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CONTEMPORARY ASPECTS OF TAX CERTAINTY: DIGITAL TAX, GAARS AND TAX RULINGS IN THE FIELD OF FISCAL STATE AID

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Contemporary aspects of tax certainty

Digital tax, GAARs and tax rulings in the field of fiscal state aid

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Abstract

Tax certainty is an essential element for the protection of taxpayers' rights. In the today's highly digitalized tax environment, various anti-tax avoidance measures that have been enacted inevitably entail some drawbacks, such as the increased tax uncertainty, as a result of their implementation. A specific area to be taken into account, when discussing the issue of tax certainty, is the area of digital taxation. In this respect, the rules of traditional international tax law have proved to be inefficient and need to be appropriately adapted and updated, taking into account the new reality. The new rules will redistribute taxable income across individual states based on these new criteria and set a minimum tax rate in the form of a minimum global tax rate. However, they will also cause tax uncertainty. When it comes to the application of a general anti-abuse rule, it is more than obvious that an inherent characteristic to its implementation is the significant tax uncertainty caused, since the tax authorities are entitled to disregard arrangements that are considered to be non-genuine or artificial or even refuse to grant specific tax advantages recognized by a primary tax provision, upon their wide discretion. It is doubtless that the conditions for the implementation of the GAAR are by definition rather vague. However, the ambiguity caused results in the increase of tax uncertainty, which can hamper taxpayers' fundamental rights. Last but not least, a very important red flag that is challenging tax certainty to a significant extent refers to the tax rulings in the field of fiscal state aid, given that these tax rulings have been found under the microscope of the European Commission in the context of investigating their compatibility with the State aid framework.

Keywords

Tax avoidance, tax abuse, arrangement, genuine, digital, tax rulings, state aid, GAAR, SAAR, certainty, transfer pricing, anti-avoidance, base erosion, profit shifting, client-facing business, dispute resolution, digital economy, principal purpose test, Amount A, Amount B

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Introduction

The current landscape in the tax certainty agenda is rather vague, since a lot of challenges have arisen in today's globalized international tax environment[1], which is characterised by high digitalization of the modern economies, huge technological growth, elaborated tax avoidance strategies, extended use of tax havens, base erosion and profit shifting tax practices, lack of transparency and intense increase of the cross-border business activity. Fair taxation, emphasis on the real economic substance and alignment of the tax results with the value creation[2] lie at the core of the latest developments of the international and EU tax law.

Features such as the stability and simplicity of the tax system are crucial, in order for it to be considered favorable and attractive for investments. Frequent and unforeseen legislative amendments, ambiguities of the law, gaps, mismatches and loopholes of law as well as legal defects in general but also interpretative regressions of the tax administration through administrative solutions and conflicting interpretative circulars constitute serious disincentives in business activity[3].

However, some remarkable efforts are made towards achieving greater tax certainty. The sources of tax uncertainty can be divided into four main categories that relate to i) the characteristics of the legal systems, ii) the tax administrations, iii) dispute resolution mechanisms and iv) specific international dimensions[4] and include the design of the tax policy, the "tax mix" selected, the implementation of the tax policy, legislative uncertainty, administrative uncertainty caused by the interpretation of the tax legislation, uncertainty arisen from the tax dispute resolution mechanisms, uncertainty arisen from business and technological changes, taxpayer's

1 See T. Dagan, Re-Imagining Tax Justice in a Globalised World, in Tax Justice and Tax Law, Understanding Unfairness in Tax Systems pp. 169-185 (D. de Cogan & P. Harris eds., Hart Publishing 2020).

2 Patricia Hofmann, Nadine Riedel, 'Debate: Comment on J. Becker & J. Englisch, 'Taxing Where Value Is Created: What's "User Involvement" Got to Do with It?'', (2019), 47, Intertax, Issue 2, pp. 172-175, https://kluwerlawonline.com/journalarticle/Intertax/47.2/TAXI2019016.

3 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

4 IMF/OECD Report for the G20 Finance Ministers, Tax Certainty, March 2017, p.43-44, available at: https:www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf (visited 28/2/2022).

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behavior, as well as international aspects of uncertainty, such as cross-border transactions conducted in more than one jurisdictions and, last but not least non-adoption or false interpretation of the international standards (i.e. OECD/G20 BEPS Package, OECD International VAT/GST Guidelines)[5]. Other factors that give rise to tax uncertainty mainly relate to poorly drafted and unclear or too complicated tax legislation or tax legislation full of gaps, mismatches and loopholes, lack of clarity as per the ability to claim and obtain a withholding tax relief, unpredictable or inconsistent tax treatment by the competent tax authorities or the courts, considerable bureaucracy and increased compliance costs, inability to achieve early certainty through tax rulings or other similar mechanisms on a proactive basis, lengthy decision making by the courts or other bodies, interpretational inconsistencies mainly with regard to international tax standards, lack of expertise of the tax administration on international and EU tax law and, last but not least, lack of understanding of international business[6].

Tax uncertainty has a significant impact on the selection of the place of investment, the change of business structure as well as the resources expenditures, taking into account that more management time should be devoted in order to deal with increased uncertainty. Furthermore, in case of increased tax uncertainty, the cost of risk for the investment or the rate of return required for the investment to proceed is also increased and this situation may have a negative impact on investments, whereas it is also more likely that taxpayers may wish to take advantage of tax uncertainty to reduce their tax liability in a country[7].

In this respect, a three-pillar analysis of the main aspects of tax uncertainty is being conducted and presented here below, based upon three contemporary fields of tax law which indicate corresponding areas of interest, in view of the current and upcoming developments from an international and EU tax law perspective. More specifically, the present study focuses on the main challenges of tax certainty pertaining to i) the taxation of the digital economy, ii) the fight against abusive tax practices and non-genuine arrangements with a special, sui generis category of tax provisions, namely the general anti-abuse rules or "GAARs" and iii) tax rulings in view of the EU state aid legal framework. This three-pillar, comparative analysis entails the parallel examination of the various aspects of tax certainty in the three above-mentioned contemporary fields of tax law, which all constitute aspects of tax avoidance, with the aim to highlight the importance of securing tax certainty in view of the protection of taxpayers' rights and to propose the necessary safeguards and counter-measures, in this respect. The central pillar of all the

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5 IMF/OECD Report for the G20 Finance Ministers, Tax Certainty, March 2017, p.22, available at: https:www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf (visited 28/2/2022). For the issue of tax uncertainty, see also Zangari Ernesto, Caiumi Antonella, Hemmelgarn Thomas, "Tax Uncertainty: Economic Evidence and Policy Responses", European Commission, Taxation Papers, Working Paper N.67, March 2017, https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_paper_67.pdf.

6 IMF/OECD Report for the G20 Finance Ministers, Tax Certainty, March 2017, p.44-45, available at: https:www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf (visited 28/2/2022).

7 IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2018 (p. 43-44).

three areas of interest that are subject to examination is that they relate to tax avoidance and tax abuse[8]. Taking this into account, the present analysis focuses in essence on the impact of the tax policy designed to address international tax avoidance[9], abusive tax practices and aggressive tax planning on tax certainty as well as the relevant consequences for both the taxpayers and the tax administration.

8 Katerina Savvaidou/Vasiliki Athanasaki, General and Specific Anti-Tax Avoidance Measures under recent Tax Reform in Greece", Intertax, Volume 47 (2019), Issue 4, p. 402, Katerina Savvaidou/Vasiliki Athanasaki, Greece-Specific Anti-Avoidance Measures in Greece in the Post-BEPS and Post-ATAD Era, European Taxation Journal, 2019 (Volume 59), No 4, Published 7 March 2019, p. 169.

9 Sebastian Bergmann, Emmanuel Raingeard de la Blétière, Yariv Brauner, Jakob Bundgaard, Gustavo Lopes Courinha, Ana Paula Dourado, Sandra Eden, Benn Folkvord, Elizabeth Gil García, Werner Haslehner, Anders Hultqvist, Raimo Immonen, Ricardo André Galendi Júnior, Nataša Žunić Kovačević, Juha Lindgren, Jorge Martín López, Adolfo Martín Jiménez, Danuše Nerudová, Agnieszka Olesinska, Bart Peeters, Pasquale Pistone, Evgeniy Pustovalov, Ekkehart Reimer, Jennifer Roeleveld, Andrey Savitskiy, Peter Koerver Schmidt, Luís Eduardo Schoueri, Mustafa Sevgin, María Teresa Soler Roch, Veronika Solilova, Eleni Theocharopoulou, Namk Kemal Uyanik, Craig West, Maarten de Wilde, Ciska Wisman, Joanna Witkowska, Funda Başaran Yavaşlar, Eugen Zakharov and Giuseppe Zizzo., Ana Paula Dourado (ed.), Tax Avoidance Revisited in the EU BEPS Context, EATLP International Tax Series, IBFD, 2017.

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1. Taxation of the digital economy within the frame of the BEPS 2.0 Project: a new, innovative approach

The rapid evolvement of technology in the latest years has gradually led to the digitalization of the modern economies. The concept of digital presence has prevailed and taxation can now be imposed in a market jurisdiction, even though no physical presence exists there. This is a real revolution, taking into account the traditional rules of international tax law, which are subject to a holistic reform[10]. Nowadays, in the new highly digitalized tax era, in view of the evolvement of artificial intelligence ("AI")[11] and the internet of things ("IoT"), business can be conducted online via digital platforms, remote servers, extended use of algorithms, digital questionnaires, e-shops, and in general despite the absence of physical establishment in a certain jurisdiction. Especially following the COVID-19 pandemic outbreak[12], e-commerce has rapidly increased, tending to be the prevailing distribution channel in the international market[13]. Moreover, cryptocurrencies are now extensively used in everyday

10 M.P. Devereux & J. Vella, Implications of Digitalization for International Corporate Tax Reform, 46 Intertax 6/7, pp. 550-559 (2018)

11 See Buolamwini Joy, Gebru Timnit; Proceedings of the 1st Conference on Fairness, Accountability and Transparency, PMLR 81:77-91, 2018, Calderón Carrero J.M. & Quintas Seara A., "The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning", https://www.kluwerlawonline.com/, Chand V.; Kostic S.; Reis A., International - Taxing Artificial Intelligence and Robots: Critical Assessment of Potential Policy Solutions and Recommendation for Alternative Approaches, World Tax Journal, 2020 (Volume 12), No 4.

12 Raymond H.C. Luja, See EU Fiscal State Aid Rules and COVID-19: Will One Survive the Other?, EC Tax Review, Volume 29, Issue 4 (2020) pp. 147 – 157.

13 See also Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC as well as the Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe (Brussels, 6.5.2015, COM(2015) 192 final, {SWD(2015) 100 final}, according to which *"A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.".*

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life[14]. Therefore, it ensues that this peak of digital economic activity will entail even huger amounts of public revenues for the various states that would go untaxed in the state of the significant digital presence, in case no respective tailor-made measures are taken. This finding highlights the importance of fairly taxing the business activity carried out in a digital environment and necessitates drastic and unified tax measures, in view of an inevitable Europe fit for the digital age[15]. As a result, new and innovative business models[16] have emerged.

At the same time, tech giants (Google, Amazon, Facebook, Apple and Microsoft, abbreviated «Big Five» or «GAFAM[17]") have been strongly accused of being under-taxed, by effectively utilizing the broad opportunities for tax avoidance offered by the rapid technological development[18]. In addition, serious scandals have been revealed, such as the "Luxleaks", the "Panama Papers"[19], as well as the "Pandora Papers"[20] which have necessitated a brave reaction in terms of combatting international tax avoidance.

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14 The tax treatment of cryptocurrencies, such as Bitcoin, Ethereum, Litecoin etc. and cryptoassets in general also bears significant legal and tax uncertainty. To be noted that up until now there is no solid legal framework as per the tax implications of cryptocurrencies. See, however, the proposed DAC8 to increase transparency and combat potential tax evasion tactics and tax fraud. DAC 8 is supposed to be the next update of the Directive on Administrative Cooperation (DAC), aiming at strengthening the respective rules and expanding the exchange of information regime regarding e-money and cryptoassets. To be noted that cryptocurrencies and decentralised finance (DeFi) is a a blockchain-based form of finance that bypasses central financial intermediaries.

15 Vasiliki Athanasaki, The challenge of taxation in the era of digital economy: International and EU law concerns and latest developments, European Law Observatory on New Technologies ("ELONtech"), https://www.elontech.org/the-challenge-of-taxation/, A. Christians & T.D. Magalhães, A New Global Tax Deal for the Digital Age, 67 Canadian Tax Journal 2, p. 1153 et seq. (2019).

16 Bauer, Georg and Fritz, Jil and Schanz, Deborah and Sixt, Michael, Corporate Income Tax Challenges Arising From Digitalised Business Models (March 7, 2019). Available at SSRN: https://ssrn.com/abstract=3348544 or http://dx.doi.org/10.2139/ssrn.3348544.

