying the import duties to be used for

²⁰⁴ Regarding the Value Added Tax ,09.03.1995. *Latvijas Vēstnesis* (Official Journal of Latvia), 1995, No 49.

²⁰⁵ *State Revenue Service v. SIA “Ablessio”*. [Electronic resource]. Electronic data 2025 // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135026&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051195> (Accessed: 19.12.2025).

²⁰⁶ *State Revenue Service of Latvia v. SIA “Ablessio”*. [Electronic resource]. Electronic data 2025.//URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135026&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051195> (Accessed: 19.12.2025.).

²⁰⁷ Council Regulation (EEC) No 918/83 of 28 March 1983 [Electronic resource]. Electronic data 2025. // URL: <https://op.europa.eu/en/publication-detail/-/publication/e43c06b8-6973-429a-973f-1f031015968f/lang-ue-en> (Accessed: 19.12.2025).

the needs of his son who wanted to return to Latvia. The son of Mr. Treimanis lives in Riga, studies in Tallinn and is dependent on his father, and Mr. Treimanis lives in the United States.²⁰⁸ The Court of Justice of European Union resolved that the car can be imported to the customs territory of the European Union from the third country under the exemption from import duties, upon the condition that the importer has actually transferred his or her permanent place of residence to the European Union. In case of a car which is used free of charge by a family member of the importer, this is deemed to be intended for the importer's household, and the exemption from import duties is maintained.²⁰⁹

Thus, the author underlines that it is also possible to plan payment of import customs duties for import of such taxable values, including vehicles, to the territory of the European Union (the customs area of the European Union) taking into account possible exceptions based on the concept "household (or personal) needs."

Concluding Findings of Case Analysis

The Table 2.1 presented in this section provides a comprehensive summary of the key findings derived from the research conducted in this chapter, aiming to shed light on the intricacies of tax planning in the EU Member States. The investigation focused on understanding the concepts, principles, and boundaries that define legitimate tax planning within the framework of EU law. Moreover, the interpretations of tax planning by the Court of Justice of the European Union (ECJ) were examined to gain insights into the legal landscape surrounding tax optimisation.

²⁰⁸ Laimonis Treimanis v. State Revenue Service of Latvia 06.09.2012. [Electronic resource]. Electronic data 2025.// URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126424&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=7051227> (Accessed: 19.12.2025).

²⁰⁹ *Ibid.*

Summary of Key Findings of Tax Planning in EU Member Status

Topic	Key Findings
Concepts, principles, boundaries of legitimate tax planning in EU law	The concept of substance, as related to economic activities, is widely recognised in tax doctrines of numerous jurisdictions and is intrinsically linked to permissible tax optimization whereby it encompasses various factors, such as the presence of physical establishments, personnel, executive bodies, and genuine business operations. The assessment of the lawfulness of a transaction hinge upon substantiating its economic reality.
Interpretation of tax planning by the Court of Justice of the European Union	EU Member States are precluded from implementing provisions that unduly restrict the rights and freedoms of companies engaging in the establishment of foreign-controlled subsidiaries, regardless of any potential tax advantages, when such companies engage in genuine economic activities within any EU Member State (Cadbury Schweppes Case). This pivotal ruling has set a precedent in subsequent tax dispute cases and established the concept of “wholly artificial arrangements” as a central consideration. Companies are entitled to rely on the conditions of the TFEU and engage in legitimate tax planning activities within the EU. The court has underscored the significance of objective circumstances in assessing the legitimacy of tax planning strategies.
Definition of aggressive tax planning	Aggressive tax planning represents a crucial criterion in assessing business operations on a global scale. Tax authorities concentrate on atypical tax behaviours to combat base erosion and profit shifting. While a precise definition of aggressive tax planning may not be explicitly enshrined in legislation, its application and reporting requirements are increasingly prevalent at the international level.
Arrangements of payment of dividends	National provisions concerning controlled foreign companies (CFCs) can be applied and interpreted as a means of shifting the burden of proof onto taxpayers when they engage in activities beyond the scope of permissible actions (Controlled Foreign Companies and EU Law). The application and modification of CFC provisions fall under the purview of national law, rather than EU law. The concepts of “economic substance” and “effective establishment” assume critical significance in determining the validity of CFC provisions
Schemes of transfer of loss and profit	Member States may differentiate between cross-border and domestic transactions to prevent tax avoidance arrangements. The ECJ has upheld the legitimacy of different treatment if it aims to dissolve arrangements made for tax avoidance. Loss transfer restrictions may be imposed to prevent abusive practices and ensure a fair distribution of the tax burden.
Skatteministeriet v. T Danmark Case	Exemption from withholding of profit tax can be rejected in case of fraud or abusive practice, even without specific national or treaty provisions (Skatteministeriet v T Danmark Case).
Halifax / Credit Suisse cases	The temporary tax on dividends (bonuses) of a company cannot be considered a selective advantage, even if it only applies to certain companies during a specific period.
Apple Sales International, Apple Operations Europe v European Commission	The General Court concluded that the Commission failed to prove that Apple’s licenses to intellectual property should be allocated to Irish subsidiaries for assessing their annual profit in Ireland (Apple Sales International, Apple Operations Europe v European Commission).
Belgium v Truck Center SA	The EU Court of Justice concluded that Belgium’s legislation, which taxed interest paid by a resident company to a non-resident beneficiary, did not violate the principle of freedom of establishment. The Court considered the two beneficiaries of interest to be in non-comparable situations (Belgium v Truck Center SA).
Marks & Spencer case	The EU Court of Justice concluded that Member States may differentiate between cross-border and domestic transactions to prevent tax avoidance arrangements (Marks & Spencer case).

3 Factors affecting modern entrepreneurship and tax planning

In recent years, the concept of tax planning has undergone significant evolution, leading to diverse interpretations from both businesses and governments. Striking a balance between complying with state regulations and harnessing tax benefits across jurisdictions has become a delicate challenge for entrepreneurs. Cases like *Cadbury Schweppes* have shaped the EU Court of Justice's interpretation of tax planning and the freedom of establishment, further influencing the principles and boundaries of legitimate tax planning within the EU.

Moreover, factors such as anti-money laundering (AML) legislation, sanctions laws, the digital economy's rapid expansion, and the principle of freedom of establishment have all emerged as critical determinants of modern tax planning strategies. Entrepreneurs must navigate through evolving legal landscapes, business secrecy, and the role of mass media while complying with whistleblowing regulations.

The integration of modern entrepreneurship and tax planning offers businesses opportunities to enhance competitiveness, expand operations, and achieve sustainable growth. However, it also demands a keen understanding of the legal complexities, tax regulations, and the changing business environment.

The peculiar feature of tax planning nowadays is that it presupposes the obligation of the 'authors' of such tax planning (lawyers, accountants, auditors or tax advisors) to inform relevant authorities of breaches of legislation, and this is directly related to special legislation on "whistleblowers" and information providers, completely changing the approach to tax planning. Each individual advisor independently decides that they are not engaging in unlawful tax planning, and in this case, they are relieved of the notification duties; however, as this operation is not interpreted by the individual, the situation changes. Accordingly, if they encounter unlawful planning, they are obliged to notify, and this entirely recasts the relation to basic concepts, such as business or confidential information.

The interference of mass media and its effects present the third and not a minor factor, which again revives the question of confidentiality as a whole and the confidentiality of tax planning in particular, as any information, which is even presented in a simple e-mail letter, leaves its digital footprint. On one hand, this has made the process of managing the planning simpler, however, it has simultaneously complicated the situation on the account of the above referred risks. Thus, considering information leaks, such as the Panama Papers Scandal, adoption of the legislation on whistleblowers, sanctions, AML, releasing and sharing of information and de-offshorisation, the era of offshores has been hence dissolved when they exhausted their classic form as tools for tax planning.

3.1 Anti-money laundering (AML) legislation, its validity and practice of application

Within the European Economic Area the AML procedures are governed by a range of directives implemented in the national legislations of the Member States, as well as Resolution of the European Parliament and Council 1781/2006 of 20 May 2015 on information accompanying transfers of funds,²¹⁰ besides the above, the AML system of the European Union also takes into account the globalisation trends and the recommendations of FATF (Financial Action Task Force on Money Laundering).²¹¹ The core directives in this field are:

1. Directive of the European Parliament and Council 2015/849²¹² of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing with amendments made by Directive of the European Parliament and Council 2018/843²¹³ of 30 May 2018.
2. Directive of the European Parliament and Council 2009/110/EC²¹⁴ on the taking up, pursuit and prudential supervision of the business of electronic money institutions.
3. Directive of the European Parliament and Council 2011/61/EU²¹⁵ of 8 June 2011 on alternative investment fund managers.

²¹⁰ Council Regulation (EU) 2015/847 amending Directive 2015/849 on information accompanying transfers of funds and repealing Regulation No 1781/2006, 20.05.2015. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:32015R0847&from=EN> (Accessed: 19.12.2025).

²¹¹ Vavoula N. The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law. 04.2016. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.researchgate.net/publication/313490366> (Accessed: 19.12.2025); International standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. FATF. 2012. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html> (Accessed: 19.12.2025); Delna. Connections. Money laundering in Latvia and the role of trust and company service providers. 2018. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://delna.lv/wp-content/uploads/2018/01/Delna_Connections_2018_small-2MB.pdf (Accessed: 19.12.2025).

²¹² Council Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 20.05.2015 [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/lv/TXT/?uri=CELEX:32015L0849> (Accessed: 19.12.2025).

²¹³ Council Directive (EU) 2018/843 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 30.05.2018. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L0843&from=LV> (Accessed: 19.12.2025).

²¹⁴ Council Directive (EU) 2009/110/EU on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC. 16.09.2009. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/eli/dir/2009/110/oj/eng> (Accessed: 19.12.2025).

²¹⁵ Council Directive (EU) 2011/61/EU on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, 08.06.2011. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0061&from=LV> (Accessed: 19.12.2025).

4. Directive of the European Parliament and Council 2019/1153²¹⁶ of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

Directive of the European Parliament and Council 2015/849 of 20 May 2015 on introduction of measures for fighting money laundering (Anti-money laundering directive) covers intentional actions, like conversion or transfer of property being aware that the property was acquired in a criminal way, preventive disguising of the true nature of origin, location, handling, movement, hiding of the right, acquisition, possession or use of property which is known to have been acquired in a criminal way, as well as prevention of involvement in this activity.

Reporting and also other measures provided by the Anti-money laundering directive are applied to particular organisations, including financial and credit institutions, as well as different professional organisations, including auditors, lawyers and notaries, external accountants, tax advisers and trust companies or company service providers (Article 2 Paragraph one).

As all the above entities are involved in the operations of tax planning (restructuring of financial resources by companies, including movement of assets, operations, re-registration of companies, participation in transactions, etc.), the companies (their board members) may be brought to criminal liability for criminal offences, including for money laundering activities (including for suspicion of tax evasion), as well as sanctions and other measures may be applied against such companies within the scope of preventing such operations if it is suspected (features are identified) that money laundering takes place through tax planning.

The Anti-money laundering directive provides for the measures like due diligence of clients (Chapter II) which comprises identification of legal entities and the beneficiary owner (including shareholders), evaluation and receipt of information concerning the goal and nature of business relations, as well as continuous monitoring and evaluation of risks for both establishment of legal relationship and for transactions amounting to EUR 15 000.00 and above, as well as for verification of funds above EUR 1 000.00 (the Member States have the right to set stricter restrictions). Besides this, the entities established in the third countries (not the EU Member States) are subject to enhanced due diligence of clients (Chapter 3), and in compliance with Article 24, credit and financial institutions are prohibited to enter into correspondent relationship with “shell banks”.

