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

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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*<sup>1</sup> –

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<sup>1</sup> Cadbury Schweppes and Cadbury Schweppes Overseas, 12.09.2006 [Electronic resource] // Info Curia – Case-law of the Court of Justice. Electronic data 2018. 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. These arrangements have undergone major changes within the last 20 years due to the dynamics of the national legislative approach, the international law, the interpretation of the operations, and the measures taken by companies to optimise their tax burden through the courts. The concepts and frameworks of offshores, tax heavens and tax holidays are becoming a thing of 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 at EU level are analysed in textbooks (Christiana N. L. Panayi, Luca Cerioni, Mihaela Tofan, Ana Paula Dourado) and in journalistic literature (Gutman, Piero Borya).

**The theoretical basis of the research** is provided by the works that exclusively cover matters of tax planning, as well as scientific monographs and articles by recognised experts that have been published in English.

**The empirical basis of the research** was provided by the legislative sources, including the Treaty on the Functioning of the European Union, the European Union Directives, and the legislation of the Member States of the European Union. Rulings of the Court of Justice of the European Union and the opinions of Judges and Advocates General also present an important part of the sources.

**The object of 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 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 Doctoral Thesis 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, 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 categorization 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, propositions, the list of used sources, and literature.

## 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 case Cadbury Schweppes, 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.

## Proposals

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.

## **Publications on the topic of the Thesis**

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