17 See, e.g., M. Moore & D. Tambini, Introduction, in Digital Dominance: The Power of Google, Amazon, Facebook, and Apple pp. 1-7 (M. Moore & D. Tambini eds., Oxford University Press 2018), P. Barwise & L. Watkins, The Evolution of Digital Dominance, How and Why We Got to GAFA, in Digital Dominance: The Power of Google, Amazon, Facebook, and Apple pp. 21-30 (M. Moore & D. Tambini eds., Oxford University Press 2018); F. Rochelandet, Monétisation et Marchandisation des Données Personnelles, in Les Big Data à Découvert pp. 300-301 (M. Bouzeghoub & R. Mosseri eds., CNRS Editions 2016). European Commission, Commission Expert Group on Taxation of the Digital Economy, Report p. 11 (28 May 2014), O. Lynskey, The Power of Providence, The Role of Platforms in Leveraging the Legibility of Users to Accentuate Inequality, in Digital Dominance: The Power of Google, Amazon, Facebook, and Apple p. 176 et seq. (M. Moore & D. Tambini eds, Oxford University Press 2018); E. Bell, The Dependent Press, How Silicon Valley Threatens Independent Journalism, in Digital Dominance: The Power of Google, Amazon, Facebook, and Apple pp. 241-261 (M. Moore & D. Tambini eds., Oxford University Press 2018); D. Tambini, Social Media Power and Election Legitimacy, in Digital Dominance: The Power of Google, Amazon, Facebook, and Apple pp. 265-293 (M. Moore & D. Tambini eds., Oxford University Press 2018).

18 See also Yvette Lind, Attracting Multinational Tech-Companies Through Environmental Tax Incentives, Intertax, Vol. 49 (2021) Issue 11 (p. 885).

19 See Report on the inquiry into money laundering, tax avoidance and tax evasion (2017/2013(INI)), Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, Rapporteurs Petr Ježek and Jeppe Kofod, A8-0357/2017, 16.11.2017.

20 See Ana Paula Dourado, 'Debate: Digital Taxation Opens the Pandora Box: The OECD Interim Report and the European Commission Proposals', (2018), 46, Intertax, Issue 6, pp. 565-572, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018058.

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In light of all these latest developments, a two-pillar approach has been proposed[21], pursuant to the OECD/G20 BEPS 2.0 Project, that could potentially have serious adverse consequences, mainly because it entails an additional layer of administrative complexity. Such an approach should comply with some core and fundamental taxation principles, such as the principle of fair taxation and tax certainty, the elimination of double or even multiple taxation as well as the need for low administrative burden and compliance costs and all the design and procedural complexities. In any case, it is of vital importance to safeguard neutrality among different business models and capture equally all forms of remote involvement in the economy of a market jurisdiction, while at the same time ensure alignment of economic substance and profit. Not fail to mention that simplicity, stabilisation of the tax system and increased tax certainty in implementation are key factors of decisive importance, in terms of effectiveness and efficiency[22]. According to the afore-mentioned two-pillar approach, in January 2019, the Inclusive Framework issued a Policy Note on Addressing the Tax Challenges of the Digitalisation of the Economy, within the frame of base erosion and profit shifting (BEPS) 2.0 project[23]. Under this Policy Note, the Inclusive Framework agreed, on a without prejudice basis, to undertake work on the following two pillars, pursuant to a coordinated approach:

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21 The Inclusive Framework issued a Public Consultation Document on 13 February 2019, which sought input from external stakeholders on the specific proposals examined under Pillar One and Pillar Two (Public Consultation Document, Addressing the Tax Challenges of the Digitalisation of the Economy, 13 February – 6 March 2019, http://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf (visited 5/8/2020). See also IMF, OECD, UN, and World Bank (2015), Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment, A Report to the G-20 Development Working Group, pp. 8-9. Following this public consultation document, a public consultation held in Paris on 13 and 14 March 2019, which was attended by over 400 representatives from governments, business, civil society and academia (OECD, Global Anti-Base Erosion Proposal ("GloBE")- Pillar Two, 8 November 2019 – 2 December 2019, https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf (visited 5/8/2020). In addition, OECD issued a public consultation document on a Secretariat Proposal for a "Unified Approach" under Pillar One (9 October 2019 – 12 November 2019) as well as a public consultation document on the Global Anti-Base Erosion Proposal ("GloBE"), within the frame of Pillar Two (8 November 2019 – 2 December 2019). In January 2020, the OECD released a statement on the two-pillar approach to address the tax challenges arising from the digitalisation of the economy, announcing that the Inclusive Framework members had renewed their commitment to the BEPS 2.0 project and providing a revised pillar one PoW and an update on pillar two, which was also endorsed by the G20. See Barbara Angus and Luis Coronado, The OECD presses on with BEPS 2.0 in today's distressed times, International Tax Review, 30 June 2020, https://www.internationaltaxreview.com/article/b1m93zd5csctf7/the-oecd-presses-on-with-beps-20-in-todays-distressed-times (visited 5/8/2020), according to which, on June 18 2020, the OECD released a statement from the Secretary-General expressing concern about the negative implications of unilateral measures related to taxation of digital activity and describing a multilateral solution through the Inclusive Framework as the best way forward. The OECD release indicates the intention to maintain the schedule of working group meetings leading up to the planned October 2020 decision-making meeting of the Inclusive Framework. While there certainly is substantial technical and design work to still be done on both pillars, exactly how this work will progress in light of these political developments remains to be seen.

22 Vasiliki Athanasaki, Contemporary aspects of the taxation of digital economy: A unified approach for a fairer allocation of taxing rights and the Global Anti-Base Erosion Proposal ("GloBE"), European Law Observatory on New Technologies ("ELONtech"), https://www.elontech.org/contemporary-aspects-of-the-taxation-of-digital-economy/ . See also M. Valta, Das Internationale Steuerrecht zwischen Effizienz,Gerechtigkeit und Entwicklungshilfe (Mohr Siebeck 2014).

23 Mark Martin and Thomas Bettge, Finding consensus: BEPS 2.0 and tax certainty, International Tax Review (ITR), 28 July 2021, https://www.internationaltaxreview.com/article/b1swpkm60ry5ct/finding-consensus-beps-20-and-tax-certainty (ανάκτηση την 16/1/2022).

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- Pillar One, an essential element of which is securing tax certainty, addresses the allocation of taxing rights between jurisdictions and describes proposals for new profit[24] allocation and nexus rules based on the concepts of "significant economic presence" and the exploitation of "user participation" and "marketing intangibles" in a jurisdiction.

- Pillar Two[25] (also referred to as the "GloBE" proposal) calls for the development of a co-ordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation[26].

According to the public consultation document on the Secretariat Proposal for a "Unified Approach"[27], within the frame of Pillar I, the scope of the said approach is not restricted only to digital business models, but goes even further, also covering consumer-facing businesses[28] and indicates an innovative and holistic modification of the existing, traditional profit allocation and tax nexus rules with reference to digital economy[29] enterprises. The proposed rules aim to grant new taxing rights to the countries where users of highly digitalised business models[30] are located. The Secretariat's proposal for a "Unified Approach" constitutes a solution that attracts support from all members of the Inclusive Framework. It creates a new nexus mainly based upon sales and not physical presence, designed as a new self-standing treaty provision. It also creates a new profit allocation rule, going beyond the arm's length principle and departing from the separate entity principle, applicable to taxpayers within the scope, and irrespective of

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24 M.P. Devereux, et al., Taxing Profit in a Global Economy (Oxford University Press 2021);

25 Ana Paula Dourado, The Global Anti-Base Erosion Proposal (GloBE) in Pillar II (Editorial), Intertax, Volume 48, Issue 2, 2020, pg.152-156, Ana Paula Dourado, Pillar Two Model Rules: Inequalities Raised by the GloBE Rules, the Scope, and Carve-Outs (Editorial), Intertax, Volume 50, Issue 4, 2022, pg.1-4.

26 See Vasiliki Athanasaki, Contemporary aspects of the taxation of digital economy: A unified approach for a fairer allocation of taxing rights and the Global Anti-Base Erosion Proposal ("GloBE"), European Law Observatory on New Technologies ("ELONtech"), https://www.elontech.org/contemporary-aspects-of-the-taxation-of-digital-economy/, Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, as approved by the Inclusive Framework on BEPS on 23 January 2019, OECD 2019, http://www.oecd.org/tax/beps/policy-notebeps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf (visited 5/8/2020), OECD, Global Anti-Base Erosion Proposal ("GloBE")- Pillar Two, 8 November 2019 – 2 December 2019, https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf (visited 5/8/2020).

27 Ana Paula Dourado, The OECD Unified Approach and the New International Tax System: A Half-Way Solution (Editorial), Intertax, Volume 48, Issue 1, 2020, pg. 3-8.

28 See also Ana Paula Dourado, Taxing Consumer-Facing Business as a Regulatory Currency, World Tax Journal (WTJ), Volume 13 – Issue 4 – November 2021, pg. 533-573, according to whom *"The author also contends that fair allocation of taxing rights between the residence and the market states is likewise and in itself a condition for the maintenance of liberal states in the digitalized global economy. This is so, due to the loss of revenues in the market states that would progressively lead to their loss of sovereignty and to illiberal or autocratic regimes exploiting the citizens' dissatisfaction with the states' functions.".*

29 Maarten F. de Wilde, 'Comparing Tax Policy Responses for the Digitalizing Economy: Fold or All-in', (2018), 46, Intertax, Issue 6, pp. 466-475, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018051, Alessandro Turina, 'Which 'Source Taxation' for the Digital Economy?', (2018), 46, Intertax, Issue 6, pp. 495-519, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018053, Ana Paula Dourado, 'Editorial note: Taxing the Digital Economy', (2019), 47, Intertax, Issue 2, pp. 138-139, https://kluwerlawonline.com/journalarticle/Intertax/47.2/TAXI2019012.

30 See also Marcel Olbert, Ann-Catherin Werner, 'Measuring and Interpreting Countries' Tax Attractiveness for Investments in Digital Business Models', (2019), 47, Intertax, Issue 2, pp. 148-160, https://kluwerlawonline.com/journalarticle/Intertax/47.2/TAXI2019014.

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whether they have an in-country marketing or distribution presence (permanent establishment or separate subsidiary) or sell via unrelated distributors. At the same time, the approach largely insists on the current transfer pricing rules based on the arm's length principle, by retaining them, but complements them with formula-based solutions in areas where tensions in the current system are the highest[31].

Finally yet importantly, the approach aims at increased tax certainty for taxpayers and tax administrations delivered via a three tier profit allocation mechanism[32], which comprises from i) Amount A, which refers to a share of deemed residual profit allocated to market jurisdictions using a formulaic approach, i.e. a new taxing right which enables countries to impose tax on a portion of digital profits, even despite the absence of a traditional nexus with a specific jurisdiction and which is determined by the application of a formula to a newly defined tax base; ii) Amount B[33], which represents a fixed remuneration for baseline marketing and distribution functions that take place in the market jurisdiction and has a dual purpose, which consists of a) the simplification of the administration of transfer pricing rules for tax administrations and the decrease of compliance costs for taxpayers and b) enhancement of tax certainty and reduction of controversy between tax administrations and taxpayers[34]; Amount B is characterized by less complexity and administration. and iii) tax certainty and dispute prevention and resolution for and beyond Amount A (prior Amount C), which refers to binding and effective dispute prevention and resolution mechanisms relating to all respective elements, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B. More specifically, as per the aspect of tax certainty, appropriate mandatory, binding, timely dispute resolution mechanisms will be developed[35].

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31 OECD, a public consultation document on a Secretariat Proposal for a "Unified Approach" under Pillar One (9 October 2019 – 12 November 2019).

32 Ana Paula Dourado, The OECD Unified Approach and the New International Tax System: A Half-Way Solution (Editorial), Intertax, Volume 48, Issue 1, 2020, pg. 3-8, who concludes that *"The new nexus linked to the concepts of digital centric business, consumer-facing business, and to a three-tier profit allocation mechanism is overly complex, ring-fences the economy, and does not allocate relevant revenue to the Market States in the end. The Unified Approach is half-way between effective taxation of ability-to-pay in the current digitalized economy: it continues to rely on transfer pricing that does not satisfactorily tax intangibles; it adopts sales as complementary to transfer pricing but does not go into a formula based taxation system; and sales (the Market State) do not fully reflect the value of intangibles. The Unified Approach aims to avoid proliferation of uncoordinated unilateral tax measures including measures taxing gross revenues. Its complexity and reliance of Amount A on a small proportion of sales will probably not achieve its purpose. It would be much more preferable to evolve into full formulary apportionment without ring-fencing highly digitalized business even if the portion allocated to sales were lower than the portion allocated to Supply-Side States".*

33 Amount B refers to simplified TP baseline marketing and distribution activities based on a fixed return varying from industry and region as well as the resale to third parties and routine distribution activities. The alternative could entail the transfer pricing framework to remain "as is" for distributors. See Prof. Dr. Betty Andrade, Jeroen Kuppens, Barry Larking, Global Tax Reform and Digital Taxation, IBFD, 2020.