²¹⁶ Council Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA. 20.06.2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1153&from=lv> (Accessed: 19.12.2025).

The Anti-money laundering directive also imposes the obligation upon reporting subjects to report suspicious transactions (without notifying the entities whose transactions were identified as suspicious) and obliges the Member States to introduce powers for relevant supervising institutions in their national legislation to suspend or withdraw agreement to a current transaction for the purpose of analysing the transaction, verifying the suspicions and sharing the results of the analysis among competent authorities, and the Directive also imposes the obligation of cooperation between these authorities of the Member States. AML provides the right to EU and national supervisory authorities to freeze assets of natural entities (to prohibit any movement of assets and transactions), as well as to suspend suspicious transactions of the subjects of the above regulation.

Besides the above, the Anti-money laundering directive also imposes the obligation upon relevant subjects to report suspicious transactions (without notifying the entities whose transactions were identified as suspicious) and obliges the Member States to introduce powers for relevant supervising institutions in their national legislation to suspend or withdraw agreement to a current transaction, to analyse the transaction, verify the suspicions and share the results of the analysis among competent authorities, and the Directive also AML provides the right to EU and national supervisory authorities to freeze assets of natural entities (to prohibit any movement of assets and transactions), as well as to suspend suspicious transactions of the subjects of the above regulation.

Thus, considering the above, companies and their representatives in the course of receiving assistance from accountants, tax experts, lawyers, notaries and other professionals within the scope of tax planning, should consider the risks that their transactions can be suspended or frozen (in the Republic of Latvia the right to freeze assets of entities is assigned to the Financial Investigation Unit in compliance with Article 32 of the “Law on Prevention of Money Laundering and Terrorism and Proliferation Financing”)²¹⁷ if these professionals arrange a suspicious transaction.

The constitutional rights of persons – in compliance with the Constitution of the Republic of Latvia – the right to protection of the property referred to in Article 105, the right to freely choose the profession referred to in Article 106,²¹⁸ Paragraph 2, Article 17 of the Charter of Fundamental Rights of the European Union – the right to protection of the property, Article 16 – freedom of business, 45 Article 47 – freedom of movement,

²¹⁷ “Law on Prevention of Laundering of Proceeds Derived from Criminal Activity and financing of terrorism and proliferation”, 17.07.2008. Latvijas Vēstnesis (Official Journal of Latvia), 2008, No 116.

²¹⁸ Charter of Fundamental Rights of the European Union. 07.06.2016. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (Accessed: 19.12.2025)

Article 47²¹⁹ – the presumption of innocence, Article 1 of the Additional Protocol to the Convention on Protection of Human Rights and Fundamental Freedoms – protection of the right of ownership, Article 2²²⁰– freedom of movement and Article 45 of the Treaty on Functioning of the European Union, freedom of establishment, Article 49²²¹, thus can be restricted, in particular, if there is suspicion that tax evasion, unlawful reduction of the taxable amount has taken place instead of lawful tax planning, based on which companies are required to provide information on true beneficiaries of companies, goals and nature of transactions.

However, the rights provided by the Constitution and international documents can be restricted and are not absolute, therefore, for the purpose of reduction of the risk of money laundering it is possible to impose restrictions to the right of individual entities, however, in this case the proportionality of imposed restrictions should be maintained and there should be the possibility to appeal against the resolution on application of such measures. In compliance with the case law of the Court of Justice of European Union confirmed, for example, in *Ordre des Barreaux*, irrespective of the criticism of this practice in the legal literature,²²² the AML regulation restricts the fundamental rights and freedoms of the person provided by the national constitutions of the EU Member States, including the right to privacy and the right to access to justice.

For example, in the ruling of the Court of Justice of the European Union of 28 July 2016 in the case No C-543/14. In document C-543/14 it is concluded that services provided by attorneys are not exempted from the Value Added Tax and that application of this tax does not violate the right to effective judicial defence and the principle of equality of the parties guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

In the course of the main proceedings the Constitutional Court of Belgium examined a range of actions for amending the Belgium Code on payment of VAT, cancelling the exemption from payment of VAT for the services of attorneys, and the court expressed doubts regarding the compatibility of the amendments with the right to fair trial. Moreover, the court agreed to the restrictions of fundamental rights and the prevalence of AML provisions and tax legislation in this case.²²³

²¹⁹ Charter of Fundamental Rights of the European Union. 07.06.2016. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.europarl.europa.eu/charter/pdf/text_en.pdf (Accessed: 19.12.2025)

²²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms. 1950. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf. (Accessed: 19.12.2025).

²²¹ Treaty on Functioning of the European Union [Electronic resource] //EU Law. Electronic data 2018. URL: <http://eulaw.ru/treaties/tfeu> (Accessed: 19.12.2025).

²²² Sciarba M. *The Incompatibility of Global Anti-Money Laundering Regimes with Human and Civil Rights. Reform needed?* 2019. Nomos Verlagsgesellschaft, Baden-Baden, Germany, p. 80.

²²³ *Ordre des barreaux francophones et germanophone u.c.,v. Conseil des ministres*. [Electronic resource]. Electronic data 2025 //URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=182290&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=4839815> (Accessed: 19.12.2025).

In its ruling of 25 April 2013 in case No C-212/11, the Court of Justice of the European Union recognised that the freedom of establishment is not restricted by the provision according to which the undertaking (its subdivisions) should provide information requested by the Member State represented by state authorities – the Financial Intelligence Unit.

In this ruling, in the main case *Jyske Bank*, the Danish subsidiary of the Danish bank *NS Jyske Bank*, acted based on the conditions of freedom of provision of services (without establishing a company in Spain), however, the Spanish tax authority notified regarding this, unless it appointed the representative for communication with this authority, to examining the organisational structure of *Jyske*, as well as AML procedures in relation to its services. Therefore, it is concluded that compliance with the AML provisions conforms with the general interest, and on these basis fundamental rights, including freedom of establishment can be restricted in order to ensure attainment of the goal of legislation, and its compliance should be ensured without expanding beyond the necessity and without application of the rules in a non-discriminatory way.²²⁴

On the other side, in the opinion of the Advocate General in case C-78/18 (the ruling of EC was not available at the moment of drafting the Thesis) concerning the Hungarian national system of AML provisions and the provisions of Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union regarding free movement of capital, confidentiality and protection of personal data, and regarding the right to the freedom of association it was concluded that there should not be discriminatory regulation of restrictions in the AML field for foreign entities different from domestic companies. In this situation, the Hungarian national legislation required external donors whose donations exceeded the set amount to submit an additional declaration on the origin of funds in the situation when this was not required from resident donors.²²⁵

The European Court of Human Rights dealt with the conflict between the AML regulation and fundamental rights in the case *Mihoid v. France*. In this case, the French lawyer demanded that the rules provided by three AML directives adopted by the EU requiring attorneys to report on suspicious transactions be additionally clarified in an internal resolution of the National Council of Attorneys on approval of internal AML procedures for attorneys. However, in its ruling on this case, the European Court of Human Rights concluded that provisions for combatting money laundering as a legitimate interest allow attorneys to fulfil

²²⁴ *Jyske Bank Gibraltar Ltd. v. Administración del Estado*. Electronic source 2025 // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136784&pageIndex=0&doclang=lv&mode=req&dir=&occ=first&part=1&cid=4839666> (Accessed: 19.12.2025).

²²⁵ *EU Commission v. Hungary*. Case No C-78/18. Opinion of Advocate General. 14.01.2020. [Electronic resource]. Electronic data 2025. // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=222223&pageIndex=0&doclang=LV&mode=req&dir=&occ=first&part=1&cid=4859255> (Accessed: 19.12.2025).

their obligation to conduct due diligence and to report suspicious transactions to the anti-money laundering authorities of the relevant Member State.²²⁶

3.2 Sanctions legislation of the USA, EU and several other countries

Resolution of the Council of European Union dated 22 November 1996 and Regulation No 2271/96 contains the provisions according to which decisions and resolutions of administrative authorities issued beyond the EU borders are not recognised and enforced (Article 4), and also citizens and residents of the EU Member States, legal entities established in EU are not obliged to respond to such foreign acts and actions of authorities having issued such acts (Article 5), and resolutions of such foreign authorities and courts, based on a range of sanctions of the United States introduced in relation to Cuba, Iran and Syria in the Annex to this Regulation (the list is replaced with the list in the Annex to the Delegated Regulation of the Commission No 2018/1100).^{227, 228}

Additional sanctions are provided by other regulatory enactments for 33 countries,²²⁹ for example, sanctions applicable to Korea People's Democratic Republic,²³⁰ introducing financial restrictions, restrictions for movement of goods and other sanctions based on the resolutions of the Council, which, in turn, are based on the restrictive measures of the United Nations.²³¹ The sanctions of UN and EU restrict the possibilities of tax planning for the countries which are not EU and UN Member States or which were convicted by UN for any actions.

In addition to sanctions, it is also necessary to mention the so-called EU "black list" of tax jurisdictions including the countries which do not implement automated exchange of financial information with the tax authorities of the EU Member States (for example, Fiji,

²²⁶ Michaud v. France. [Electronic resource]. Electronic data 2025. // URL: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-115377%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-115377%22]) (Accessed: 19.12.2025)

²²⁷ Council Regulation (EU) 2018/1100 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 06.06.2018. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1100> (Accessed: 19.12.2025).

²²⁸ Council Regulation (EU) 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 22.11.1996. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/eli/reg/1996/2271/oj/eng> (Accessed: 19.12.2025)

²²⁹ EU sanctions map. 28.04.2020. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://sanctionsmap.eu/#/main> (Accessed: 19.12.2025).

²³⁰ Council Regulation (EU) 2017/1509 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation, 30.08.2017. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1509> (Accessed: 29.12.2025).

²³¹ United Nations Security Council Consolidated List. 29.04.2020. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://main.un.org/securitycouncil/en/content/un-sc-consolidated-list> (Accessed: 29.12.2025).

the Cayman Islands, Panama, Seychelles)²³² and the “grey list” comprising the countries tending to demonstrate visible improvements in the automated exchange of financial information as on 31 December 2020 (Turkey, Bosnia and Herzegovina, Jordan, Thailand, Morocco, etc.).²³³

In compliance with the criteria referred to by OECD, the criteria for tax haven include the lack of taxes or presence of only nominal taxes, effective exchange of information, transparency or meaningful action (measures) for ensuring compliance with the tax legislation.²³⁴

The countries included in the above lists do not ensure transparency, fair tax competition and conformity of their legislation with the OECD strategies of fighting the tax base erosion and profit shifting (BEPS), which are aimed at reducing the scales of the tax planning strategies by using the called “gaps” in the tax legislation of various countries.

Considering that 137 global countries are members of BEPS²³⁵ and there are few countries which have not assumed the obligations or not adhered to BEPS strategies, developed for preventing tax evasion and reduction of taxes (the so-called “black list”), such measures restrict the possibility for unlawful tax evasion through “tax havens” and “bogus” companies, an instrument further strengthened by the obligation of automated exchange of information among countries. However, it should be noted that in the legal literature there are doubts as regarding the EU lists of “tax havens” by underlining that the biggest tax havens in the USA (like the state of Delaware, South Dakota and Florida) are not included in these lists due to political reasons.²³⁶

Moreover, a reference should be made to the list of countries which do not cooperate with other countries in fighting money laundering, including with FATF. The list of FATF includes but is not limited to Cyprus, Russian Federation, Israel and Lichtenstein.²³⁷

Additionally, OECD has prepared the white list which includes the criterion – exchange of information upon request if this is “obviously expected” for application of the domestic

²³² Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes 2020/C 64/03. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020XG0227\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020XG0227(01)) (Accessed: 29.12.2025.).

²³³ Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes 2020/C 64/03. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020XG0227\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020XG0227(01)) (Accessed: 29.12.2025.).

²³⁴ Harmful Tax Competition. An Emerging Global Issue. OECD. 1998. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en (Accessed: 29.12.2025)

²³⁵ BEPS member state list. OECD. 2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (Accessed: 29.12.2025).

²³⁶ Akhtar, J., Grondona, V. 2019. Tax Haven Listing in Multiple Hues: Blind, Winking or Conniving?

²³⁷ FATF. Review to Identify Non-Cooperative Countries or Territories: Increasing The Worldwide Effectiveness of Anti-Money Laundering Measures. 2000. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.fatf-gafi.org/media/fatf/documents/reports/1999%202000%20NCCT%20ENG.pdf> (Accessed: 29.12.2025).

legislation of the applying jurisdiction, without reference to any restrictions of information exchange due to bank confidentiality or internal tax, compliance with the requirements concerning the interest, guarantees of protection of confidentiality of exchanged information, respecting the rights of the taxpayer and existence of reliable information and powers for its receipt, by noting that the jurisdiction should “to a reasonable degree implement” the standards, in particular, signing minimum 12 bilateral treaties with other countries containing provisions on information exchange. The list includes the countries which have adopted the standards of OECD.²³⁸

However, this regulation does not exclude the possibility of lawful tax planning by choosing the most favourable tax regime for the taxable entity, where the tax rate or base, is lower furthermore by availing of legal benefits and discounts available on the national level, not included in these lists.

In the light of the above, it should be underlined that it is necessary to differentiate between the concepts of “tax planning” and “tax evasion”, as the first is legislation and according to it tax is not overpaid, in particular, only due tax amounts are paid, while the concept of “tax evasion” is applied to unlawful behaviour which, contrary to the law and the goal of the law, disguises or artificially reduces the taxable amount, and sanctions are directly applicable in case of the latter.

However, it should be noted that not only mass media and general public, but also tax authorities and even national courts of the EU Member States mix up these concepts and incorrectly consider tax planning as unlawful per se, including application of penalties for a failure to pay taxes and adoption of national legislation non compatible with the legislation of the European Union, which often become the subject of dispute at the Court of Justice of the European Union.

However, as the tax havens from the late 1990s vanished and cross-country tax relations improved, some Western states emerged as key players in tax planning and were named as the “new” tax havens, such as the Netherlands, Ireland, Belgium, Switzerland and others.²³⁹

²³⁸ Akhtar, J., Grondona, V. 2019. Tax Heaven Listing in Multiple Hues: Blind, Winking or Conniving? South Centre. 2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.southcentre.int/wp-content/uploads/2019/04/RP94_Tax-Haven-Listing-in-Multiple-Hues-Blind-Winking-or-Conniving_EN.pdf (Accessed: 29.12.2025)

²³⁹ Vleggeert, J., Vording, H. 2019. How the Netherlands became a tax haven for multinationals. Leiden University–Leiden Law School. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317629 (Accessed: 29.12.2025); Gottlieb I. Dutch Closing Door on Popular Corporate Tax Breaks. *BloombergTax*. 19.09.2020. <https://news.bloombergtax.com/daily-tax-report-international/Netherlands-Closes-Door-on-Popular-Corporate-Tax-Breaks>[Electronic resource]// *EUR-Lex. Electronic data 2025*, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317629 (Accessed: 29.12.2025); Torslov T. R., Wier L. S., Zucman G. The missing profits of nations. NBER working paper series. National Bureau of Economic Research. 2018. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://gabriel-zucman.eu/files/TWZ2018.pdf> (Accessed: 29.12.2025).

For example, the European Commission examined the case of assumed state aid for Nike, asserting that the company unlawfully used the advantages of the Dutch tax benefits with the help of trademarks (analogous to the description of the case Starbucks above).²⁴⁰ Nike used the EMEA structures (“Europe, Middle East and Africa”) in compliance with which the companies of the group with substantial property pay considerable tax exempted royalties to the EU subjects without substance. The Dutch tax authorities signed an agreement on preliminary pricing with many taxpayers who used structures equal those used by Nike. As follows, the Commission initiated a case against Nike concerning its receipt of potentially unlawful state aid (see Figure 3.1).²⁴¹

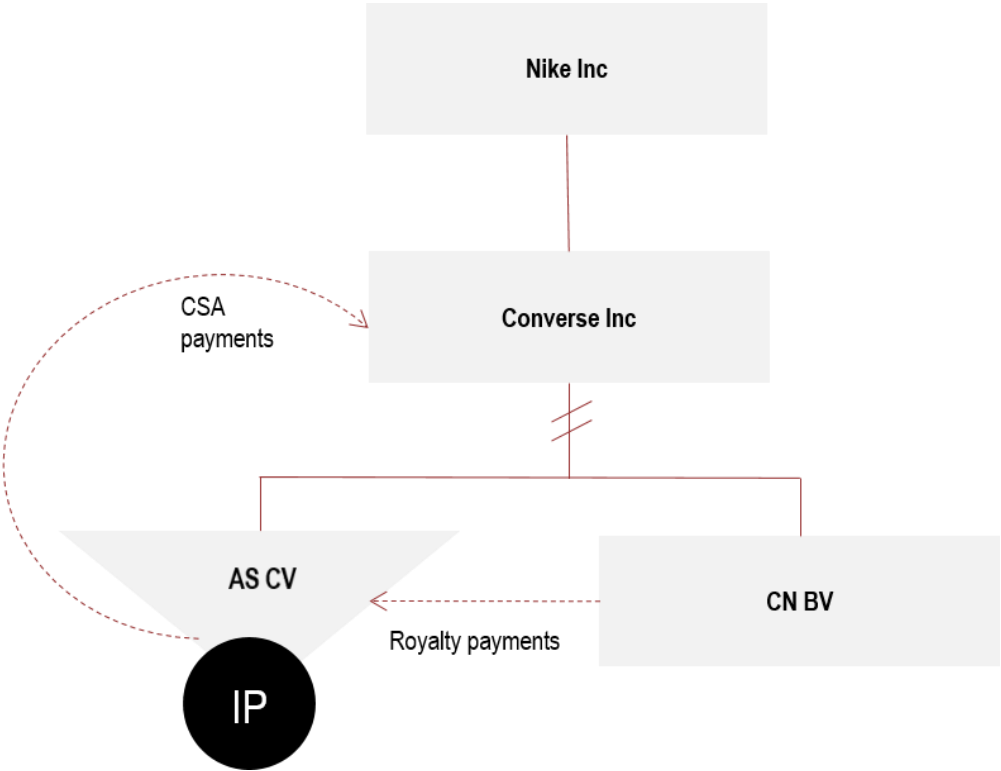


Figure 3.1 Scheme of the European Commission in Nike No SA.51284

Dijkstra W. “The Commission’s decision to investigate Nike tax rulings explained. 16.07.2019”²⁴²

Nike Inc. has offices in the Netherlands and the holding company entail several Dutch companies through several American companies, including *Nike Europe Holding B.V. (NEH)* and the holding company *Nike European Operations Netherlands B.V. (NEON)*. In this case, the group *Nike* (controlled by the American company *Nike Inc.*) acquired the group *Converse*,

²⁴⁰ European Union Commission 10.01.2019. decision State Aid–Netherlands. Possible State aid in favour of Nike No SA.51284 (2018/NN) [Electronic resource] // *EUR-Lex. Electronic data 2020*, URL: https://ec.europa.eu/competition/state_aid/cases1/201927/277937_2079330_55_2.pdf (Accessed: 29.12.2025).

²⁴¹ Dijkstra W. Commission’s decision to investigate Nike tax rulings explained. 16.07.2019.[Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.debrauw.com/legalarticles/commissions-decision-to-investigate-nike-tax-rulings-explained/> (Accessed: 29.12.2025)

²⁴² *Ibid.*

including *Converse Inc.* The company *NEH Group* provided warehouses through the Dutch subsidiary *Customer Service Centre Nike (CSC)*. Through *NEON*, *NEH* held the shares of *Nike Retail BV (NR BV)* and other companies non-resident in the Netherlands, but *NEH*, *NEON* and *NR BV* created a unified fiscal organisation whose parent company is *NEH*.²⁴³

The company *Nike International Limited (NIL)* located in Bermuda owns the entire intellectual property registered outside USA. In 2005, *NEON* received the exclusive licence for using the rights of *Nike* to the intellectual property and distribution of *Nike* products in Europe, Middle East and Africa, and *NEON* signed a supplementary agreement with *Nike Inc.* for distribution of clothing and footwear, as well as received the licence from the company *Nike Group Hurley Phantom CV (HP CV)* for receiving trademarks and patents.²⁴⁴

Nike used the opportunities of tax planning it had by submitting the joint tax declaration of *NEH*, *NEON* and *NR BV* as the joint tax declaration of the subject in compliance with the legislation of the Netherlands by reducing the taxable amounts according to payments for trademarks, and transferring the rights of the intellectual property of *Nike International*.

C.V. (NI CV) to *NIL*, as according to the Dutch legislation, *NI CV* does not pay the corporate tax. The Commission considered that *Nike* group artificially reduced the taxable amount on the account of royalties through the group structure, which allowed avoiding payment of taxes.²⁴⁵

According to the author's opinion, existence of a violation in this case should be determined based on whether there is lawful basis for the group to perform such transactions and restructuring of the group, so it can be said that they used the tax advantage and, in this way, implemented lawful tax planning instead of unlawful tax avoidance. It should be underlined that the essence of the decision of the Commission and the goals of stemming actions of *Nike*, in restructuring and transfer of the right of the intellectual property from one company to another, as well as the question if the state aid to the group was lawful is yet to be examined by the Court of Justice of European Union.

Following the violation by Luxembourg, the Netherlands and Belgium concerning selective benefits for large groups of companies, like *Fiat*, *Amazon*, *Starbucks* and *Apple*, which allowed them to pay lower taxes, the Commission also resolved to investigate the situation of taxes and the state aid of the company *IKEA*.²⁴⁶In the case of *IKEA*, the Commission of

²⁴³ European Union Commission 10.01.2019. decision State Aid–Netherlands. Possible State aid in favour of Nike No SA.51284 (2018/NN) [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://ec.europa.eu/competition/state_aid/cases1/201927/277937_2079330_55_2.pdf (Accessed: 29.12.2025).

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ European Union Commission. State aid: Commission opens in-depth investigation into the Netherlands' tax treatment of Inter IKEA. 18.12.2017. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5343 (Accessed: 29.12.2025).

the European Union also resolved that tax evasion was found for a period of 6 years on the account of restructuring of the groups and licence fees for the intellectual property, and that the unlawfully received Dutch state aid was provided as tax benefits,²⁴⁷ equal to the resolution in the case *Nike* adopted by the Commission in 2019 and described above.