34 OECD/G20 Base Erosion And Profit Shifting Project Inclusive Framework on BEPS, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, 2020, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint.pdf (visited 26/2/2022).

35 OECD/G20 Base Erosion And Profit Shifting Project Inclusive Framework on BEPS, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, 2020, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint.pdf (visited 26/2/2022).

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Meanwhile, in the EU, a lot of measures were examined aiming at the fair[36] taxation of digital economy[37], in order for an interim, harmonized solution to be adopted, instead of a "patchwork" of many unilateral measures which would intensify tax uncertainty. New concepts have arisen, such as the concepts of marketing intangibles, user participation and significant digital presence[38], which

36 See R. Mason & L. Parada, The Legality of Digital Taxes in Europe, Virginia Public Law and Legal Theory Research Paper No. 2020-50 (2020); J. Kennedy, Digital Services Tax: A Bad Idea Whose Time Should Never Come, Information Technology & Innovation Foundation (May 2019), Wei Cui, Digital Services Tax, a Conceptual Defense, Allard, Faculty Publications, (26 Oct. 2018), available at https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1469&context=fac_pubs (accessed 15 Sep. 2021); claiming for ring-fencing, O.Y. Marion, Taxing Data, UC Irvine School of Law Research Paper No. 2021-17 (2021).

37 Digital Taxation Package of 21 March 2018, the adoption of two directives was proposed, i.e. the Digital Presence Directive and the Digital Services Tax Directive. Moreover, the Digital Taxation Package included one recommendation, i.e. the Digital Presence Recommendation. Both the Digital Presence Directive and the Digital Presence Recommendation would be incorporated in the amended CCCTB Directive and would constitute a comprehensive solution which would entail significant amendments in corporate tax rules. The Common Consolidated Corporate Tax Base (CCCTB) is a single set of rules to calculate companies' taxable profits in the EU. With the CCCTB, cross-border companies will only have to comply with one, single EU system for computing their taxable income, rather than many different national rulebooks. Companies can file one tax return for all of their EU activities, and offset losses in one Member State against profits in another. The consolidated taxable profits will be shared between the Member States in which the group is active, using an apportionment formula. Each Member State will then tax its share of the profits at its own national tax rate. The CCCTB is a modern, fair and competitive corporate tax framework for the EU. In October 2016, the Commission proposed to re-launch the Common Consolidated Corporate Tax Base. The re-launched CCCTB was about to be implemented through a two-step process and will be mandatory for the largest groups in the EU. The Commission had originally proposed the CCCTB in 2011, but that proposal proved too ambitious for Member States to agree in one go. However, there was still strong demand for the benefits that the CCCTB could offer to Member States and businesses in the EU. Therefore, the Commission re-enforced the original CCCTB proposal and re-launched it through a more manageable process. For more information see European Commission, Taxation and Customs Union, Business, Company Tax, Common Consolidated Corporate Tax Base (CCCTB), https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en#heading_0 (visited 01/05/2020). Digital Services Tax Directive was designed to adopt an interim measure, in the form of an indirect tax. See also Georg Kofler, Julia Sinnig, 'Equalization Taxes and the EU's 'Digital Services Tax'', (2019), 47, Intertax, Issue 2, pp. 176-200, https://kluwerlawonline.com/journalarticle/Intertax/47.2/TAXI2019017, Christina Dimitropoulou, 'The Digital Services Tax and Fundamental Freedoms: Appraisal Under the Doctrine of Measures Having Equivalent Effect to Quantitative Restrictions', (2019), 47, Intertax, Issue 2, pp. 201-218, https://kluwerlawonline.com/journalarticle/Intertax/47.2/TAXI2019018, EY India, How taxing the digital economy debate impacts all global businesses, 23 September 2019, https://www.ey.com/en_in/tax/how-taxing-the-digital-economy-debate-impacts-all-global-businesses (visited 30/4/2020) and Vasiliki Athanasaki, The challenge of taxation in the era of digital economy: International and EU law concerns and latest developments, European Law Observatory on New Technologies ("ELONtech"), https://www.elontech.org/the-challenge-of-taxation/ .

38 With regard to the consolidated solution and, more specifically, the notion of "significant digital presence", certain quantitative criteria should alternatively be met, namely, a) revenues from supplying digital services should exceed EUR 7 million or b) more than 100.000 users should exist or c) the number of business contracts should exceed 3.000. It was assessed that no new tax should be provided for, but instead respective changes should be effected in the existing corporate tax systems of member states within the framework of a global solution, applied even to entities in a 3rd country (where no Double Tax Convention exists). As per the allocation of profits to the said "significant digital presence", certain qualitive criteria should be fulfilled. First of all, a functional and risk analysis should be carried out, when it comes to risks, assets and functions in terms of compliance with the arm's length principle. Secondly, user activities should contribute to the economic ownership of intangible assets and to value creation. Last but not least, the OECD profit split method could be used e.g. based on R&D expenses or user data collected. Not fail to mention that the transactional profit split method seeks to establish arm's length outcomes or test reported outcomes for controlled transactions in order to approximate the results that would have been achieved between independent enterprises engaging in a comparable transaction or transactions. The method first identifies the profits to be split from the controlled transactions—the relevant profits—and then splits them between the associated enterprises on an economically valid basis that approximates the division of profits that would have been agreed at arm's length. As is the case with all transfer pricing methods, the aim is to ensure that profits of the associated enterprises are aligned with the value of their contributions and the compensation which would have been agreed in comparable transactions between independent enterprises for those contributions.

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indicates a reform[39] of the taxable nexus, based upon the significant interaction with customers in a certain market jurisdiction, despite the absence of physical presence in such a jurisdiction. However, all the respective attempts at EU level were unsuccessful, due to the requirement of unanimity at the decision-making process, since some member-states (i.e. Ireland, Luxembourg, the Netherlands) were opposed to the proposed measures. Furthermore, another legislative proposal on digital levy tax was announced, which was paused in order for the developments at OECD/G20 level as per a global, uniform solution to be taken into account[40].

The core mission of the proposed actions both at the level of OECD[41] and EU is the effective imposition of a fair share of tax on the income arisen from digital transactions. A war of unilateral measures should by all means be avoided[42], given the adverse tax implications it would entail in terms of jeopardizing tax certainty. Moreover, an international tax reform is a rather complex matter, given the fact that the traditional international tax rules are well established and it is difficult to be subject to extensive change. Such a significant reform finally took place on 8 October 2021[43], when a historic agreement on global minimum tax and partial reallocation of profit to mark et jurisdictions was reached among 136 jurisdictions[44] under the auspices of OECD and G20. This is the most important tax reform in the history of international taxation, within the frame of which a new multilateral instrument will be developed and signed in 2022, with respect to Pillar One, as regards the profit reallocation element of the agreement,

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The transactional profit split method is particularly useful when the compensation to the associated enterprises can be more reliably valued by reference to the relative shares of their contributions to the profits arising in relation to the transaction(s) than by a more direct estimation of the value of those contributions. See OECD/G20 Base Erosion and Profit Shifting Project Revised Guidance on the Application of the Transactional Profit Split Method Inclusive Framework on BEPS: Action 10, 2018. See Vasiliki Athanasaki, The challenge of taxation in the era of digital economy: International and EU law concerns and latest developments, European Law Observatory on New Technologies ("ELONtech"), https://www.elontech.org/the-challenge-of-taxation/ .

39 See also Michael P. Devereux, John Vella, 'Debate: Implications of Digitalization for International Corporate Tax Reform', (2018), 46, Intertax, Issue 6, pp. 550-559, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018056 and Andrés Báez Moreno, 'Debate: A Note on Some Radical Alternatives to the Existing International Corporate Tax and Their Implications for the Digital(ized) Economy', (2018), 46, Intertax, Issue 6, pp. 560-564, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018057.

40 European Parliament, Legislative train 09.2021,2 a Europe fit for the digital age, Digital levy and a proposal for digital levy as own resource / 2020-9, https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-levy (visited 8/10/2021).

41 The key OECD principles for taxing digital economy comprise from an increase of source taxation, no ring-fencing as well as fairness of taxation among the jurisdictions involved. See Prof. Dr. Betty Andrade, Jeroen Kuppens, Barry Larking, Global Tax Reform and Digital Taxation, IBFD, 2020.

42 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

43 See OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm?mc_cid=4c59600584&mc_eid=138f99f078 (visited 11/11/2021).

44 137 member jurisdictions have agreed to it as of 4 November 2021. See also https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm?mc_cid=4c59600584&mc_eid=138f99f078 (visited 11/11/2021).

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with effective implementation from 2023 onwards. The agreement includes a standstill clause, pursuant to which existing digital service taxes and other similar relevant unilateral tax measures must be frozen or abolished in due course, under certain conditions[45]. This element of the agreement aims to ensure greater tax certainty, through the elimination of overlaps, loopholes and mismatches and to achieve greater consistency, when it comes to the taxation of digital economy[46]. Pursuant to the respective Statement[47], revenue will be sourced to the end market jurisdictions[48] where goods or services are used or consumed. To facilitate the application of this principle, detailed source rules for specific categories of transactions will be developed. In applying the sourcing rules, an in-scope MNE must use a reliable method based on the MNE's specific facts and circumstances. Moreover, at an EU level, on 22 December 2021 a Proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the European Union (EU) (hereinafter, the Proposal) was published[49]. It adheres to the Pillar Two implementation plan included in the 8 October 2021 Inclusive Framework (IF) statement[50] and the

45 Actually, the Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated. The Inclusive Framework notes reports from some members that transitional arrangements are being discussed expeditiously. See OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, dated 8 October 2021.

46 Ana Paula Dourado, 'Editorial: Editorial Note on the Digital Tax Special Issue', (2018), 46, Intertax, Issue 6, pp. 461-461, https://kluwerlawonline.com/journalarticle/Intertax/46.6/TAXI2018049, Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

47 OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, dated 8 October 2021.

48 In-scope companies are the multinational enterprises (MNEs) with global turnover above 20 billion euros and profitability above 10% (i.e. profit before tax/revenue) calculated using an averaging mechanism with the turnover threshold to be reduced to 10 billion euros, contingent on successful implementation including of tax certainty on Amount A, with the relevant review beginning 7 years after the agreement comes into force, and the review being completed in no more than one year. Extractives and Regulated Financial Services are excluded. There will be a new special purpose nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than 40 billion euros, the nexus will be set at 250 000 euros. The special purpose nexus rule applies solely to determine whether a jurisdiction qualifies for the Amount A allocation. Compliance costs (incl. on tracing small amounts of sales) will be limited to a minimum. For in-scope MNEs, 25% of residual profit defined as profit in excess of 10% of revenue will be allocated to market jurisdictions with nexus using a revenue-based allocation key. See OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, dated 8 October 2021.

49 European Commission, Proposal for a Council Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union, Brussels, 22 Dec. 2021, COM(2021) 823 Final, https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf (accessed 18 Mar. 2022), Ana Paula Dourado, The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comment, Volume 50, Issue 3 © 2022, pg. 200-204.

50 The Proposal builds on the OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy 4 (8 Oct. 2021, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.). (accessed 4 Feb. 2022), Ana Paula Dourado, The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comment, Volume 50, Issue 3 © 2022, pg. 200-204.

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model rules published on 20 December 2021[51] whereas Pillar Two and its model rules are not binding ('they have the status of a common approach[52]), the EU opts for a binding instrument.

According to the said historic agreement mentioned above and especially with regard to Amount A, new mandatory binding mechanisms for the prevention and settlement of tax disputes will be enacted, which will cover the main aspects of Amount A, such as the determination of jurisdictions, source of revenues etc. as well as "related issues", which include tax disputes that arise in the field of transfer pricing and disputes related to permanent establishment issues. Actually, in-scope MNEs will benefit from dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g. transfer pricing and business profits disputes), in a mandatory and binding manner. Disputes on whether issues may relate to Amount A will be solved in a mandatory and binding manner, without delaying the substantive dispute prevention and resolution mechanism. An elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review[53] and have no or low levels of MAP disputes. The eligibility of a jurisdiction for this elective mechanism will be reviewed regularly; jurisdictions found ineligible by a review will remain ineligible in all subsequent years. This is a very important aspect of the respective framework, since practically all transfer pricing and permanent establishment related issues should all be considered as falling within the scope of Amount A and therefore should be covered by the respective procedures. Last but not least, there will be a restricted "opt-out" regarding some developing countries which will be provided for the "related issues", given that even the developing countries will be subject to binding dispute resolution for the core issues of Amount A. Furthermore, opt-out right will be restricted to developing countries with a minimum number of bilateral tax disputes arising from double tax treaties and are eligible for deferral of peer review under BEPS Action 14. In other words, once a developing country has enough bilateral dispute resolution experience, it is permanently within the scope of the mandatory Amount A procedures[54]. Taxpayers that will fall within the ambit of Amount A will benefit significantly from the tax certainty achieved in case of transfer pric-

51 OECD, Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS OECD, Paris (2021), https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-base-erosion-model-rules-pillar-two.htm. (accessed 4 Feb. 2022), Ana Paula Dourado, The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comment, Volume 50, Issue 3 © 2022, pg. 200-204.