In the above referred case of the Commission, *IKEA* was divided into two separate groups in 1980: *Inter Ikea* and *Ingka*, the group *Inter Ikea* purchased the right of the intellectual property which provided the right to use the trademarks *Ikea* by other dealers and producers of Ikea, while the group *Ingka* dealt directly with trade, i. e. stores.²⁴⁸

Inter Ikea is owned by the *Fund Interogo* established in Lichtenstein. *Systems* – the company of the group *Inter Ikea*, established in the Netherlands, owns the concept of the franchise *Ikea*, and *Systems* is owned by the Dutch company *Inter Ikea Systems Holding BV*, which, in turn is owned by the Luxembourg company *Inter Ikea Holding SA (IIHSA)*. *Systems* signed agreements with 11 franchise groups in 49 countries, the majority of which were owned by *Ingka Group* (see Figure 3.2).²⁴⁹

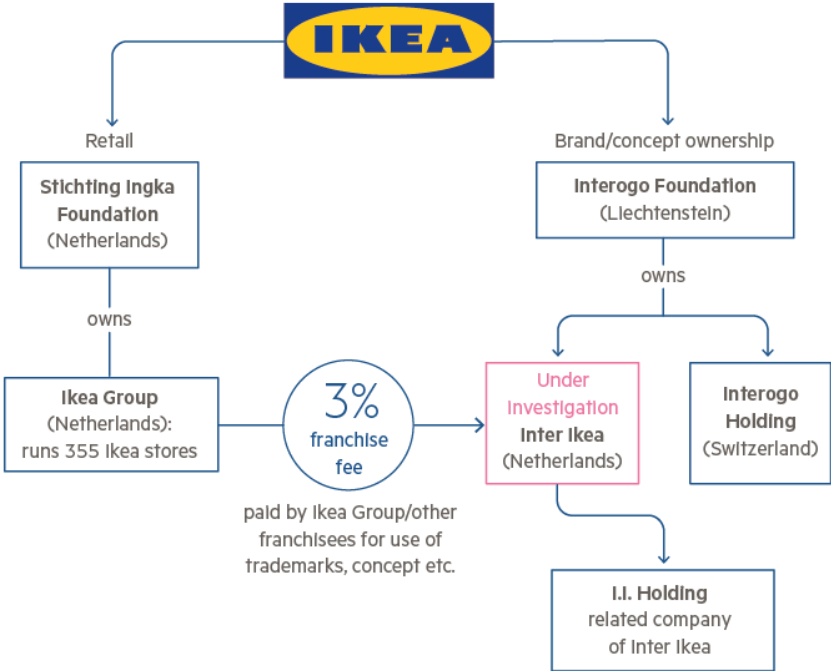


Figure 3.2 Scheme of the European Commission in Ikea No SA.46470 (2017/NN)

Milne, R., Toplensky, R. ‘Ikea’s complicated tax-driven structure faces EU scrutiny.’ 18.12.2017²⁵⁰

²⁴⁷ European Union Commission 18.12.2017. decision State Aid–Netherlands. Possible State aid in favour of Ikea. No SA.46470 (2017/NN) [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://ec.europa.eu/competition/state_aid/cases/272426/272426_1973466_49_4.pdf (Accessed: 29.12.2025).

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Milne R., Toplensky R. Ikea’s complicated tax-driven structure faces EU scrutiny. 18.12.2017. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL:<https://www.ft.com/content/d332c7a0-e3fb-11e7-97e2-916d4fbac0da> (Accessed: 29.12.2025)

The Dutch tax authorities and *Systems* signed an agreement concerning the amount of the taxable franchise licence regarding the other company *Inter Ikea* in Luxembourg, *I.I. Holding C.A. (Holding)* for licence fees of the franchise which should be paid to *Systems*, while *Holding* signed the licence agreement with *Systems* allowing *Systems* to use the intellectual property of the company for development of the franchise concept *Ikea* providing for payment of the licence fee. The licence fee reduced the taxable income of *Systems* by transfer of a considerable part of its income to *Holding*, which, in turn, was exempted from payment of the tax of the relevant amount according to the tax rules of the holding valid in Luxembourg at that time.²⁵¹

Thus, *Ikea* reduced its taxable income on the account of restructuring of the group and licence fees for use of the intellectual property, which finally deprived Luxembourg of the relevant part of income. The Commission considered that the payment for transfer of this intellectual property right did not correspond to the actual price, and therefore the company did not correctly assess the appropriate tax amount for the income of the group and received the misdirected state aid as tax exemption of the companies of the group *Ikea*.²⁵²

This opinion concerning tax planning and the state aid is shared by the Court of Justice of European Union, for example, in its ruling of 24 September 2019 in the case *Grand Duchy of Luxembourg v. European Commission* concerning the state aid provided to *Fiat Chrysler Finance Europe*.²⁵³

In this case, *Fiat Chrysler Finance Europe (Fiat)* applied to the tax authorities of Luxembourg for an early tax decision, the tax authorities of Luxembourg adopted the early tax decision by agreeing that the transfer will be analysed in compliance with the circular letter concerning the approval of the method of distribution of the profit within the group *Fiat Chrysler*, and which allowed *Fiat Chrysler Finance Europe* to define the amount of its corporate tax payable in Grand Duchy of Luxembourg every year and which provided that the transactions between companies within the same group should be paid for as if they were performed by independent companies by transfers according to comparable conditions with non-related parties, and it was explained how the remuneration of non-related parties should be defined, in particular, in relation to financial transactions of the group of

²⁵¹ European Union Commission 18.12.2017. decision State Aid–Netherlands. Possible State aid in favour of Ikea. No SA.46470 (2017/NN) [Electronic resource] // *Electronic data 2025*, URL: https://ec.europa.eu/competition/state_aid/cases1/202027/272426_2169565_285_2.pdf (Accessed: 29.12.2025)

²⁵² *Ibid.*

²⁵³ European Union Commission 11.06.2014. decision State Aid–Luxembourg. Possible State aid in favour of Fiat Chrysler Finance Europe. No SA.38375 (2014/NN) [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://competition-cases.ec.europa.eu/cases/SA.38375> (Accessed: 29.12.2025).

companies. However, the European Commission initiated investigation of the state aid (reduction of the payable tax) of Grand Duchy of Luxembourg.²⁵⁴

Thus, it can be concluded that even in the situation of lawful tax planning by using the existing tax benefits or exemptions defined by the state, there is the possibility that the Commission of the European Union may declare such benefits or exemptions as non-compatible with the legislation of the European Union and not justified state aid and declare the tax planning implemented by the group as tax evasion and unlawful tax planning and oblige it to cover the incurred debt.

However, in the situation with *McDonald's Europe*, for example, the European Commission concluded that there was no tax evasion and that Grand Duchy of Luxembourg did not provide unlawful state aid. In this case, *McDonald's Europe Franchising* is the subsidiary of *McDonald's Corporation* based in the USA. The company is the tax resident of Luxembourg and has two subsidiaries of which one is in the United States and the other in Switzerland.²⁵⁵

The European franchise company *McDonald's* acquired a range of rights to the franchise of *McDonald's* from the corporation *McDonald's* in the United States, which were later transferred by it to the internal division in the American subsidiary of the company. In the result, the European franchising of *McDonald's* was receiving royalties from the franchise of the managers of restaurants *McDonald's* in Europe, Ukraine and Russia, for the franchise of *McDonald's*. *McDonald's Europe Franchising* also established the Swiss subsidiary in charge of licensing of the franchise rights and through which the payments of royalties were sent from Luxembourg to the American subsidiary of the company (see Figure 3.3).²⁵⁶

²⁵⁴ Grand Duchy of Luxembourg v. Ireland, supported by Fiat Chrysler Finance Europe. Case No T-755/15, T-759/15. Opinion of Advocate General. 24.09.2019. [Electronic resource]. Electronic data 2025 // URL: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=218102&pageIndex=0&doclang=LV&mode=lst&dir=&occ=first&part=1&cid=8234212> (Accessed: 29.12.2025.)

²⁵⁵ European Union Commission 19.09.2018. decision State Aid–Luxembourg. Possible State aid in favour of McDonald's Europe. No SA.38945 (2015/NN) [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://ec.europa.eu/competition/state_aid/cases1/201930/261647_2033697_270_2.pdf (Accessed: 30.12.2025).

²⁵⁶ *Ibid.*

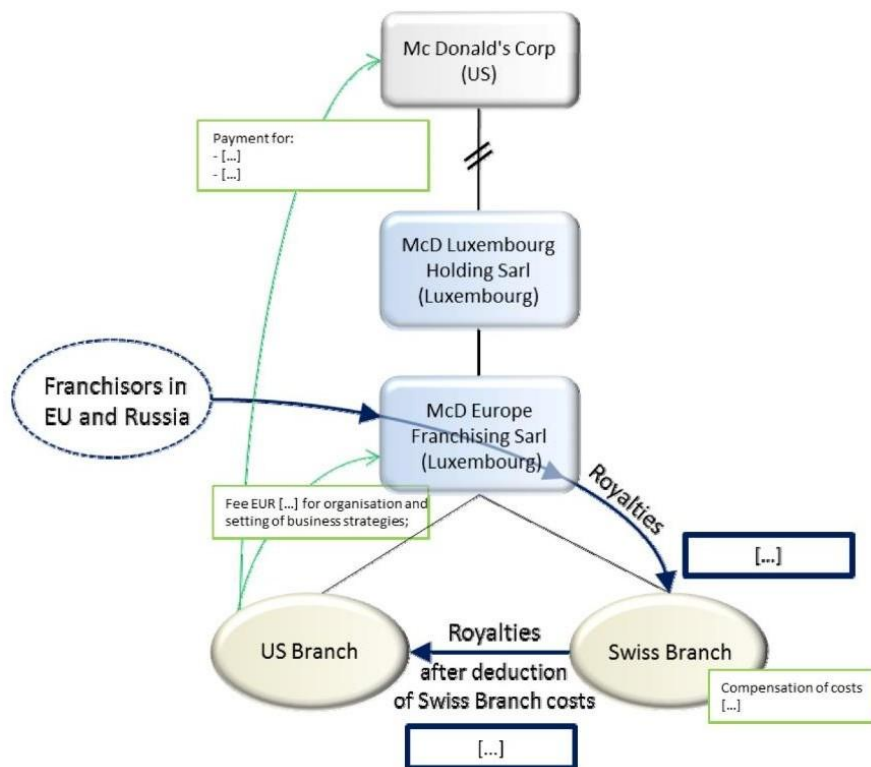


Figure 3.3 Scheme of the European Commission in the proceedings *McDonald's Europe No SA.38945* *McDonald's Europe. No SA.38945 (2015/NN)*

Milne, R., Toplensky, R. 'Ikea's complicated tax-driven structure faces EU scrutiny.' 18.12.2017.²⁵⁷

McDonald's stated that, although in compliance with the tax legislation of the USA the subsidiary in the *SUA* was not the “permanent representative office”, in compliance with the tax legislation of Luxembourg it was the “permanent representative office”. In the result, income from royalty should be exempted from taxation in compliance with the legislation on the corporate tax of Luxembourg. Thus, the tax authorities of Luxembourg concluded that the company does not have to pay the corporate tax in Luxembourg, as the profit will be taxed in the United States. Thus, in this case a part of the income of *McDonald's* in Luxembourg was exempted from taxes.²⁵⁸

The European Commission concluded that Grand Duchy of Luxembourg had provided lawful state aid and that the company had not evaded taxes. This was because the Luxembourg state authorities had applied the treaty for avoiding double taxation between Luxembourg and the USA, exempting American division's income from Luxembourg's corporate taxation.²⁵⁹

Ultimately, the author of the Thesis points out that tax benefits or benefits granted by

²⁵⁷ Haslehner W. *Ikea's complicated tax-driven structure faces EU scrutiny.* 22.06.2016. [Electronic resource] // EUR-Lex. Electronic data 2025, URL: http://kluwertaxblog.com/2016/06/22/the-mcdonalds-state-aid-case-the-eu-commission-interprets-a-tax-treaty/?doing_wp_cron=1588252478.5431149005889892578125 (Accessed: 30.12.2025).