52 OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two-Pillar … supra n. 2., at 3: Inclusive framework (IF) members, however, cannot oppose the application of the GloBE rules applied by other IF members 'including agreement as to rule order and the application of any agreed safe harbours': Idem, Ana Paula Dourado, The EC Proposal of Directive on a Minimum Level of Taxation in Light of Pillar Two: Some Preliminary Comment, Volume 50, Issue 3 © 2022, pg. 200-204.

53 The conditions for being eligible for a deferral of the BEPS Action 14 peer review are provided in paragraph 7 of the current Action 14 Assessment Methodology published as part of the Action 14 peer review documents. See OECD/G20 Base Erosion and Profit Shifting Project Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, dated 8 October 2021.

54 See Mark Martin, Thomas Bettge, Pillar one's Amount A: A revolution in TP controversy, International Tax Review (ITR), November 29 2021, https://www.internationaltaxreview.com/article/b1vnq3w4y2znbz/pillar-ones-amount-a-a-revolution-in-tp-controversy (visited 16/1/2022).

ing and permanent establishment disputes, taking into account the fact that such disputes are too complicated, as these taxpayers could avoid double taxation and potentially streamline the traditional controversy process[55]. It goes without saying that the implementation of the process requires careful design choices and a cooperative spirit[56].

Significant technical work remains to be done for the formation of an effective and timely tax disputes prevention procedure. However, the declaration of October 2021 highlights a worthwhile vision which would totally alter the way in which taxpayers deal with cross-border tax disputes and which would entail important benefits for them, especially with regard to Amount A[57]. This is one of the reasons for the characterization of the declaration of July 2021[58] as per the compulsory, binding tax disputes prevention and resolution with regard to Amount A as historic, given that the progress reported at both a political and technical level would constitute the starting point for future improvements in tax certainty, irrespective of the extension of these mechanisms to Amount B and Pillar II as well[59].

A feature of tax certainty with regard to Pillar I that should be specifically highlighted is the preventive nature of the respective mechanisms, taking into account that there is a special focus on securing early tax certainty, with a specific orientation to the time before transfer pricing adjustments are made. As it is commonly admitted, transfer pricing is not an exact science[60] and transfer pricing issues are very complex[61]. Therefore, a lot of arguments as well as counter-arguments could be invoked by both the taxpayers and the tax authorities in order to establish and support their position. This characteristic intensifies tax uncertainty, especially in light of the

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55 See Mark Martin, Thomas Bettge, Pillar one's Amount A: A revolution in TP controversy, International Tax Review (ITR), November 29 2021, https://www.internationaltaxreview.com/article/b1vnq3w4y2znbz/pillar-ones-amount-a-a-revolution-in-tp-controversy (visited 16/1/2022).

56 See for example IRS compliance assurance process or "CAP"), which is a program of dispute prevention that could serve as a model for the Amount A procedure. However, the respective experience has proven that transfer pricing disputes which mainly relate with complicated tax adjustments cannot easily be resolved ex ante and for this reason the advanced pricing agreement procedure ("APA") is being selected instead. See Mark Martin, Thomas Bettge, Pillar one's Amount A: A revolution in TP controversy, International Tax Review (ITR), November 29 2021, https://www.internationaltaxreview.com/article/b1vnq3w4y2znbz/pillar-ones-amount-a-a-revolution-in-tp-controversy (visited 16/1/2022).

57 See Mark Martin, Thomas Bettge, Pillar one's Amount A: A revolution in TP controversy, International Tax Review (ITR), November 29 2021, https://www.internationaltaxreview.com/article/b1vnq3w4y2znbz/pillar-ones-amount-a-a-revolution-in-tp-controversy (visited 16/1/2022).

58 OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 1 July 2021, OECD/G20 Base Erosion and Profit Shifting Project, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf (visited 2/3/2022).

59 Mark Martin and Thomas Bettge, Finding consensus: BEPS 2.0 and tax certainty, International Tax Review (ITR), 28 July 2021, https://www.internationaltaxreview.com/article/b1swpkm60ry5ct/finding-consensus-beps-20-and-tax-certainty (visited 16/1/2022).

60 OECD Transfer Pricing Guidelines (2017), Chapter IV: Administrative Dispute Resolution, paragraph 4.8, Wittendorff J., Transfer pricing and the arm's length principle in international tax law, Wolters Kluwer, pg. 3 et seq.

61 OECD Transfer Pricing Guidelines (2017), Chapter IV: Administrative Dispute Resolution, paragraph 4.40. See also respective case law, indicatively Slovakia vs Coca-Cola s.r.o., April 2015, Supreme Court of the Slovak Republic No. 2Sžf/76/2014.

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recent drastic developments at OECD level, given that a new taxing right has been introduced. The aim of early tax certainty could be achieved through various procedural stages, such as the development of a standardised Amount A self-assessment return as well as a documentation package, accompanied by a centralised filing, validation and exchange of this information, the request for tax certainty by a multinational group through a voluntary mechanism, an optional initial review by the lead tax administration and determination if a panel review is needed, the constitution of the review panel, the review panel process and approval by affected tax administrations and the constitution of the determination panel and the determination panel process, the determination of cases where a multinational group does not accept a panel conclusion[62].

When it comes to tax certainty beyond Amount A, specific steps are being provided for concerning a novel dispute resolution mechanism[63]. These steps include improvements to dispute resolution mechanisms, consisting of the use of standardised benchmarks in common transfer pricing situations, the enactment of specific time limits to make transfer pricing and permanent establishment adjustments, suspension of tax collection for the duration of the respective disputes, joint tax and transfer pricing audits in a coordinated manner, in order to eliminate inconsistencies and disagreements between tax administrations, improved processes for bilateral and multilateral APAs, in order for advance certainty to be achieved and potential transfer pricing disputes to be avoided. Last but not least, voluntary programmes, such as ICAP, are very important in this respect. Particularly ICAP performs a co-ordinated risk assessment of potentially all of an MNE group's transfer pricing and permanent establishment risk by tax administrations in a number of jurisdictions where the MNE group has activity, including its headquarter jurisdic-

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62 See OECD (2020), "Tax Certainty", in Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris. DOI: https://doi.org/10.1787/59b9c504-en (visited 27/2/2022), where reference is also made to other opportunities to provide greater certainty concerning Amount A as well as to transfer pricing adjustments and other adjustments in subsequent years.

63 See OECD (2020), "Tax Certainty", in Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris. DOI: https://doi.org/10.1787/59b9c504-en (visited 27/2/2022). See also Ana Paula Dourado, Taxing Consumer-Facing Business as a Regulatory Currency, World Tax Journal (WTJ), Volume 13 – Issue 4 – November 2021, pg. 533-573, according to whom *"The Report on Pillar One Blueprint adds complexity to the Unified Approach and the scope of Amount A. It submits the application of Amount A to an activity test, and in-scope activities are either automated digital services (ADS) or consumer-facing businesses (CFB). In-scope activities are meant to be comprehensive. For the sake of certainty, the Report on Pillar One Blueprint proposes to first identify an activity on a positive list. If the activity is not on the positive list, a negative list will clarify whether the activity is excluded. If the activity is not in either list, the interpreter will determine whether it falls under the general definition (OECD, Report on Pillar One Blueprint, supra n. 15, at pp. 19-20. OECD, OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors, Saudi Arabia (OECD Publishing, Oct. 2020) that will be based on the elements "automated" and "digital"(OECD, Report on Pillar One Blueprint, supra n. 15, at p. 20.) (…) The ADS contains nine categories of services, specifically: online advertising services; sale or other alienation of user data; online search engines; online intermediation platform services; social media platforms; digital content services; online gaming; cloud computing services; and standardized online teaching services."*. See also Andrés Báez Moreno, Because Not Always B Comes after A: Critical Reflections on the New Article 12B of the UN Model on Automated Digital Services, World Tax Journal (WTJ), Volume 13 – Issue 4 – November 2021, pg. 501-531, See, e.g., M.F. de Wilde, Sharing the Pie, Taxing Multinationals in a Global Market (IBFD 2017), Books IBFD; M.F. de Wilde, Comparing Tax Policy Responses for the Digitalising Economy: Fold or All-In, 46 Intertax 6/7, pp. 466-475 (2018); L. Spinosa & V. Chand, A Long-Term Solution for Taxing Digitalized Business Models: Should the Permanent Establishment Definition be Modified to Resolve the Issue or Should the Focus Be on a Shared Taxing Rights Mechanism?, 46 Intertax 6/7, pp. 476-494 (2018). Claiming for a withholding tax in the frame of the OECD Model Convention on Income and on Capital: A.M. Jiménez, BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties, 46 Intertax 8/9, pp. 620-638 (2018).

tion and gives comfort and assurance where tax administrations participating in an MNE's risk assessment consider a covered risk to be low[64]. The remaining steps for ensuring tax certainty beyond Amount A refer to improvements to the mutual agreement procedure ("MAP") as well as the enactment of a binding dispute resolution mechanism beyond Amount A. These steps should be regarded in conjunction with Action 14 of the OECD BEPS Action Plan referring to improvements to the MAP, in order for its robustness and effectiveness to be further enhanced.

At the same time, at an EU level a new European Data Strategy will enable the EU to make the most of the enormous value of non-personal data as an ever-expanding and re-usable asset in the digital economy. The European Commission proposed two legislative initiatives to upgrade rules governing digital services in the EU, namely the Digital Services Act ("DSA") and the Digital Markets Act ("DMA")[65]. They form a single set of new rules applicable across the whole EU to create a safer and more open digital space[66]. Thus, the single market for digital services will be reinforced and smaller businesses will be provided with the legal clarity and level playing field they need. Protecting citizens and their rights, not least the freedom of expression, will be at the core of EU's efforts[67]. In this respect, the functional and risk analysis plays a key role in finding out the exact contribution of each counterparty in the whole value chain, according to which a proper, arm's length remuneration should be calculated.

It ensues from the above, that a real revolution of the existing international tax framework has taken place since the international tax law, as we know it up until know has been totally reformed. However, especially with regard to Amount A, a question seems to be borne, relating to an additional layer of administration, increased complexity and cost efficiency of the new rules,

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64 See OECD (2020), "Tax Certainty", in Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris. DOI: https://doi.org/10.1787/59b9c504-en (visited 27/2/2022), where it is stated that a multilateral ICAP-like mechanism could also be used to facilitate greater certainty and a more consistent outcome as to whether an MNE group's activities in a number of jurisdictions represent baseline marketing and distribution functions (and so are within the scope of Amount B) or go beyond this.

65 See also Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC7), which extends the E U tax transparency rules to digital platforms and introduces an obligation for platform operators to provide information on income derived by sellers through platforms, as from 2023 onwards. For more details see KPMG, DAC7 – New reporting obligations for digital platforms, https://home.kpmg/mt/en/home/insights/2021/04/dac7-new-reporting-obligations-for-digital-platforms.html (visited 1/3/2022).

66 See https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (visited 27/2/2022). See also Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC as well as the Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe (Brussels, 6.5.2015, COM(2015) 192 final, {SWD(2015) 100 final}, according to which *"A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.".*

67 European Commission, Commission Work 2020 Programme, A Union that strives for more, Brussels, 29.1.2020 COM(2020) 37 final, pg. 4.

especially given the fact that Amount A is allocated to jurisdictions with users and customers if and only to the extent that significant presence exists. However, it seems in some instances to be difficult for significant presence to be proven effectively. The business impact of Amount A is worth-mentioning, taking into account that it results in a less operational, tax-driven allocation of key functions performed, risks assumed and assets used and of control over risk and DEMPE[68] functions. It has been pointed out that safe harbor rules could be introduced, in order to decrease uncertainty. However, various alternatives, such as the proliferation of unilateral measures or the retaliation of the USA on client-facing businesses with import taxes do not seem very attractive and they are expected to have a significant negative economic impact on states and businesses[69].

68 Development, Enhancement, Maintenance, Protection and Exploitation, in case of intangible assets.

69 Prof. Dr. Betty Andrade, Jeroen Kuppens, Barry Larking, Global Tax Reform and Digital Taxation, IBFD, 2020.

2. General anti-abuse rules and the feature of tax uncertainty as a conditio sine qua non

In the current global tax environment, tax evasion has rapidly increased, as taxpayers are taking advantage of the variety of options they now have, as well as the plurality of tax system gaps and mismatches. A general anti-abuse rule (hereinafter referred to as "GAAR") constitutes a valuable instrument for combatting international tax avoidance. This is the main reason for the growing trend that is observed towards the inclusion of GAARs both in the tax systems of various States worldwide and generally in the various tax laws and at the level of supranational- international law[70]. Precisely because of this overriding purpose of combatting tax avoidance, especially in view of all the modern methods that are used by taxpayers within the frame of the globalized economic environment either via the digital economy or through complex financial structures, the use of new hybrid financial products and interference of companies in tax havens, GAARs shall reinforce the legal arsenal of tax administrations, by significantly differentiating the way and methods, according to which tax audits are performed. This fact clearly confirms the urgent need to redefine the traditional practices of tax administrations, which have proved inadequate over time, particularly in view of the fact that notably large multinational corporations have invented particularly imaginative and elaborate tax avoidance techniques[71], with the use of which they manage to save huge funds, to the detriment of public revenues[72].

As indicated by the term used itself, this is a general anti-abuse rule. Therefore, the core elements of the provision are also general enough, in order to be able to cover all potential cases

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70 Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

71 See Thomas Neale, DG Taxation and Customs Union European Commission, Current issues in countering international tax avoidance and evasion, Fighting tax fraud, evasion and aggressive tax planning, UN 29 May 2013, Klaus Schurig, Die Gesetzesumgehung im Privatrecht, in: FS fur Murad Ferid, Frankfurt am Main 1988, σελ. 375, 377, Arndt Teichmann, Die Gesetzesumgehung, Gottingen 1962, pg. 5, Friedrich Carl von Savign System des heutigen romischen Rechts, Band I, Berlin 1840, pg. 324] and Heinrich Thol, Einleitung in das deutsche Privatrecht, Gottingen 1851, pg. 159], Susanne Sieker, Umgehungsgeschafte, Tubingen 2001, pg. 8.

72 Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

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of tax avoidance, that do not fall within the scope and ambit of a specific anti-avoidance rule. A core feature of the GAAR is the ambiguity of its wording, given that this generality is a conditio sine qua non for this type of tax rules. The GAAR, as it is provided for in article 6 of the ATAD, comprises from several general expressions and vague concepts, such as the concept of "main purpose or one of the main purposes" of obtaining a "tax advantage" that hat "defeats the object or purpose" of the applicable tax law and the concept of "non-genuine" arrangements, which are not put into place "for valid commercial reasons" "which reflect economic reality". The terminology used is very broad and it is difficult to be specified, thus creating significant tax and legal uncertainty, since the tax authorities can invoke the GAAR practically almost in every case of tax planning, that results in tax minimization or tax optimization, even though no tax avoidance or tax abuse exists. Similarly, taxpayers can almost always argue that their arrangements are genuine and, consequently, they do not fall within the scope of the GAAR given the facts and circumstances of each particular case. The criteria for the characterization of a specific arrangement as non-genuine or artificial (as the respective terminology is used in the CJEU case law) are not explicitly defined in Article 6 of the Directive 2016/1164 (the Anti-Tax Avoidance Directive, hereinafter "ATAD")[73]. Instead, there is a general wording, according to which "an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality", referring to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. In other words, almost always taxpayers will be able to find and invoke appropriate counter-arguments in order to express objections as per the existence of an abusive arrangement. In this respect, the results of a particular tax scheme are almost never ex ante predictable enough. Moreover, in some jurisdictions, the tax administrations have even wider power, given that they can also proceed to the recharacterization of a specific artificial arrangement, which is an even stricter and more drastic measure. It could be supported that tax uncertainty is inextricably linked-to a certain degree- to the GAARs, as a distinct category of tax provisions, with their own features and characteristics.

Similar legal terms are widely used in the various national GAARs around the world. Other national GAARs, such as the Greek one, which has been based upon article 6 of the ATAD but also combine some elements that can be found at the template of the EU GAAR, which is included in the EU Commission Recommendation on Aggressive Tax Planning[74] consist of specific terms, such as "artificiality", "essential purpose", "tax avoidance", "economic substance", "com-

73 See also de la Feria, Rita, EU General Anti-(Tax) Avoidance Mechanisms: From GAAP to GAAR (November 1, 2019). In G Loutzenhiser and R de la Feria (eds), The Dynamics of Taxation (Oxford: Hart Publishing, 2020), 155-183, Available at SSRN: https://ssrn.com/abstract=3485784 or http://dx.doi.org/10.2139/ssrn.3485784.

74 2012/772/EU: Commission Recommendation of 6 December 2012 on aggressive tax planning, see also Ana Paula Dourado, Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6, INTERTAX, Volume 43, Issue 1, 2015, pg. 42-57.

mercial substance", "reasonable business conduct", "the object, spirit and purpose of law", "transactions offsetting each other or self-cancelling", "transactions of a cyclical nature", coming from the relevant CJEU case law. Some of the terms enumerated above appear to be, sometimes, contradictory or even inconsistent. As concerns these incompatibilities and failures observed and the way to be addressed, the contribution of Ampliscientifica[75] case law of the CJEU could play an important role. In the said decision, which was issued in May 2008, following the decisions of Halifax[76] and Cadbury Schweppes[77] and is related to the field of indirect taxation and, more specifically, the sixth VAT Directive, the CJEU attempted to combine and unify the two different jurisprudential approaches regarding the abusive practices, resulting in conclusions, in principle similar with the conclusions of A Oy,[78] according to paragraph 63 of which, *"The effect of that principle is therefore to prohibit wholly artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage".* [79] In the next paragraph of A Oy (par. 64) it is stated that *"Thus, in the interpretation of the Sixth Directive, an abusive practice can be found to exist if, firstly, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of that directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, secondly, it is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain such a tax advantage",* with reference to Halifax and Part Service case[80].

Therefore, on the one hand the decision refers to the intention of a taxpayer to set an arrangement with the sole purpose of obtaining a tax benefit and on the other hand such subjective test is objectified, by reference to the essential purpose of the transactions, namely the actual acquisition of a tax advantage, which can be quantified. This ambiguity causes significant uncertainty[81] to the taxpayer. As it ensues from the above, the mixture of these two concepts

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75 ECJ, 22.5.2008, C-162/07, Ampliscientifica.

76 ECJ, 21.2.2006, C-255/02, Halifax.

77 CJEU, 12.9.2006, C-196/2004, Cadbury Schweppes.

78 CJEU 19.7.2012, C-33/11, A Oy.

79 CJEU 19.7.2012, C-33/11, A Oy, par. 63, with reference to Ampliscinetifica, par. 28, which in turn refers to CJEU 12.9.2006, C-196/2004, Cadbury Schweppes, par. 55. This is also the case with CJEU 27.10.2011, C-504/10, Tanoarch, par. 51 or CJEU 22.12.2010, C-277/09, RBS Deutschland, or. 51.

80 CJEU 19.7.2012, C-33/11, A Oy, par. 64, with reference to CJEU 21.2.2006, C-255/02, Halifax, par. 74 and 75 and CJEU 21.2.2008, C-425/06, Part Service, par. 42. This is also the case in RBS Deutschland as well as Tanoarch (CJEU, 27.10.2011, C-504/10), where it is stated in paragraphs 49 and 52 respectively that "an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions and, second, it is apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage". See also Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Lang (Ed), Linde, 2016, pg.189-190.

81 See also Prebble, R., & Prebble, J. (2017). General anti-avoidance rules and the rule of law. In N. Hashimzade & Y. Epifantseva (Eds.), The Routledge companion to tax avoidance research (pp. 61–78). Abingdon: Routledge

results in the combination of approaches, which should not appear as interconnected. The EU Commission, attempting to properly interpret these concepts, expressed the view that the essential purpose should be viewed from the perspective of the arrangement itself and its objectified intention and not the subjective motive of the taxpayer. In this sense, the essential purpose of the arrangement should focus on the fact of tax avoidance. However, such a conclusion seems not to arise from the wording of the provision, which specifies that the essential purpose of the taxpayer should oppose to the requirements set by the provision.[82]

Within the process of application and interpretation of a GAAR by the competent tax authorities as well as the courts, the general principles of administrative law, including the fundamental principle of legality and the principle of taxpayer's protected trust should be definitely respected. Moreover, constitutional rights as well as the fundamental freedoms enacted by the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR), such as the right to a fair trial (article 6) and the protection of property (Article 1 of the First Protocol to the ECHR) should thoroughly be protected.

The international criticism of the introduction of a GAAR in the countries' national tax systems[83] in terms of tax uncertainty also focuses on the issue of coexistence and interaction with the rules of the applicable double tax treaties as well as the rules provided for in specific and targeted anti-abuse provisions (hereinafter referred to as "SAARs" and "TAARs"). A question that arises in this respect relates to the possible need to abolish SAARs based on the argument that they can be totally replaced by the GAAR. Another significant question refers to whether the GAAR is inapplicable in case a SAAR exists, covering a specific area of interest. In any case, the introduction of a GAAR has ultimately not led, as it was believed, to the abolition of the plurality of more SAARs by substituting them and rendering them obsolete. This fact has resulted in a multiplicity and complexity in tax systems, which comprise from a plethora of anti-avoidance rules, which may sometimes overlap. As a consequence, a variety of interpretative issues arise in relation to the interaction of GAARs, resulting in legal and tax uncertainty[84]. It is a fact that the introduction of a GAAR tends to slow down and even discourage the parallel adoption of SAARs. In this context, it should be borne in mind that the a priori substitution of all SAARs and TAARs in general by a GAAR could only reinforce legal uncertainty. This is because the absence of more detailed and analytical rules covering specific cases of transactions and arrangements and specific individual aspects of tax planning would potentially make GAAR inapplicable to

82 Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Lang (Ed), Linde, 2016, pg.189-190, Mitroyanni, *European Union* in Lang/Rust/Schuch/Staringer/Owens/Pistone (eds.) – A key element of tax systems in the Post-BEPS Tax World? (2016), 23 et seq., 26 et seq. See also Vasiliki Athanasaki, 'A Critical Approach to GAARs in the Greek and EU Tax Law', (2019), 28, EC Tax Review, Issue 4, pp. 183-195, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019022.

83 See Judith Freedman, op. cit.

84 Vasiliki Athanasaki, Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

a significant extent and would increase the doubts and uncertainties of taxpayers while also inhibiting business activity[85]. The underlying risk is that many cases of aggressive tax planning, even though they are abusive, would ultimately fall outside the scope of the GAAR, while others would be covered by it, without in essence constituting abusive tax avoidance. Moreover, without the specific implementation criteria included in the SAARs, the exact application and interpretation of the GAAR would be totally left to the wide discretion of the tax administration or courts, which would examine the facts and circumstances of each particular case on an ad hoc basis and on its own merits, without any interpretative systemization or uniformity. This fact would entail a large variety of stricter or even more lenient approaches for quite similar cases, solely based upon the judgment of the competent tax authorities, without any consistency and this situation could maximize tax uncertainty.

Another crucial factor lies in the fact that GAARs themselves provide for the legal consequences in case of infringement. As a result, in case a GAAR applies, given that an artificial arrangement exists, the latter will either be ignored and the respective taxation will be based upon the hypothesis that the taxpayer would not have proceeded to the said arrangement or a re-characterization will take place. Moreover, GAARs usually stipulate that taxation will be imposed on a hypothetical arrangement that would have been carried out instead of the artificial one that actually took place. This approach could inevitably create significant problems, since no one can be sure about what the taxpayer would have selected, provided that the said taxpayer could have known or predicted that the tax authorities or tax courts would have considered the selected arrangement as artificial and, consequently, the tax benefit sought to be obtained would not have been granted. In other words, it cannot be safely predicted whether the said taxpayer would not have proceeded to any - even similar – arrangement or whether he would have selected another alternative. This fact creates great uncertainty and intensifies the disadvantages of GAARs[86].

Therefore, the proper balance and control of the wide discretion recognized to the tax administration as well as the courts by the GAAR is of great importance, since such a discretion indicates greater tax and legal uncertainty. Although it is impossible to completely eliminate tax and legal uncertainty[87] which arises from such a discretion provided to the courts and tax

85 Vasiliki Athanasaki, op. cit.

86 Vasiliki Athanasaki, 'A Critical Approach to GAARs in the Greek and EU Tax Law', (2019), 28, EC Tax Review, Issue 4, pp. 183-195, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019022.

87 To be noted that the courts in the countries that have adopted a statutory GAAR tend to show greater uniformity in the interpretation and application of this rule, starting from the grammatical interpretation of the relevant provisions and the purpose of the historic legislator. On the other hand, in countries without such a written rule, the courts often resort to contradictory judgments and interpretations of the jurisprudential GAAR, without being bound by specific provisions and their specific wording, with the result that discrepancies and inconsistencies are often observed when interpreting the relevant rules against tax avoidance. This fact, combined with the already broad scope of these rules, which by definition have a general and vague content, intensifies the legal uncertainty and makes judicial GAARs slightly inefficient and not functional. See Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

authorities, since this is an inherent characteristic of the GAAR[88], it could of course be restricted to a minimum level. This could be effected through the activation of appropriate and effective safeguards which should be enacted. Moreover, a specific procedure should be provided for, in order to clearly delimit the said discretion[89]. There is a wide variety of measures that could serve as safeguards[90] in this respect, such as the establishment of a panel of experts who would express a formal opinion prior to the application of a GAAR on an ad hoc basis, given that the issues pertaining to the application of a GAAR are in general fact sensitive and the enactment of a tax rulings or an advanced agreement procedure, similar to the one applicable in the field of transfer pricing, where advanced pricing agreements can be concluded between the taxpayers and the tax authorities, which could regulate in detail the terms and conditions of a particular transaction, scheme or arrangement in general, accompanied by a confirmation that the said transaction, scheme or arrangement do not fall within the ambit of the GAAR. Moreover, other significant safeguards could include the issuance of detailed guidance by tax administrations, with particular examples of cases where the GAAR is applicable[91] or has been already applied

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88 See also K. Savvaidou, V. Athanasaki, Country note: General and specific anti-tax avoidance measures under recent tax reform in Greece, Intertax– Volume 47/2019 Issue 4, March 2019. For further details regarding the Greek GAAR, see V. Athanasaki, GAARs in European and International Taxation (Nomiki Vivliothiki 2018) (forthcoming); B. Georgaki, Antitax avoidance in direct taxation p. 257 (Nomiki Vivliothiki 2017); K. Savvaidou, The introduction in the Greek tax law of a general provision against the abuse of the tax legislation in order to combat tax avoidance in light of the European and international developments (in Greek), Bulletin of Tax Legislation, pp. 259-296 and pp. 323-354 (2017).