²⁵⁸ European Union Commission 19.09.2018. decision *State Aid–Luxembourg. Possible State aid in favour of McDonald's Europe. No SA.38945 (2015/NN)* [Electronic resource] // EUR-Lex. Electronic data 2025, URL: https://ec.europa.eu/competition/state_aid/cases1/201930/261647_2033697_270_2.pdf (Accessed: 30.12.2025).

²⁵⁹ *Ibid.*

the state within the scope of the corporate tax planning are not always recognised by the European Commission as prohibited state aid. Therefore, lawful tax planning without EU sanctions remains possible.

3.3 Business secrets, role of mass media and legislation on ‘whistleblowers’

The role of the business secret, mass media and whistleblowers in the tax legislation weighs heavily in relation to both tax evasion by large and important companies,²⁶⁰ and situations where companies implement lawful tax planning, however, which is misconstrued or mixed with tax evasion due to a lack of adequate legal knowledge about tax planning and its variations, within the mass media, which later transpires into public scandals damaging the companies holistically through a blow on their long-built reputations.

Such scandals can also be caused by both internal and outsourced personnel of the companies (accountants, advisers, etc.), who have “leaked” the company documents to broader public concerning payable taxes and their amounts (tax leaks), or reports on the possible violations of the firms to the state tax authorities (whistleblowers).

Examples of such scandals involving tax leaks are the so called Panama Papers,²⁶¹ Mauritius leaks,²⁶² Luanda leaks²⁶³ and Luxembourg leaks,²⁶⁴ as well as tax leaks of the USA President Donald Trump²⁶⁵ and other tax scandals.²⁶⁶

In such cases the records of the company income are, as a rule, protected by the business secret, which does not allow their publication in full scope, however, their protection is not

²⁶⁰ Leaked Documents Expose Global Companies’ Secret Tax Deals in Luxembourg. International Consortium of Investigative Journalists. 05.11.2014. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.icij.org/investigations/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg/> (Accessed: 30.12.2025).

²⁶¹ The ‘Paradise Papers’ And The Long Twilight Struggle Against Offshore Secrecy. International Consortium of Investigative Journalists. 27.12.2017. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.icij.org/investigations/paradise-papers/paradise-papers-long-twilight-struggle-offshore-secrecy/> (Accessed: 30.12.2025).

²⁶² These Are the Paradise Papers. Sueddetutsche Zeitung. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://projekte.sueddeutsche.de/paradisepapers/politik/this-is-the-leak-e866529/> (Accessed: 30.12.2025).

²⁶³ Treasure Island: Leak Reveals How Mauritius Siphons Tax From Poor Nations To Benefit Elites. International Consortium of Investigative Journalists. 23.07.2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.icij.org/investigations/mauritius-leaks/treasure-island-leak-reveals-how-mauritius-siphons-tax-from-poor-nations-to-benefit-elites/> (Accessed: 30.12.2025).

²⁶⁴ How Africa’s Richest Woman Exploited Family Ties, Shell Companies And Inside Deals To Build An Empire. International Consortium of Investigative Journalists. 19.01.2020. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.icij.org/investigations/luanda-leaks/how-africas-richest-woman-exploited-family-ties-shell-companies-and-inside-deals-to-build-an-empire/> (Accessed: 30.12.2025).

²⁶⁵ Repeated leaks and revelations are chipping away at Trump’s attempts to keep his tax records secret from the American public. Business Insider. 08.05.2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.businessinsider.com/trump-taxes-nyt-report-leaks-ruining-attempts-to-keep-records-secret-2019-5> (Accessed: 30.12.2025).

²⁶⁶ The Panama Papers: Exposing the Rogue Offshore Finance Industry. International Consortium of Investigative Journalists. 06.04.2020. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.icij.org/investigations/panama-papers/> (Accessed: 30.12.2025).

applicable to investigation performed by the state authorities concerning possible administrative or criminal offences. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of expression),²⁶⁷ as well as Directive of the European Parliament and Council No 2019/1937 of 23 October 2019²⁶⁸ provide for protection of whistleblowers in cases when the provided information was made public for the public interest for finding serious violations.²⁶⁹ However, whistleblowers are often subject of the court prosecution because of abusing the business secret, like in the scandal with Luxembourg leaks, irrespective of that the Bonus of the European Parliament is granted for such reports.²⁷⁰

Protection of the business secret is regulated by Directive No 2016/943²⁷¹ of 8 June 2016 (implemented in the national legislation of the EU Member States), which provides protection of information under the status of business secret against its unlawful gaining, use and disclosure, as well as specifies that the business secret is information (all the criteria should be satisfied) which is usually not known or not accessible for a broad range of persons equally to the range of persons who usually use this information, has commercial value, as this information is secret and is subject to reasonable measures of security under relevant circumstances as adopted by the person in lawful control of this information (Article 2).

However, in the supplement to exemptions from the Directive providing that the Directive is not applicable to disclosure of business secret for the public interest, and disclosure of information to the state authorities or national state authorities, in the national legislation there are exceptions concerning the freedom of expression of opinions and information (the freedom of expression).

However, in the resolution of 15 March 2017 in the criminal case *LuxLeaks*, the Appeal Court of Luxembourg resolved that Antoine Deltour, the employee of *Price Waterhouse Coopers*, who participated in tax leaks in Luxembourg was declared guilty for stealing information within the country and gaining access to the data base by fraud, as well as for the unlawful possession of this

²⁶⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms. 1950. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 30.12.2025)

²⁶⁸ Council Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, 23.10.2019. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/LV/TXT/HTML/?uri=CELEX:32019L1937&from=EN> (Accessed: 30.12.2025).

²⁶⁹ Former PwC employees face trial over role in LuxLeaks scandal. *The Guardian*. 24.04.2020. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://www.theguardian.com/world/2016/apr/24/luxleaks-antoine-deltour-luxembourg-tax-avoidance-ricewaterhousecoopers-trial> (Accessed: 30.12.2025).

²⁷⁰ *Ibid.*

²⁷¹ Council Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 08.07.2016. [Electronic resource] // *EUR-Lex. Electronic data 2025*, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0943> (Accessed: 30.12.2025).

information he was sentenced to conditional imprisonment for 6 months and charged a fine of EUR 1500. However, later in 2018 the cassation court cancelled the judgment.

At the same time, another employee Raphael Halet was declared guilty for stealing business information within the country and gaining access to the data base by fraud and laundering of money received in the result of the criminal offence, as well as possession of the subject of theft within the country, a violation of the obligation to maintain business secret, and according to the court's conclusion, the exemption of the whistleblower did not apply to the accused person; however, mitigating conditions were applied – considering his motivation did not involve criminal intentions, these circumstances were taken into account at setting the penalty, thus imprisonment was not applied and he had to pay a fine of EUR 1000. Still, both persons faced potential civil charges for the caused damage. Eduard Perren, the journalist who published the materials received from Deltour, was acquitted and no charges were imposed on him.²⁷²

Therefore, it is necessary to underline that in situations when large companies are involved in potential tax fraud (or tax planning or the state aid is wrongly viewed as tax fraud), irrespective of the national and supra-national regulation of protection of whistleblowers they do not have sufficient protection, as it has been mentioned in mass media on several instances – in the situation of Wikileaks and Edward Snowden, as well as in relation to other reporters.²⁷³

With regards to the Commission's commitment to dissolving barriers for whistleblower protection, a more proactive approach has been cultivated in 2018, with a comprehensive package of initiatives put forward for safeguarding reporting procedures. These include a proposal for the Directive on the protection of persons reporting on breaches of Union law and a communication, with a developed legal framework for whistleblower protection for safeguarding the public interest at European level. The adoption of the proposed initiatives occurred on 23 October 2019 and subsequently the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law took effect on 16 December 2019.²⁷⁴

However, the Commission has faced obstinate stances from Member States in the issue of transposition and in July of 2022 issued letters of formal notice to 24 states for their failure

²⁷² Summary translation of Court of Appeal of Luxembourg judgement. 15.03.2017. Annelies Vandendriessche, PhD Candidate at the University of Luxembourg. [Electronic resource]. Electronic data 2025 // URL: <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/07/Luxleaks-Appeal-Judgement-Summary-Translation.pdf> (Accessed: 30.12.2025)

²⁷³ Declassified: From Snowden to WikiLeaks to Crypto AG, these are the biggest leaks of the past decade and what we've learned from them. Business Insider. 24.02.2020. [Electronic resource]. Electronic data 2025 // URL: <https://www.businessinsider.com/snowden-wikileaks-crypto-ag-biggest-leaks-secrets-revealed-2010-2020-2> (Accessed: 30.12.2025).

²⁷⁴ European Parliament, & Council of the European Union. (2019). Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Official Journal of the European Union, L 305/17. URL: <https://eur-lex.europa.eu/eli/dir/2019/1937/oj/eng>

to fully transpose the directive and subsequently referred 8 cases to the Court of Justice of the European Union. The exposure of extensive wrongdoing through the Panama Papers underscored the immediate necessity for strengthened measures aimed at safeguarding whistleblowers. It is crucial to recognise by aligning national legislation with the Directive and eliminating discrepancies between legislations, individual countries not only contribute to the harmonisation of whistleblower protection across the EU but also promote internal consistency and soundness in their respective financial systems.

For example, in the matter of upholding effective enforcement of EU law it is necessary to define protection for any matter that threatens or harms the public interest, such that the scope of protection extends to reports exposing abuses of authority. This mechanism ensures that whistleblowers do not forfeit their rights when their disclosures fall within the gray area between abuses of power and technical violations of the law. The EU directive prohibits “any form of retaliation” including threats of retaliation and attempts at retaliation (Article 19) and provides for penalties to be applied for persons who hinder or attempt to hinder reporting (Article 23).

Furthermore, it is imperative to eliminate any arbitrary loopholes absent in the EU Directive, which undermine the purpose of whistleblower laws by facilitating retaliation in cases of disclosing publicly available information. While the Directive on whistleblowing is relatively young, the principles and approaches for aligning national legislation with EU directives are of urgent matter and would benefit from exchange of best practices among Member States – this can be achieved through establishment of formal forums and designated platforms where individual states can enhance protection mechanisms through a collaborative approach.

The establishment of a Civil Society Monitor dedicated to the transposition and implementation of whistleblowing directives constitutes a commendable step towards reinforcing transparency and accountability. Nonetheless, it would benefit from a broadened scope that extends beyond the mere transposition of directives to encompass the comprehensive monitoring of the practical application of whistleblowing laws. This expanded mandate would entail evaluating the efficacy of these laws in safeguarding whistleblowers and facilitating transparency. Key aspects to be assessed would include the adequacy of law enforcement, identification of potential deficiencies, and ongoing monitoring of the outcomes of whistleblower cases. A robust framework for collecting and analysing data which would gather insights on tracking of reported cases, categorisation of the disclosed violations, examination of authorities’ responses, and assessment of the overall impact of whistleblowing legislation would also be a more actionable step into protection of whistleblower protection.²⁷⁵

²⁷⁵ (N.d.). Retrieved from <https://whistleblowingnetwork.org/Our-Work/Spotlight/Stories/New-Civil-Society-Monitor-Transposition-and-Imple> (Accessed: 30.12.2025)

3.4 Trends in the development of tax law in context of digital economy

The rise of the digital landscape has redirected academic discussions towards the practical applications of tax planning within the “new” economy of the European Union’s (EU). Particularly, within the realm of artificial intelligence (AI) and the digital economy, various discernible trends have emerged in tax law, capturing the attention of policymakers.