89 See. M. Gammie, "Tax avoidance and the Rule of Law: The experience of the UK" in. G. Cooper (ed.), Tax Avoidance and the Rule of Law (Amsterdam: IBFD, 1997), J. Freedman, "Defining Taxpayer Responsibility: In support of a General Anti-Avoidance Principle" [2004] BTR 331. See also de la Feria, Rita, EU General Anti-(Tax) Avoidance Mechanisms: From GAAP to GAAR (November 1, 2019). In G Loutzenhiser and R de la Feria (eds), The Dynamics of Taxation (Oxford: Hart Publishing, 2020), 155-183, Available at SSRN: https://ssrn.com/abstract=3485784 or http://dx.doi.org/10.2139/ssrn.3485784. It should be highlighted that the paper concludes that the coexistence of a GAAP ("General Anti-Avoidance Principle"), with the characteristics of a legal principle, jurisprudentially created and a GAAR within the EU legal system is far from redundant, and presents significant advantages.

90 See Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Land (Ed), Linde, 2016.

91 For example, reference to specific criteria, such as these enumerated in the 2012/772/EU, Commission Recommendation of 6 December 2012 on aggressive tax planning could be very useful. This reference is explicitly included in the Greek GAAR (article 38 L. 4174/2013), which has been modified in order to transpose article 6 of ATAD into the Greek tax law but has also retained these criteria in order to better specifiy the legal requirements of the provision. According to these criteria, which come from the CJEU case law: "In determining whether the arrangement or series of arrangements is artificial, national authorities are invited to consider whether they involve one or more of the following situations: (a)the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole; (b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct; (c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other; (d) transactions concluded are circular in nature; (e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows; (f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit". Moreover, "in determining whether an arrangement or series of arrangements has led to a tax benefit as referred to in point 4.2, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s). In that context, it is useful to consider whether one or more of the following situations occur: (a) an amount is not included in the tax base; (b) the taxpayer benefits from a deduction; (c) a loss for tax purposes is incurred; (d) no withholding tax is due; (e) foreign tax is offset".

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as well as the extended reliance upon the CJEU case law[92] on tax avoidance and tax abuse[93]. Apart from the measures enumerated above, a manual of best practices collected from the international experience as per the proper interpretation and application of a GAAR would be of great importance. Safe harbors could also be utilized, in order to ensure tax certainty in specific cases stipulated in the relevant provisions and certain quantitative and qualitative criteria could be enacted, in order to contribute in the standardization of the cases that fall within the scope of the GAAR. Moreover, the proper determination and allocation of the burden of proof between the taxpayers and the tax authorities could play a decisive role. Actually, it should be clarified who is required to prove that the legal conditions of the GAAR are or are not met. Last but not least, OECD BEPS Action Plan on base erosion and profit shifting could serve as a point of reference for the specification of cases that could imply the application of the GAAR, such as, for example, transfer pricing and intercompany transactions, hybrid mismatches, harmful tax practices, artificial avoidance of permanent establishment status, IP regimes, preferential tax regimes, digital economy etc.

Furthermore, the inclusion of subjective tests in the GAAR is unnecessary[94], in view of the fact that an arrangement does not infringe a tax provision, when it is "artificial" ("arrangement test") or when it has been entered into force with the "aim" ("purpose test") of obtaining a "tax benefit" ("tax advantage") or even when "reasonable taxpayers" would not have proceeded in such an arrangement ("double reasonableness test"). Additionally, the requirement for subjective tests is meaningless[95], since the required subjective criteria are too vague and broad and, for this reason, they could always be fulfilled or it could always be supported that they are fulfilled not only from the side of tax authorities and tax courts but also from the behalf of taxpayers, who would benefit from the opportunity to defend themselves and rebut the existence of abuse. More specifically, taxpayers could be able to support that transactions of a cyclic nature or self-cancelling transactions are not "artificial", on the grounds that, for example, repos or

92 Indicatively, C-155/73, Sacchi, C-111/75, Mazzalai, C-231/89, Gmurzynska-Bscher, C-428/06 and C-434/06, UGT-Rioja and Others, C-35/97, Commission v. France par. 46, C-481/99, Georg Heininger and Helga Heininger, C-322/88, Grimaldi, par. 16, 18 and 19, See also Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Double Taxation in the Single Market, COM (2011) 712 final of 11 November 2011.

93 Zalazinski A., Proportionality of anti-avoidance and anti-abuse measures in the ECJ's Direct Tax Law, Intertax 2007, 310, Zalazinski A., Some basic aspects of the concept of abuse in the tax case law of the European Court of Justice, Intertax 2008, 156. See also Rita de la Feria, 'Prohibition of abuse of (Community) law: The creation of a new general principle of EC law through tax', (2008), 45, Common Market Law Review, Issue 2, pp. 395-441, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/45.2/COLA2008027, who analyses the evolution of the Court's case law on abuse, from the first cases on free movement of services, to the latest rulings on taxation. The article then considers whether the case law developed by the Court, on what has been designated as "prohibition of abuse of law", does indeed amount to a new general principle of Community law. See also Rita de la Feria, Stefan Vogenauer (Eds.), Prohibition of Abuse of Law: A New General Principle of EU Law? (Studies of the Oxford Institute of European and Comparative Law), Hart Publishing, 2011.

94 Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Lang (Ed), Linde, 2016, pg. 206.

95 Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Lang (Ed), Linde, 2016, pg. 206.

sale and lease back transactions are consistently regarded as "genuine" and compliant with the commercial and business practice.[96] Apart from this argument, taxpayers could also allege[97] that the aim of obtaining a tax advantage does not constitute the principal "purpose" of a specific arrangement but simply a side effect of minor importance and that there are other non-tax considerations behind such an arrangement or that the tax advantage obtained is offset by various disadvantages arisen from the arrangement in question[98].

Further to the above, it is undoubted that the internal motives of the taxpayers should not constitute a clear legal basis for tax assessment, whereas there is also an inherent risk these subjective criteria to be used by tax courts and tax authorities in such a way, so as for the latter to exploit the wide discretion provided to them in order to impose taxes or validate the respective tax assessment acts[99]. In other words, both tax courts and tax/audit authorities could extremely focus on the "artificiality" of the arrangement or its "purpose", especially in light of complicated tax provisions, that is difficult to be properly interpreted. Therefore, there is a risk that an arrangement could be regarded as opposed to the legal requirements of a respective tax provision, only because it is considered that the taxpayer had the intention to obtain a tax advantage or because other reasonable taxpayers, constituting third parties, would have acted differently[100].

As has been pointed out by part of theory[101], a GAAR could simply be a means of legitimizing the discretion which courts already have and exercise. Although the introduction of a GAAR can perform many more and more important functions than being a simple legitimizing instrument[102], this legitimizing function is notably remarkable[103]. In this respect, the crucial role of the

96 Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Lang (Ed), Linde, 2016, pg. 206.

97 In other words, the linguistic issue should be dealt with in respect of the function of the subjective element. Through the use of the subjective element, taxpayers are allowed to justify their choices based on reasons not explicitly acknowledged by tax systems, taking into account the purpose of the activity. The issue is whether there is any rational justification for the concrete activity and whether the nature of the transaction can be aligned with the purpose of the rule. See Paolo Piantavigna, The Role of the Subjective Element in Tax Abuse and Aggressive Tax Planning, World Tax Journal (WTJ), Issue N.2/2018, 15 March 2018, pg. 193-232.

98 Vasiliki Athanasaki, 'A Critical Approach to GAARs in the Greek and EU Tax Law', (2019), 28, EC Tax Review, Issue 4, pp. 183-195, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019022.

99 Paolo Piantavigna, The Role of the Subjective Element in Tax Abuse and Aggressive Tax Planning, World Tax Journal (WTJ), Issue N.2/2018, 15 March 2018, pg. 193-232. These inconsistencies could be avoided if the OCED and EU institutions were to agree on a broader conceptual consensus on the underlying concepts. Only by taking particular care in defining the relevant terminology and background of the issue is one able to achieve better solutions in terms of legal certainty and non-discrimination. In this regard, some recommendations for the drafters of the various legal instruments can be wished-for. On this topic, see P. Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies, 9 World Tax J. 1 (2017).

100 Vasiliki Athanasaki, 'A Critical Approach to GAARs in the Greek and EU Tax Law', (2019), 28, EC Tax Review, Issue 4, pp. 183-195,https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019022.

101 See also Helen Lethaby, Aaronson's GAAR [2012], BTR 27.

102 See also Judith Freedman, "GAAR as a process and the process of discussing the GAAR", Sweet & Maxwell, Reprinted from British Tax Review, Issue 1, 2012, pg. 22-27.

103 Vasiliki Athanasaki, op. cit.

judge for the proper interpretation and implementation of the GAAR on an ad hoc basis (in concreto) in the context of tax disputes should also be highlighted. According to Freedman[104], *"A GAAR will not operate properly unless the underlying law is based on a clearly stated principle, because without such a principle or objective it is impossible to decide whether there has been abuse of legislation",* whereas, Gammie[105] has stated that *"The GAAR reflects the failure of current policy and legislation and in particular the failure to think more carefully about the nature of the tax base – what you want to tax- and to articulated it correctly with greater principle, clarity and purpose".* In this sense, GAARs should, in principle, be treated as reminders of having to properly and effectively interpret the law and, it has been stressed out, that this kind of tax provisions have been enacted to compensate legislative cowardice and judicial shortcomings in statutory interpretation[106].

Apart from the above, significant concerns also arise with regard to some elements included in the DAC6[107], from a tax certainty perspective. More specifically, certain features of the DAC6 on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, such as specific hallmarks, the main benefit test and the concept of tax advantage bear significant similarities as per their nature to the general anti-abuse clause[108]. These issues also raise questions as regards tax and legal certainty, given the ambiguity of the concepts used, their general wording and the inherent difficulties in interpretation and application.

Especially the application of the main benefit test provided for in DAC6 implies extended risks for the taxpayer, the intermediaries and the tax authorities, in view of the fact that it grants a wide discretion as per the assessment on the fulfillment of the conditions of the respective provisions. Therefore, particular difficulties are expected to be faced by the tax administrations,

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104 Freedman, Designing a General Anti-Abuse Rule: Striking a Balance, APTB 2014, 167, 168, where it is also mentioned that "A GAAR should not be, and is not, an excuse for slapdash drafting".

105 Malcolm Gammie, Moral Taxation, Immoral avoidance – what role for the law?, BTR 2013, 577, 589, where it is also stated that "We should recognize that the GAAR is a prop to failed legislation and to inadequate tax policy".

106 Markus Seiler, GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU, Series on International Tax Law, Michael Land (Ed), Linde, 2016, pg. 145, Malcolm Gammie, BTR 2013, p. 589.

107 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

108 In paragraph 14 of the preamble of DAC6 there is an explicit refence to the GAAR of the Anti-Tax Avoidance Directive(EU) 2016/1164, according to which *" While direct taxation remains within the competence of Member States, it is appropriate to refer to a corporate tax rate of zero or almost zero, solely for the purpose of clearly defining the scope of the hallmark that covers arrangements involving cross-border transactions, which should be reportable under Directive 2011/16/EU by intermediaries or, as appropriate, taxpayers, and about which the competent authorities should exchange information automatically. Moreover, it is appropriate to recall that aggressive cross-border tax-planning arrangements, the main purpose or one of the main purposes of which is to obtain a tax advantage that defeats the object or purpose of the applicable tax law, are subject to the general anti-abuse rule as set out in Article 6 of Council Directive (EU) 2016/1164".*

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the tax justice[109] and all stakeholders, including taxpayers and intermediaries, in the process of implementing DAC6 to adequately demonstrate the fulfillment of the conditions for its application, due to the inherent ambiguity arisen from the use of a variety of vague concepts, mainly in view of the drastic consequences it entails. In the light of the above, solutions should be provided for the effective implementation of the relevant provisions, with the main focus on the alignment of the interpretative criteria with those used for the interpretation of the GAAR and the need to specialize the cases that should be considered to fall within their regulatory scope, in order to reduce the ambiguity created and the resulting legal and tax uncertainty.

This seems to be also the case with the "Principal Purpose Test"[110] as incorporated into the 2017 OECD Convention Model Tax Convention (article 29 par. 9), as a result of the relevant proposals of the OECD BEPS Action Plan. The purpose of Action 6 of the BEPS Action Plan[111] is to prevent the granting of treaty benefits arising from double tax treaties under inappropriate circumstances, by using a minimum standard proposed. This action refers to cases of abuse of double tax treaties ("treaty shopping"), mainly through the interposition of shell companies or mailbox companies or "conduits" that lack the appropriate economic substance, in jurisdictions with a favorable treaty network or with a favorable tax treatment. Another area of interest that is challenging tax certainty relates to the interaction of the PPT[112] with the various national GAARs of the contracting states as well as the application of the national GAARs in case no PPT has been inserted in the applicable double tax treaty.

In order to address the weaknesses described above, the OECD Final Report on Action 6 proposes the establishment of an advisory body from the various states, similar to the one already operating in many of them, for the interpretation and application of the general anti-tax avoidance clause, which will give an opinion on the issues of interpretation and the difficulties arising from the application of the PPT rule. The establishment of such an advisory body would largely ensure the uniform interpretation and application of such a rule by the various states, however, its consistent and uniform application remains questionable, which seems to further reinforce legal uncertainty.

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109 See D. Broekhuijsen & H. Vording, What May we Expect of a Theory of International Tax Justice?, in Tax Justice and Tax Law, Understanding Unfairness in Tax Systems pp. 155-168 (D. de Cogan & P. Harris eds., Hart Publishing 2020); T. Dagan, Re-Imagining Tax Justice in a Globalised World, in Tax Justice and Tax Law, Understanding Unfairness in Tax Systems pp. 169-185 (D. de Cogan & P. Harris eds., Hart Publishing 2020); I. Ozai, Between Legitimacy and Justice in International Tax Policy?, in Tax Justice and Tax Law, Understanding Unfairness in Tax Systems pp. 187-200 (D. de Cogan & P. Harris eds., Hart Publishing 2020), I.J.M. Valderrama, Legitimacy and the Making of International Law: The Challenges of Multilateralism, 7 World Tax J. 3, pp. 344-345 (2015), Journal Articles & Opinion Pieces IBFD.

110 See also Andrés Báez Moreno, GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained form BEPS Action 6? (2017), 45, Intertax, Issue 6/7, pp. 432-446.

111 Ana Paula Dourado, Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6, Intertax, Volume 43, Issue 1, 2015, pg. 42-57.

112 Ana Paula Dourado, Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6, INTERTAX, Volume 43, Issue 1, 2015, pg. 42-57, pursuant to which *"The PPT rule in tax treaties is complementary to the GAAR in domestic laws proposed in the EC Recommendation on ATP, since they have different scopes. Whereas the PPT rule aims to combat abuse of tax treaties the GAAR in domestic laws aims to combat abuse of domestic law using a tax treaty or an EU fundamental freedom".*

Last but not least, the recent proposal issued by the European Commission for the adoption of the third anti-tax avoidance directive ("ATAD 3") in relation to preventing the misuse of shell entities lacking minimum economic substance for the purpose of obtaining tax advantages will probably also give rise to the same issues pertaining to tax certainty. This new regime aims at EU resident holding companies which claim benefits under double tax treaties and other EU directives, such as the parent-subsidiary and the interest and royalty directives and is intended to come into effect from 1 January 2024. The proposed directive sets out a series of tests and gateways that are intended to identify high risk entities. The ATAD 3 proposal is currently subject to consultation until 14 March 2022 and many stakeholders are asking for greater clarity on the rules and the exemptions available prior to adoption of the directive. The final wording of the directive and any relevant guidance will be crucial in determining who is affected[113]. In any case, all tax certainty related issues should be dealt with in detail.

113 KPMG, ATAD 3 – European Commission proposal to prevent the misuse of shell entities, 21 February 2022, https://home.kpmg/uk/en/home/insights/2022/02/tmd-atad-3-european-commission-proposal-to-prevent-the-misuse-of-shell-entities.html (visited 27/2/2022).

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3. Tax rulings: safeguarding tax certainty or multiplying tax uncertainty?

The purpose of granting a tax ruling to a company is to confirm in advance the application of a common tax system in a specific case in view of the specific facts and circumstances, for the purpose of ensuring legal and tax certainty, as well as predictability regarding the application of general tax rules[114].

Tax rulings have proven to constitute a rather controversial tool over time. On the one hand, tax rulings and advanced pricing agreements are tools that were traditionally used in order to better safeguard tax certainty. More specifically, tax rulings, pursuant to their original purpose, provide legal certainty for the taxpayer and reduce the financial risk for honest firms in cases where the tax laws or their particular application in certain circumstances are unclear or subject to diverging interpretations, in particular with regard to complex transactions, and thereby avoid future disputes between the taxpayer and the tax authority. Actually, tax rulings cover a wide range of practices in Member States, ranging from ad-hoc policy to a clearly framed application of the law, in terms of possible scope and topics covered, binding nature, frequency of use, publicity, length and payment of fees; whereas there is no commonly agreed definition of tax rulings at international level except for the Commission's reference to them as 'any communication or any other instrument or action with similar effects, by or on behalf of the Member State regarding the interpretation or application of tax laws[115]. On the other hand, in the latest years there is a significant difference of the way tax rulings operate in the contemporary global tax environment[116]. All recent developments in the area of tackling tax avoidance and tax abuse have given rise to a different consideration of tax rulings, especially when it comes to issues per-

114 C. Romano, Advance tax rulings and principles of law, Towards a European Tax Rulings system?, Doctoral Series, Vol.4, p.119.

115 European Parliament, Report on tax rulings and other measures similar in nature or effect (2015/2066(INI)) Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (Co-rapporteurs: Elisa Ferreira and Michael Theurer), A8-0317/2015, 5/11/2015 (https://www.europarl.europa.eu/doceo/document/A-8-2015-0317_EN.html?redirect, visited on 24/2/2022).

116 See, indicatively, Commission's Tax Transparency Package on automatic exchange of information between Member States on their tax rulings, of March 2015, and the action plan for a fair and efficient corporate tax system in the EU of June 2015.

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taining to cross-border transactions and transfer pricing. Thus, tax rulings may also constitute a red flag, causing tax uncertainty[117], although their initial purpose is exactly the opposite.

However, the respective investigation of important cases regarding tax rulings, which was carried out by the European Commission and the consequent conclusion that they are not in compliance with the EU fiscal state aid regime have received strong criticism[118]. According to one of the main arguments, this approach results in violation of the arm's length principle and implies a covered attempt of harmonization in the area of direct taxation. However, this argument seems not to be accepted by the CJEU[119]. According to the established case law of CJEU, member states are free to adopt the economic policy that consider as the most appropriate and to decide on the most allocation of the tax burden, however they should exercise that competence in accordance with the EU law and should therefore not adopt or maintain legislation involving incompatible state aid or discrimination that is contrary to fundamental freedoms[120].

As concerns the field of transfer pricing, APAs[121] as well as tax rulings, in case of complex tax structures that include complicated cross-border transactions can significantly contribute to a great extent to tax certainty, which is a characteristic of a tax system that plays a decisive role in economic growth and the strengthening of competitiveness. On the other hand, it is doubtful whether enterprises will seek to receive a tax ruling or whether they will be discouraged to proceed to such a solution, due to the negative concept of such a tool, following the latest developments, mainly when it comes to their compatibility with fiscal state aid law[122]. It is a fact that some tax rulings result in the double non-taxation of a group company. The European Commission investigation has shown that some tax planning schemes target double non-taxation through tools and principles originally designed to avoid double taxation, such as transfer pric-

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117 See also Giraud, Adrien, and Sylvain Petit. "Tax Rulings and State Aid Qualification: Should Reality Matter?" European State Aid Law Quarterly, vol. 16, no. 2, Lexxion Verlagsgesellschaft mbH, 2017, pp. 233–42, https://www.jstor.org/stable/26694140.

118 See Han Verhagen, State Aid and Tax Rulings – An Assessment of the Selectivity Criterion of Article 107 (1) of the TFEU in Relation to Recent Commission Transfer Pricing Decisions, European Taxation, July 2017, p.279-287, published: 11 August 2017.

119 See Katerina Savvaidou, Fiscal State Aid and Tax Rulings, Nomiki Bibliothiki, (subject to publication, Greek language).

120 See, inter alia, Case C-182/08, Glaxo Wellcome, ECLI: EU: C: 2009: 559 paragraph 34; Case C-446/03 Marks & Spencer [2005] ECR I-10837, paragraph 29; Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-7995, paragraph 40; Case C-374/04 Test Claimants in Class IV of the ACT Group Litigation [2006] ECR I-11673, paragraph 36; and Case C-379/05 Amurta [2007] ECR I-9569, paragraph 16).

121 An APA is an agreement between a taxpayer and tax authority determining the transfer pricing methodology for pricing the taxpayer's international transactions for future years. The methodology is to be applied for a certain period of time based on the fulfillment of certain terms and conditions (called critical assumptions). APAs can be unilateral, bilateral and multilateral. See Deloitte, Advance Pricing Agreement Frequently Asked Questions, September 2012, https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-deloitte-apa-faqs-noexp.pdf (visited 1/3/2022).

122 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

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ing methods, double tax treaties, participation exemption regimes etc. In case the application of these tools grants a selective advantage to the beneficiaries of the "tax ruling", it may constitute prohibited state aid within the meaning of article 107 par. 1 TFEU. Of course, it should be noted that double non-taxation does not in itself lead to a selective advantage.

Certain tax rulings have been found under the microscope of the European Commission in the context of investigating their compatibility with the State aid framework (i.e. Starbucks[123], Apple[124], Fiat[125], Amazon[126] and ENGIE[127] cases). Therefore, special care should be taken to ensure that a tax ruling does not confer a selective tax advantage[128] on the taxpayer in breach of the relevant EU legal framework. More specifically, the European Commission has concluded, after having performed respective investigation, that the tax rulings granted to Apple, Amazon[129], Fiat, Starbucks and ENGIE constitute unlawful state aid and ordered the relevant countries involved to recover the aid from the abovementioned companies.

The EU General Court has annulled the Commission's decision that a tax ruling given by Netherlands to Starbucks was unlawful state aid, but it has upheld a decision that a ruling given by Luxembourg to Fiat did constitute unlawful state aid[130]. More specifically, at the end of September 2019, the EU General Court issued its long-awaited rulings in two appeals against the

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123 Commission Decision of 21.10.2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, Brussels, 21.10.2015 C(2015) 7143 final. See also related tax cases T-636/16, T-760-15, T-877/16. See also Katerina Savvaidou, Fiscal state aid and "tax rulings", following the CHEU rulings on Fiat and Starbucks cases, Applications of Public Law, I/2020, p.61-72.

124 European Commission, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923 (visited 8/10/2021).

125 Commission Decision of 21.10.2015 on State Aid SA.38375 (2014/C ex 2014/NN, Brussels, 21.10.2015 C(2015) 7152 final) which Luxembourg granted to Fiat. See also related court cases C-885/19, C-898/19 P, T-755/15, and T-759/15. See also Katerina Savvaidou, Fiscal state aid and "tax rulings", following the CHEU rulings on Fiat and Starbucks cases, Applications of Public Law, I/2020, p.61-72.

126 Commission Decision of 4.10.2017 on State Aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon, Brussels, 4.10.2017 C(2017) 6740 final. See also related court cases T-318/18 and T-816/17.

127 Commission Decision of 20.6.2018 on state aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favor of ENGIE, Brussels, 20.6.2018 C(2018) 3839 final. See also relevant cases C-454/21P T-516/18, T-525/18.

128 Vasiliki Athanasaki, State Aid Rules in the Financial Sector During the Economic Crisis: A Disguised but yet Necessary Retreat or an Honest Compromise? The Case of Greece' (2017) 23 European Public Law, Issue 3, pp. 615–639 and Vasiliki Athanasaki, ECTJ Vol.17.5 Fiscal State Aid in Infrastructure Projects: The Case of Piraeus Port in Greece 19.9.18.

129 T. Ryding, Eurodad reaction to ECJ ruling on Amazon and ENGIE tax state aid cases, eurodad, 12 May 2021, https://www.eurodad.org/eurodad_reaction_to_ecj_ruling_on_amazon_and_engie_tax_state_aid_cases.