Firstly, the digitisation of economic activities necessitates the recalibration of tax laws to effectively capture the inherent value generated through digital platforms, online sales, and cross-border transactions. This adjustment recognises that traditional tax frameworks may not adequately address the complexities of the digital economy. The European Court of Justice (ECJ) has played a pivotal role in shaping the development of tax law in this context, providing distinct and authoritative interpretations with far-reaching implications for both theoretical and operational aspects.

Secondly, the re-evaluation of traditional paradigms governing the notions of nexus and permanent establishment does not inherently challenge their underlying purpose but rather reshapes them to account for the digital shift, which inevitably impacts tax obligations in specific jurisdictions. This transformative shift signifies a departure from the previous focus on rigid physical presence as the sole determinant of tax liability. Instead, factors like substantial economic presence, active user participation, and identifiable digital footprints are accorded heightened significance. Tax authorities consider these factors to ensure that enterprises generating significant value within the digital realm are subject to fair and equitable taxation in the jurisdictions where they conduct their operations.

The case of *Google Ireland* (2017) represents a significant milestone in the ECJ’s approach to permanent establishment and taxation in the digital economy. This landmark case examined whether the defendant’s economic activities in Ireland constituted a taxable presence and serves as a pivotal example of the ECJ’s stance on the digital nature of the modern economy in tax matters. The court’s ruling concluded that the mere presence of a server did not meet the requirements for establishing a permanent establishment for tax purposes. Instead, the creation of value and the establishment of a taxable nexus can stem from intangible elements, particularly data and algorithms. In determining tax liability, the focus transcends reliance on physical infrastructure. This ruling marks a departure from the traditional interpretation of permanent establishment, which previously relied on physical presence, and moves toward a more nuanced approach centred around economic substance and functionality.

Furthermore, efforts are underway to develop effective mechanisms that facilitate the appropriate allocation of profits derived from AI algorithms, data, and other intangible assets to the jurisdictions where the value is substantively generated. In this regard, significant

factors such as active user participation, substantial data contributions, and the multifaceted functions performed by AI systems are given due consideration. The underlying rationale for these endeavours is twofold: preventing unwarranted profit shifting and fostering a fair and equitable distribution of tax liabilities among the relevant jurisdictions. In the realm of combating aggressive tax planning practices the ECJ aims to address and deter artificial arrangements lacking genuine economic substance.

The new practices of the digital era highlight the importance of tax planning to reflect the rise of the cryptocurrency industry which has drawn regulatory attention towards taxation and manipulative trading practices like wash trading. However, the rapidly evolving nature of the crypto industry introduces new uncertainties, especially regarding emerging crypto assets such as Non-Fungible Tokens (NFTs) and Decentralized Finance (DeFi) protocols. The classification of these assets becomes intertwined with questions regarding their appropriate tax treatment. According to (Cong et al., 2022) from the National Bureau of Economic Research, recent advancements in tax scrutiny have prompted crypto investors to engage in legal tax planning techniques combined with tax-loss harvesting, rather than resorting to non-compliance strategies. The study also highlights the connection between tax planning strategies and the dynamics of the crypto market. For instance, transactions involving NFTs and the demand for and lending rate in DeFi lending tend to peak towards the end of the year, aligning with tax considerations.²⁷⁶ This suggests that tax planning and potential tax advantages may influence the timing and preferences of market participants in these specific areas. Another aspect of legal tax planning in the blockchain realm revolves around the utilisation of smart contracts. Smart contracts are self-executing and autonomous agreements embedded within the blockchain, enabling investors to automate tax calculations and reporting by incorporating predefined tax rules.²⁷⁷ This behaviour not only alleviates the burden on investors but also encourages a proactive approach through transparent and incentivised procedures. As evident from the market behaviour observed in the American study, it is reasonable to anticipate a similar shift towards compliant behaviour in response to the evolving regulations pertaining to cryptoassets in the EU. In recent agenda, EU ministers reached an agreement to implement more stringent tax regulations for crypto transactions, slated to take effect on January 1, 2026. This agreement introduces a new requirement for all crypto asset providers (CASPs) operating

²⁷⁶ Cong, L. W., Landsman, W., Maydew, E., & Rabetti, D. (2022). Tax-loss harvesting with cryptocurrencies. National Bureau of Economic Research . doi:10.3386/w30716. URL: <https://www.nber.org/papers/w30716>

²⁷⁷ Sklaroff, J. M. (2017). Smart Contracts and the Cost of Inflexibility. *University of Pennsylvania Law Review*, 166(1), 263–303. URL: <http://www.jstor.org/stable/45154933>

within the EU, mandating them to report the transactions of clients who reside in the EU.²⁷⁸ This development expects the evolution of three distinct categories of legal tax planning, namely compliance strategies, timing strategies, and location and structure strategies, the latter functionally promoting the adoption of tax-efficient structures.

3.5 Principle of freedom of establishment in EU and its compatibility with tax planning

The considered and mutually profitable decision of a group of European countries to participate in creation and development of the process of multinational integration provided by TFEU invoked the urge to adopt secondary solutions with the purpose of defining a common economic space. Irrespective of that, the process of multinational integration possesses continuous, immanent nature, it can be divided into five broad term stages – creation of the area of free trade, creation of the Customs Union, creation of the common market, creation of the economic and currency union, creation of the political union. This division conforms with the scheme of the famous American economist of Hungarian origin Bela Balasa, who refers to existence of five forms of regional economic integration equal to the ones listed above. These forms emerge according to the sequence of increase of the degree of the economic integration.²⁷⁹

This division is based not only on the principles of analytical nature, but even the fact that transition from one stage to another is always the result of the coordinated resolution of the countries. During the whole history of creation and development of the process of multinational integration EU has been following this model.²⁸⁰ It is obvious that in each of the above referred stages of gradual integration development the EU Member States lose a part of their state sovereignty, own autonomy in adoption of economic decisions in the fields of customs and taxes.²⁸¹

In order to maximise the profit and advantage from the created common market, created in the result of transformation of the Customs Union, its members, obviously, need to be involved in closer economic integration: if the Member States express intentions to transform the single market into true internal market of the entire union of countries in future, they have to provide not only free movement of goods and capital, but also movement of the factors of

²⁷⁸ New tax transparency rules will help Member States shine a light on the crypto-asset sector. (2023, May 16). URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2725 (Accessed: 30.12.2025)

²⁷⁹ Balasa B. *The Theory of Economic Integration*. London. 1961. Quotes from *European Union Law: textbook for universities/* edited by A. Y. Kapustin.–M.: Publishing house Yurait, 2013.–C.163–Series: Master.

²⁸⁰ *The European Union and Direct Taxation: A Solution for a Difficult Relationship* by Luca Cerioni. Routledge, 2018, p.275

²⁸¹ *The Inward Investment and International Taxation Review*. Ed. by Tim Sanders. Third Edition. Law Business Research Ltd, 2013. p.733.

effective production: the labour (labour resources, technologies) and capitals. In order to define these fundamental freedoms of the common market, the Member States need to develop a large number of common measures either in the existing common economic areas, or in the new ones – like the social area, protection of environment and consumers. New restrictions of sovereignty become the consequences of the attained effects.²⁸²

In the Treaty on Functioning of the European Union (TFEU)²⁸³ (Articles 110–113) are devoted to harmonisation of legislation on turnover taxes, excise taxes, and other indirect taxes; the chapter on approximation of laws (Articles 114–118) applies to taxes which have an indirect effect on the creation of the domestic market; and tax rules not within the scope of application of the standard legislative procedure, are also regulated by principles related to the taxation policy and the free movement of people and services (Article 45). The development of the EU tax rules is aimed at providing continuous functioning of the single market, and indirect taxes as harmonised at an earlier stage and on a deeper level than direct taxes. Direct taxation falls within the scope of competence of the EU Member States; however, the author of the Thesis considers that they have to exercise this competence in compliance with the EU legislation.

Thus, the common market is the third stage on the way to multinational economic integration. Like the Member States of the Customs Union, also the members of the common market eliminate restrictions for internal trade among themselves and follow common policy in the area of external trade with the third countries. However, the Member States of the EU common market have reached further on the way to the general economic integration by eliminating prohibitions for movement of the production factors. In the result of the opportunity provided by the common market, namely, placement of production factors where they can provide maximum profit, the level of productivity increases in all the countries.

Among the EU goals for attaining which the creation of the common market was directed, the following should be pointed out:

- 1) harmonised, balanced and robust development of the economic activity;
- 2) high level of employment and social protection of residents;
- 3) stable and inflation free economic growth;
- 4) high level of competitiveness and approximation of economic indices;
- 5) economic and social cohesion.²⁸⁴

²⁸² About the basis and peculiarities of the economic integration See Muratova O.V. (Муратова О.В.) Directions and limits of harmonisation of the private law under the circumstances of regional economic integration // Russian law magazine 2015. N 12.139–149, Rizkov V.B. (Рыжов В.Б.) International legal models of regional economic integration (European Union, MERKOSUR, EurAsEs) // International public and private law", 2006, Vol. 4 // SPS "ConsultantPlus"

²⁸³ Treaty on Functioning of the European Union [Electronic resource] // EU Law. Electronic data 2025. URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> (Accessed: 30.12.2025).

²⁸⁴ European Tax Law: B. Terra, P. Wattel // Kluwer Law International, 2001, p. 532.

The legal doctrine currently designates two methods of creating the common market and as the consequence of attaining the listed goals: “negative integration” (it is implemented by means of setting prohibitions for performing certain actions and discrimination) and the “positive integration” (it is implemented via implementation of the general policy).

In compliance with Article 26 of TFEU the internal market is described by the set of four freedoms: “space without internal borders where, in compliance with the provisions of treaties, free movement of capitals, goods, persons and services is provided”. From the legal point of view, the freedoms of the common market played the most important role in the process of the multinational economic integration in EU.

It is very difficult to define the concept of the “freedoms of the common market”, as it can simultaneously mean three different legal phenomena:

- 1) the principles of the legal concept of the common market;
- 2) the set of the rights of persons and prohibitions for the EU Member States to perform particular acts on the EU market;
- 3) the set of legislation governing the operation of the common market.

Thus, the freedoms of the common market may be discussed as the conditions at which all the restrictions can be effectively and fully removed. The freedoms of the common market are simultaneously the principles of organisation and functioning of the EU as a single economic space.

As it was mentioned above, the European single market is an economic space created by “interlinking” of national economies of the Member States. The latter is provided by international linking of all the production factors, however, the dominant role in this process is played by the business capital represented mainly by the shareholding property.

The process of internationalisation of the capital is objective and takes place in the entire global economy, however, in the EU it is encouraged by the measures of creation of common markets (of goods, capital, services, labour) and special regulations aimed at providing the freedom of establishment. This includes the Council Directives: “Concerning coordination of legislation, regulations and administrative provisions governing establishment and implementation of business activities of credit institutions” (1977), “Concerning approximation of laws, regulations and administrative provisions of the Member States applicable to the liability for defective products” (1985), “Concerning the mechanisms of transparency for servicing the information union” (1998), the series of directives on protection of the consumer rights (1985, 1993, 1997) etc.

It can be concluded in this regard that the freedom of establishment is the main encouraging beginning of organisation of the free economic development of EU providing its

unhindered coordination and interaction of its Member States: “The components of its due and effective implementation are provision of the free movement of goods, capital, services and labour provided on the level of the EU foundation documents”.

Principle of free movement of goods

Opening of the national markets within the framework of the common market provided liberalisation of international trade and, as a consequence, defined a range of advantages for the EU Member States. Free movement of goods within EU is provided by the customs union which is an element of the internal market and is introduced by Article 28 of TFEU, according to which the Union incorporates the Customs Union applicable to the entire circulation of goods and relating to the prohibition of import customs duties and any equal duties among the Member States, as well as adoption of the common customs rate in relations with the third countries. It can be concluded that the Customs Union has an internal component applicable only to the Member States of the Customs Union and an external component regulating relations with the third parties.²⁸⁵

This freedom consists of four elements:

- 1) prohibition of internal customs duties;
- 2) prohibition of quantitative restrictions of import and export of goods in trade between the Member States;
- 3) prohibition of discriminatory intra-country taxation;
- 4) introduction of the uniform tariff.

The operation of the Customs Union and the prohibition of the internal customs duties is only possible thanks to the defined uniform customs tariff which is defined on the basis of:

- 1) the necessity of promotion of development of trade between the Member States and the third countries;
- 2) evolution of the competition conditions inside EU to the degree which contribute to competitiveness of undertakings;
- 3) the needs of EU in provision of raw materials and semi-finished production;
- 4) the necessity to avoid serious disturbances in the economy of the Member States and to secure reasonable development of production and growth of consumption in EU.

Besides the elimination of internal customs clearance, the described freedom prohibits discriminatory internal national taxation: any tax may not discriminatorily affect the price of

²⁸⁵ This approach allows some authors to speak about distinguishing the customs law, the trade law (internal) and the internal market law within the framework of the EU economic law (regarding this see European law: textbook and practice for academic Bachelor studies / ed. by A.I. Abdulina, Y.S. Bezborodova–M.: Publishing house Yurait, 2016.–P.110-116–Series: Bachelor. Academic course.

products, increasing or decreasing it compared to the market price; discrimination may be manifested as the different amount of rates, as well as different procedure of definition of the tax base, the procedure of collection of tax (Article 110 of TFEU).

The prospective goal of implementation of the defined freedom is harmonisation of the legislation of value added taxes, excise duties and other forms of indirect taxation to the degree where this harmonisation is necessary for creation and functioning of the internal market. The issues of harmonisation of taxes and control of compliance with the EU rules in this field become particularly important under the conditions of the economic and currency union of the EU Member States and introduction of the new currency – euro.²⁸⁶

Along with the Customs Union and the prohibition of discriminatory taxation in trade between the EU Member States, also quantitative export and import restrictions (quotas) and any equivalent measures are prohibited (provided by Directive 70/50/EEC of 22 December 1969 concerning the “principle of effect”). The principle or the test of “effect” consists of qualification of any administrative practice as unlawful on the basis of assessment of the potential outcome of its application in relation to the free trade. The effect of arbitrary discrimination or hidden restrictions in trading between the countries is considered harmful.

There are some exceptions to the principle of free movement of goods. Thus, in compliance with Article 36 of TFEU there can be prohibitions or restrictions of import, export, transit justified by the restrictions of:

- 1) the public moral;
- 2) the public order and national security (defined restrictively as the “public order” – the fundamental base of the society);
- 3) protection of the health and life of people and animals or preservation of plants (based on the evaluation of the potential (objective) risk presented by a product or its component);
- 4) protection of national treasures possessing art, historical or archaeological value;
- 5) protection of production and trading property.

The above referred prohibitions and restrictions, however, should not serve as the means of arbitrary discrimination or concealed hindrances in trading between the EU Member States (Article 36 of TFEU). The principle of effect is valid also here, and it is stated that any prohibition should be proportional to the threat presented by the relevant product.

Principle of free movement of people “consists of the following freedoms comprised by it: free movement of labour, freedom of establishment, free movement of people within

²⁸⁶ In this regard see Golovcenko O.N. Cooperation in the field of taxation in the Member States of the European Union // Financial law. 2015. N 2., p.13–18.

Schengen are, as well as the free movement of not employed persons and nationals of the third countries.” Free movement of labour is the basic and most important component of the above principle and presents the right to free movement of workers, in particular, elimination of any discrimination based on nationality in relation to the workers of the Member States as regards recruitment, remuneration and other employment and working conditions (Article 45 of TFEU). This freedom has enormous practical, social and humanitarian importance for the EU Member States and provides the actual meaning to the concept of the uniform EU citizenship.

Freedom of establishment

At present, the main volume of turnover of goods in Europe is provided by transactions involving legal entities which concentrate substantial financial resources and material assets according to the principle of corporation. There is no doubt that for the purpose of optimisation of the structures of the cross-border business, free movement of the “personality” of the legal entity, i. e. freedom of its establishment is required. Freedom of establishment–this is the right of independent establishment of undertakings, to manage them, in particular, companies according to the conditions defined by the law of the country, where there is such right for its own citizens and in compliance with the provisions applicable to the capital.

It also includes the free movement of companies or firms established in compliance with the legislation of any Member State and whose registered location, central management and core business activity is within the EU. The free movement of businesses is considered equal to the free movement of EU citizens according to its status (Article 54 of TFEU). The guarantee of such movement for the purpose of exercising the right of freedom of establishment provided to the citizens is provided by Directive 2004/38/EU.²⁸⁷ Article 49 of TFEU prohibits restriction of the freedom of establishment of citizens of any Member State in the territory of another. This prohibition also applies to restrictions regarding establishment of representative offices, subsidiaries and daughter companies by citizens of any Member State who have established business in any Member State. It underlines that the freedom of establishment includes the access to business which is not employment and implementation of this activity, as well as establishment of undertakings and their management according to the conditions defined by the legislation of the country of establishment for its own citizens.

On the legal level this freedom consists of:

- 1) the right to establish business centres by natural entities who are EU citizens according to the system of mutual recognition of qualifications and licences;

²⁸⁷ European Parliament. Fact sheets on the European Union. Free movement of persons., 02.2020. [Electronic resource] //EUR-Lex. Electronic data 2025, URL: <https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons> (Accessed: 30.12.2025).

2) the right to establish business centres by legal entities established according to the civil or business law in compliance with the legislation of any Member State and whose registered location, central management and core business activity is within the EU. At the same time, only business organisations enjoy this freedom.

These rights may be restricted based on the considerations of the public order, public safety and health, as well as for persons performing official obligations (temporary or permanently) (Article 51 of TFEU).²⁸⁸

Principle of free provision of services

Free provision of services can be defined as the prohibition of restrictions of free provision of services in EU applicable to citizens of the Member States established themselves in another Member State than the one where the receivers of the services are. However, in compliance with Article 62 of TFEU, regulation of the free provision of services should be implemented considering the provisions of Article 54 of TFEU, which applies the freedom of establishment to all the business legal entities. Thus, the subjects of the right of free provision of services are not only the citizens of the Member States, but also all the legal entities performing their activities for the purpose of gaining profit.

The freedom operates when the consumer of services is foreign in the territory of the state where the seller of the services is located, as well as where the producer of the services is located in the territory of another Member State than where the services are provided. According to Article 57 of TFEU “services” comprise the services which are usually provided for remuneration and do not apply to services of free movement of goods, capitals and persons. The service, in particular, includes: a) activities of industrial nature, b) activities of trading nature, c) crafts activities, d) activities of free professions.

The criterion of the economic equivalent or remuneration provided for any economic activity which is not employment and listed in Article 57 of TFEU was also included in the basis of the determining factor of definition of the concept “service” in Article 4 of Directive 2006/123/EU.

The freedom of provision of services should be distinguished from the freedom of establishment of the operator for provision of services. As it was mentioned above, the freedom of establishment is provided by Article 49 of TFEU and is regulated by the EU corporate law.

²⁸⁸ Directive (EU) 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29.04.2004. [Electronic resource] // EUR-Lex. Electronic data 2025. URL: <https://eur-lex.europa.eu/eli/dir/2004/38/oj/eng> (Accessed: 30.12.2025)

Its implementation is based on harmonisation and unification of the relevant legislation of the EU Member States. Free provision of services, in turn, provides for the right of the entity – the citizen of the EU Member State or the company (established in the EU Member State) to perform activities of provision of services in all the EU Member States without registration and establishment of the permanent representation. Restrictions of this freedom according to the legislation may exist exclusively for the public interest.

Principle of free movement of capital

Internationalisation of production, stable positive indexes of payment balances of the EU Member States, high growth of money markets, achievements in the field of information and banking technologies have reduced the necessity of strict national control over movement of capital within the framework of the common market. At the same time, the freedom of movement of capital may be defined as the prohibition of all restrictions for movement of capital (investment money, securities) among the EU Member States, as well as the Member States and third countries (Articles 63–66 of TFEU).

Articles 65 and 66 of the Treaty contain a range of exemptions from these regulatory provisions which, however, should not serve as the means of discrimination or hiding restrictions on the free movement of capitals. Thus, the Member States have the following rights:

- 1) to apply the relevant provisions of their national legislation providing for differentiation between taxpayers in different positions from the point of view of their residence or place of their capital investment;
- 2) to implement any necessary measures aimed at preventing violations of legislative or regulatory acts, in particular, in the field of taxation or the field of supervision of financial instruments, to provide for the procedures of reporting movement of capital for receiving information for administrative and statistic purposes, or to implement measures which are justified based on compliance with the public order or the public security.

The primary EU Directives governing the matters of free movement of capital are Directive on establishment of the free market of capitals 88/361/EEC of 24 June 1988 “Concerning application of Article 88 of the Treaty of Rome”²⁸⁹, Directive EU of prospects

²⁸⁹ The Directive provided for full liberalisation of capital between the Member States. Following entry into force of Maastricht Treaty all restrictions of payments between the Member States and the third parties existing until 31 December 1993 were prohibited. This new introduction was conditioned by that until adoption of the above referred treaty, the free movement of capital was very restricted and subject to excessive burdensome regulation.

(issue) 2003/71/EU²⁹⁰, Directive EU on transparency 2004/109/EU, Directive on AIF 2011/61/EU and others.

Returning to the level of relation of tax planning as a targeted lawful activity of the taxpayer aimed at minimisation of its expenses for payment of taxes, duties, fees and other mandatory payments, attention should be paid to the following. Being the fundamental base of functioning of the entire European economic space, the freedom of establishment along with its above referred principles creates favourable conditions for abusing them by business subjects. The search for the ways of defining lawful and legitimate tax planning under these circumstances becomes extremely important and, as the analysis of the law enforcement practice of the EU Court of Justice indicates, it is a topical legal issue.

Taxpayers must carefully evaluate substantial factors and adapt their tax planning strategies accordingly, with the aim of aligning their tax positions with their overall business objectives. However, it is crucial to distinguish between legitimate tax planning reasons and those that may be indicative of aggressive or abusive tax practices. Aggressive tax planning, which seeks to exploit legal loopholes or technicalities without genuine economic substance, often lacks valid reasons beyond mere tax avoidance. Such practices are typically driven by a desire to minimise tax liabilities without due consideration for the underlying economic activities or the intent of tax laws. Hence, the following conclusions are derived:

1. Recent years have seen a marked shift in defining what constitutes lawful tax planning. Objective indicators of tax avoidance, such as the presence of abusive practices, the use of wholly artificial arrangements, and emphasis on the substance-over-form principle, are now central to this determination. This evolution reflects a growing focus on ensuring tax practices are not only legally compliant but also align with the underlying economic realities and intentions.
2. The Cadbury-Schweppes case has been pivotal in shaping the understanding and differentiation of lawful tax planning from tax avoidance. It introduced and elaborated on the concept of 'wholly artificial arrangements,' serving as a critical reference point in subsequent rulings and discussions. This case has significantly influenced how the EU Court of Justice and national tax authorities view and handle complex tax planning strategies, especially those involving cross-border elements within the EU. The emergence of the concept of 'wholly artificial arrangements' has

²⁹⁰ Considering the general importance of this Directive, it can be stated that it is the cornerstone measure in the Plan of measures for harmonisation and elimination of barriers on the common market of financial services of Europe (Financial Services Action Plan), and its global meaning is creation of the uniform pan-European market of financial services. The Directive is constructed according to the principle of total harmonisation, and accordingly, it provides for maximum restriction of the national legal regulation.

been instrumental in resolving disputes about the lawfulness of tax planning. It provides a framework for assessing whether a tax arrangement reflects genuine economic activity or is merely a contrivance to gain tax advantages.

3. The complexity of tax planning is heightened by the interaction of tax laws with other legal domains, such as anti-money laundering regulations and whistleblower provisions. This intersectionality challenges the simplistic view of tax planning and necessitates a more holistic approach to understanding and regulating it. A singular regulatory scheme is inadequate; a multifaceted perspective that incorporates national laws, EU directives, international treaties, and significant court rulings is essential for a comprehensive understanding of lawful tax planning.
4. The decision-making processes and practices of tax authorities vary significantly across EU Member States. This variability often leads to disputes being adjudicated by the EU Court of Justice, highlighting the need for a more unified approach to tax regulation and enforcement within the EU. This inconsistency not only impacts the uniformity of tax planning practices but also emphasizes the crucial role of the EU Court of Justice in establishing and maintaining coherence in tax law interpretation and application.

In assessing tax planning reasons, tax authorities and courts play a critical role in examining the substance of transactions and evaluating the commercial justifications put forth by taxpayers with the broader business context. The analysis incorporates factors such as the nature of the taxpayer's industry, the characteristics of the transactions involved, the business risks undertaken, and the alignment with the prevailing market practices. Taking into account the above conclusions and the conducted research, the proposals for defining the boundaries between lawful and unlawful tax planning and for enhancing the understanding of legal tax remain crucial in maintaining perspective consistency in the realm of EU stakeholders, taxpayers, relevant authorities and legislators.

Conclusions

As the result of overall analysis provided within this PhD thesis, the author has come to the following conclusions:

1. The particularities of tax legislation, its interaction with legal anti-money laundering provisions, provisions on the so-called whistleblowers, as well as sanctions determine the complex nature of the approach for defining such boundaries where tax planning can be reclassified from lawful to unlawful.
2. There is a range of issues which prohibit a strict definition of tax planning and also its differentiation from unlawful tax planning (aggressive tax planning).
3. It is not possible to base all regulation on the single scheme of sources.
4. The practice of adopting decisions by competent tax authorities in the EU varies from country, to country which leads to submitting disputes for resolution to the EU Court of Justice.
5. The concept of abusive practice, the concept of use of wholly artificial arrangements, and the use of the substance has also been becoming increasingly meaningful during the last few years.
6. In the *Cadbury Schweppes* case, the EU Court of Justice resolved that the tax provisions of the United Kingdom should not be applied if, based on objective factors confirmed by the third parties, it is proven that, irrespective of tax motivation, the foreign controlled company was established in the EU Member State and performs its effective economic activity.
7. The EU Court of Justice has also emphasised the importance of performing assessment of the behaviour of the taxable subject by focussing on **goals, objects, and reasons behind the disputed regulation** and thus **to encourage economic and social integration** within the EU.
8. Freedom of establishment also provides participation of natural and legal entities of an EU Member State in the economic life of the other EU member state on “robust and sustainable basis”, and profit is gained in this process. That means that the concept of freedom of establishment within the scope of TFEU entails legally correct establishment for a nonrestricted term for the purpose of gaining profit. From the moment when the EU Court of Justice applies the principle of freedom of establishment, it performs evaluation of the goal and object of such freedom.
9. Two conditions can be distinguished which are worth paying attention to for qualification of the actions of the company as ‘using wholly artificial arrangements’:

- i. Does the establishment and registration of the controlled foreign company by the resident holding company of another country affect the economic reality of the EU Member State? Does the company have effective economic activity in the selected country? Or is such an establishment fictitious and the company established in this way is the mailbox company or the bogus company?
 - ii. Does the controlled foreign company physically exist at the place of establishment? Does this company possess premises, personnel, and equipment?
10. National law of any EU member state should conform to the EU law, however, not all the provisions of the national law have been primarily established on the national level. National legislative bodies in the European Union do not have the discretion to act in relation to adoption of strategic decision, as the EU law accurately stipulates their competence and in certain areas there is absolutely no space for rulemaking.
11. The research hypothesis suggests that the definition of tax planning in the EU is not solely derived from a single source, but is instead a result of a comprehensive integration of various elements.
12. Finally, modern entrepreneurship ensures that the definition of tax planning remains sound within both theoretical and practical grounds on a contemporary basis, delineated by an evolving economy and trends that follow.

Propositions of the Thesis

Considering the observations and conclusions made by the author, there have been developed the following propositions to enhance further on the legal framework and business environment for lawful tax planning into European Union.

Propositions for the Definition of Boundaries of Lawful and Unlawful Tax Planning

Proposition 1: Codification of Substance-Over-Form Principle

It is recommended to implement a codified substance-over-form principle in EU tax directives and subsequently adopt it tax laws in member states. This principle mandates that the economic substance of transactions dictate tax outcomes, not merely their legal form. Codification would deter transactions engineered solely for tax advantages, lacking genuine economic substance, thus delineating the bounds of legality in tax planning.

Proposition 2: Establishment of Concise Statutory Definitions for Lawful Tax Planning

It is recommended to introduce a clear statutory definition distinguishing acceptable tax planning practices from impermissible avoidance schemes. The proposed definition would be literally constructed as: “Lawful Tax Planning”. Lawful tax planning can be defined as corporate strategies that minimize tax liabilities while strictly complying with relevant legal standards and specific EU regulations.

Proposition 3: Principle of Proportionality in Tax Planning

It is recommended to establish a principle of proportionality in tax planning. This principle would curb practices that are excessively complex or disproportionate to their economic rationale, thereby setting boundaries between legal and illicit tax manoeuvres.

Proposition 4: Legally binding definition of tax planning concept

In order to determine the lawfulness of tax planning, it is necessary to use the national legislation and the supranational law of the EU as the basis, by not disregarding international treaties, policies adopted by a particular range of countries including the US and EU sanction provisions, as well as the approach of the Court of Justice of European Union, the role of whose rulings has been increasing during the last 15 years in adopting decisions on lawfulness of tax planning.

Proposition 5. Defining the Boundaries between Lawful and Unlawful Tax Planning

5.1. It is recommended to provide clear guidance and standards for cross-border transactions to ensure compliance with EU tax regulations, particularly with regard to the principle of freedom of establishment and its goal of promoting economic and social integration within the EU.

5.2. It is also recommended to enlighten future research with the examination of the dynamic landscape of lawful tax planning through the lens of established core concepts, namely abusive practice, WAA and substance.

5.3. Accordingly, the author proposes concise definition of modern tax planning in the European Union, i.e. legitimate tax planning is a complex of activities performed within the legal requirements of the jurisdiction in question that allow businesses to reduce tax expense by planning their activities in advance and maintaining very clear economic substance.

5.4 To comprehensively integrate this concept into the Latvian tax law “On Taxes and Fees” adopted in 1995, a multifaceted approach should be employed, involving both the definition in the General Provisions and the integration either through a) an addition of a new clause or b) the expansion of an existing clause, with the proposed texts:

- 1) Integration of Definition in Chapter I (General Provisions), Section 1. (Terms Used in this Law): “Legitimate Tax Planning: The strategy of managing tax liabilities in a manner that complies with Latvian and EU tax laws, as interpreted by the European Court of Justice, and avoids aggressive or purely artificial arrangements aimed solely at tax avoidance where by the definition is complex of activities performed within the legal requirements of the jurisdiction in question that allow businesses to reduce tax expense by planning their activities in advance and maintaining very clear economic substance..”
- 2) Amendments to Chapter IV (Taxpayers) in Section 16: (Rights of Taxpayers).
 - A. Addition of a new clause (Clause 17): “Taxpayers have the right to engage in legal tax planning, which includes strategies that comply with Latvian tax law and EU directives, as interpreted by the European Court of Justice. This right encompasses employing legitimate means to optimise tax liabilities while adhering to principles of transparency, economic substance, and the specific purpose of national tax laws.”
 - B. Expansion of Existing Clause (Clause 1): “Taxpayers have the right to benefit from tax and fee reliefs provided by law, which includes engaging in legal tax planning strategies in compliance with both national and EU frameworks. Such tax planning practices should adhere to the principles established by the European Court of Justice, aligning with the economic substance of transactions and the overarching purpose of national tax laws.”

Proposition 6: Enhanced Taxpayer Education Programmes

EU member states are encouraged to launch comprehensive taxpayer education programmes aimed at enhancing awareness and understanding of EU and national tax laws,

incentives, and legal tax planning methods. These educational initiatives, tailored for individual taxpayers, including the self-employed and new workforce entrants, as well as small and medium enterprises, should focus on simplifying complex tax regulations and promoting lawful tax strategies. These programmes should offer a range of basic to advanced knowledge on tax laws and their impact, along with guidance on legitimate ways to reduce tax liabilities. They should also provide clear distinctions between lawful tax planning and illegal practices such as avoidance, utilising case studies, like the *Cadbury Schweppes*, to demonstrate real-world applications of tax laws and strategies. These programmes should be delivered through various channels such as workshops, webinars, online resources, and in partnership with professional associations to effectively reach and educate various groups of taxpayers.

Proposition 7: Simplification of Tax Reporting Procedures

To reduce the administrative burden on investors and improve compliance, EU member states should introduce simplified forms and processes. The proposal to simplify tax reporting in the EU involves the creation of clear tax forms tailored for various investments such as stocks, bonds, cryptocurrencies, and mutual funds. These forms aim to streamline the reporting process by eliminating unnecessary paperwork, integrating pre-filled data, and providing clear guidelines for reporting different types of income and transactions. Furthermore, leveraging technology for digitalisation and automation will allow for the efficient transmission of financial data to tax authorities, with systems designed to integrate seamlessly with financial institutions and investment platforms. This, in turn, encourages voluntary compliance and facilitates legal tax planning.

Proposition 8: Centralised Tax Planning Resource

There is a need for the establishment of a centralised tax planning platform or resource. This platform would consolidate relevant tax laws, regulations, and rulings, providing comprehensive information on tax planning strategies, case studies, and practical examples. Such a resource would serve as a reliable reference point for investors, facilitating their understanding of legal tax planning options, and ensuring compliance with applicable laws.

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