130 Catherine Robins, Insight: State Aid and Tax—Starbucks and Fiat Cases, Bloomberg Tax, Daily Tax Report: International, Oct. 21, 2019, https://news.bloombergtax.com/daily-tax-report-international/insight-state-aid-and-tax-starbucks-and-fiat-cases (visited 06.10.2021), according to which *"In October 2015, the Commission decided that rulings provided to Fiat by Luxembourg and Starbucks by the Netherlands constituted unlawful state aid and that the countries concerned would have to recover 20–30 million euros ($22–33 million) from each company to claw back the benefits of the state aid received. The Netherlands and Starbucks and Luxembourg and Fiat brought actions before the General Court for annulment of the Commission's decisions"*. See also Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

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Commission's State aid decisions, namely the Fiat case and the Starbucks case. While the EU General Court rejected the relevant appeals in the Fiat case, considering that the European Commission proved the existence of a selective advantage granted by the Grand Duchy of Luxembourg to the company Fiat Chrysler Finance Europe, on the contrary it annulled the decision of the European concerning the aid measure granted by the Netherlands in favor of Starbucks, considering that the Commission had failed to demonstrate a selective advantage in favor of that company. However, according to part of the theory[131], both rulings of the EU General Court have substantially confirmed most of the arguments adopted by the European Commission in these cases, which is a double victory for the European Commission, which of course raises legal certainty issues. In particular, it reaffirmed the Commission's judgments on the absence of "covert tax harmonization" and on its right to analyze "tax ruling" tax decisions on the basis of the "arm's length principle".

With regard to the Amazon case, in 2017, the European Commission found that the tax ruling issued by the competent tax authorities as concerns the whole transfer pricing structure as well as the transfer pricing method used, which was the transactional net profit margin method (TNMM) and its annual implementation from 2006 to 2014 constituted state aid within the meaning of Article 107 TFEU, and in particular operating aid incompatible with the internal market. In particular, the European Commission identified an advantage in favor of LuxOpCo, essentially taking into account that the royalties paid by LuxOpCo to LuxSCS during the relevant period, calculated according to the method validated in the tax ruling, were too high, with the result that LuxOpCo's compensation and, consequently, its tax base were artificially reduced. The General Court[132] annulled no. (EU) 38944 European Commission Decision of 4 October 2017[133] declaring the aid incompatible with the internal market on the ground that the European Commission had not shown that there was an unjustified reduction in the tax burden on a European subsidiary of the Amazon group.

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131 L. Parada, The Fiat and Starbucks state aid tax cases: an absolute loss for legal certainty, MNE Tax, October 7, 2019.

132 General Court of the European Union, in Cases T-816/17 and T-318/18, Grand Duchy of Luxembourg, applicant in Case T-816/17, and Amazon EU Sàrl and Amazon.com, Inc., applicants in Case T-318/18 v. European Commission, 12 Mai 2021, ECLI:EU:T:2021:252, General Court of the European Union, Press release No 79/21, Luxembourg, 12 May 2021 Judgment in Cases T-816/17 Luxembourg v Commission and T-318/18 Amazon EU Sàrl and Amazon.com, Inc. v Commission, No selective advantage in favour of a Luxembourg subsidiary of the Amazon group: the General Court annuls the Commission's decision declaring the aid incompatible with the internal market, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210079en.pdf.

133 European Commission Decision of 4.10.2017 on state aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon, Brussels, 4.10.2017 C(2017) 6740 final, published on 26-2-2018, https://ec.europa.eu/competition/state_aid/cases/254685/254685_1966181_892_4.pdf., European Commission, Press release, State aid: Commission finds Luxembourg gave illegal tax benefits to Amazon worth around €250 million, 4 October 2-17, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3701. European Commission, subject: State aid SA.38944 (2014/C) – Luxembourg Alleged aid to Amazon by way of a tax ruling, Brussels, 07.10.2014 C(2014) 7156 final, https://ec.europa.eu/competition/state_aid/cases/254685/254685_1614265_70_2.pdf., European Commission, Press release, State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg, 7 October 2014, https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1105.

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In the Apple case, on 29 January 1991 and 23 May 2007, the Irish tax authorities issued two tax rulings in favor of Apple Sales International (ASI) and Apple Operations Europe (AOE). The European Commission has found that Ireland has granted a selective advantage to the Apple Group by not applying appropriate profit-sharing methods when calculating profits from an Irish source for Apple Group branches in Ireland (ASI and AOE). The aid was declared incompatible with the internal market and the Commission (ASI and AOE) therefore requested its recovery. According to estimates by the European Commission (ASI and AOE), Ireland had given Apple thirteen billion euros in illegal tax benefits. By its decision of 15 July 2020, the General Court[134] annulled[135] the no. (EU) 2017/1283 Commission Decision[136] of 30 August 2016 on two tax rulings issued by the Irish tax authorities on 29 January 1991 and 23 May 2007 in favor of Apple Sales International (ASI) and Apple Operations Europe (AOE), which, although incorporated in Ireland, did not have their tax residence there. It should be noted that both of these companies operated in Ireland through branches.

Moreover, in the Engie case[137], the Commission, following an investigation launched in September 2016, concluded that two tax rulings issued by the Luxembourg tax authorities resulted in a fictitious reduction in the company's tax burden in Luxembourg for about a decade without any valid excuse. In particular, the Commission concluded that the tax treatment granted by Luxembourg to the company's financing structures in question did not reflect an economic reality. Those decisions of the Luxembourg authorities provided for inconsistent treatment of the same transaction both as debt and as capital. Based on the above, the Commission concluded that tax rulings granted a selective economic advantage to Engie, thus allowing the group to pay less tax than other companies subject to the same national tax rules. In fact, tax rulings allowed Engie to avoid paying 99% of its profits from Engie LNG Supply and Engie Treasury Management in Luxembourg. Luxembourg and the companies of the Engie group have brought an action for annulment before the General Court of the European Union against the decision of the European

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134 Judgement of 15th July 2020 in cases T-778/16 and T-892/16, Ireland (applicant in case T-778/16) and Apple Sales International and Apple Operations Europe (applicants in case T-892/16) versus European Commission, https://curia.europa.eu/juris/document/document.jsf?text=&docid=228621&pageIndex=0&doclang=EL&mode=lst&dir=&occ=first&part=1&cid=9545338 (visited 8/10/2021).

135 See also the Belgian "Excess Profit" tax ruling case, in which the General Court annulled the European Commission Decision 2016/1699 of 11 January 2016 on the State aid scheme for the tax exemption of excess profits implemented by Belgium (European Commission, Commission Decision of 11.1.2016 on the excess profit exemption state aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium, Brussels, 11.1.2016 C(2015) 9837 final, https://ec.europa.eu/competition/state_aid/cases/256735/256735_1748545_185_2.pdf., case SA.37667 https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_37667), against which the Kingdom of Belgium and Magnetrol International had brought an action for annulment under Article 263 TFEU. See also A. Haines, MNEs and Belgium attack EU Commission's decision on excess profits tax rulings, August 23, 2016, https://www.internationaltaxreview.com/article/b1f7ng9tgq7yd9/mnes-and-belgium-attack-eu-commissions-decision-on-excess-profits-tax-rulings.

136 European Commission, Subject: State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland Alleged aid to Apple, Brussels, 11.06.2014 C(2014) 3606 final, https://ec.europa.eu/competition/state_aid/cases/253200/253200_1582634_87_2.pdf (visited 8/10/2021).

137 See J. Monsenego, The Engie case: some open questions on the EU State aid rules and the prevention of tax avoidance, Kluwer Competition Law Blog, September 10, 2018, http://competitionlawblog.kluwercompetitionlaw.com/2018/09/10/engie-case-open-questions-eu-state-aid-rules-prevention-tax-avoidance/ (visited 25/11/2021).

Commission. In its ruling, the General Court upheld the European Commission's approach to examine a complex structure of intra-group financing, which involves examining the economic and financial reality, rather than a formalistic approach. In addition, the General Court found that the Commission was right to point out that a selective advantage had been granted as a result of the non-application of national provisions relating to the abuse of law[138].

Apart from the above, the McDonald's case[139] is the case that the European Commission has found that the tax rulings granted should not be considered as state aid. Actually, in the McDonald's case, the European Commission concluded that it could not be substantiated that the interpretation adopted in the "tax ruling" concluded by Luxembourg with McDonald's regarding the implementation of the Double Taxation Convention between the United States and Luxembourg was incorrect, although it led to a double non-taxation of royalties attributed to McDonald's US subsidiary. In view of the above, the European Commission has concluded that the Luxembourg tax authorities did not misapply the aforementioned Double Taxation Convention and that the advantage granted to McDonald's could not be construed as state aid, pursuant to article 107 par. 1 of the TFEU.

Therefore, it ensues that the respective case law has not yet been fully developed. Moreover, it seems that an instrument that traditionally safeguards and maximises tax certainty, such as the tax rulings and APAs in the field of transfer pricing can also be challenged by the European Commission as breaching the EU state aid law and this fact totally alters the nature of these tools and contradicts their mission and initial purpose. In other words, it could be supported that, when it comes to tax rulings, sometimes tax certainty seems to recede in front of the need to combat tax avoidance, whereas in other cases tax certainty takes precedence over the need to fight tax avoidance and, therefore, nothing should be taken for granted. It is now crystal clear that according to the General Court, in some cases the European Commission's approach, when examining tax rulings, is completely valid and justified, to the extent that pursuant to the arm's length principle, the practices of the multinational groups could prove to entail a selective tax advantage, thus resulting in unlawful state aid. In other words, aggressive tax planning could be

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138 See T-516/18, T-525/18 and General Court of the European Union, Press release No 80/21, Luxembourg, 12 May 2021 Judgment in Cases T-516/18 Luxembourg v Commission and T-525/18 Engie, Engie Global LNG Holding Sàrl and Engie Invest International SA v Commission, Tax rulings granted by Luxembourg to companies in the Engie group: the General Court finds the existence of a tax advantage, https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210080en.pdf. See also ENGIE Global LNG Holding κ.λπ. κατά Επιτροπής (Υπόθεση T-525/18), https://curia.europa.eu/juris/document/document.jsf?text=&docid=207390&pageIndex=0&doclang=EL&mode=lst&dir=&occ=first&part=1&cid=1982062.

139 SA.38945 (2015/NN - 2015/C) Alleged aid to Mc Donald's – Luxembourg, Letter to the member state (authentic language fr), Decision De La Commission du 19.9.2018 relative aux décisions fiscales anticipatives SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) accordées par le Luxembourg à McDonald's Europe, Bruxelles, le 19.9.2018 C(2018) 6076 final, https://ec.europa.eu/competition/state_aid/cases1/201930/261647_2033696_272_2.pdf. See also Letter to the member state (authentic language fr), Commission Europpeenne, Objet: Aide d'État n° SA.38945 (2015/C) (ex 2015/NN) – Luxembourg Aide présumée en faveur de McDonald's, Bruxelles, le 03.12.2015 C(2015) 8343 final, https://ec.europa.eu/competition/state_aid/cases1/201930/261647_1756437_273_2.pdf (visited 1/3/2022).

put in place even when obtaining an APA or a tax ruling and, in this respect, tax rulings seem to be ineffective in terms of safeguarding tax certainty. Thus, the principle of protected trust of the taxpayers seems suddenly to be at stake and, hence, another high-risk area with regard to tax certainty seems to arise[140] with a lot of serious yet uncertain consequences.

140 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

Conclusive Remarks

Tax stability and tax certainty is a key aspect of an effective and efficient tax system and a basic element of economic growth and development. Tax certainty is a characteristic of a tax system that plays a decisive role and contributes significantly in attracting and encouraging direct foreign investments, job creation and enhancement of entrepreneurship and the strengthening and promotion of competitiveness[141]. Thus, uncertainty and the resulting opacity are inhibiting and totally discouraging for foreign direct investment. The stabilization of expectations of both the taxpayers and the tax administration[142] is the key pillar of tax certainty. The recent covid-19 pandemic has exacerbated tax uncertainty[143], given the unprecedented conditions entailed, such as the need for enactment of a new, up-do-date remote working regime, as regards the consequences from a permanent establishment point of view[144]. For all the reasons enumerated above, legal and tax certainty should not be an elusive goal, as it is sometimes characterized, but instead they should represent the next target of the G20, given that a stable, solid and safe tax environment constitutes a central pillar of the EU Tax Policy Strategy.

Some key aspects for ensuring tax certainty consist of addressing high complexity of the tax systems, improving clarity of tax laws, removing gaps, failures and ambiguities, conducting simultaneous and joint tax and transfer pricing audits, making domestic dispute resolution re-

141 See also Katerina Savvaidou, State aid rules and "tax rulings", ΔΕΕ (Law of Legal Entities and Companies) 7/2019, article in Greek, p. 921-943, Katerina Savvaidou, Vasiliki Athanasaki, "Tax rulings" and the European framework on State aid, ΕΠΙΧΕΙΡΗΣΗ (Entreprise), 157/2019, article in Greek, p. 238-241, Katerina Savvaidou, Fiscal state aid and "tax rulings", following the CHEU rulings on Fiat and Starbucks cases, Applications of Public Law, I/2020, p.61-72.

142 Nara Monkam (African Tax Administration Forum, ATAF), Christian von Haldenwang (German Development Institute / Deutsches Institut für Entwicklungspolitik, DIE), Santiago Díaz de Sa rralde (Inter-American Center of Tax Administrations, CIAT), Tobias Hentze (Cologne Institute for Economic Research, IW), Tax Certainty, G-20 Insights, April 24, 2017, https://www.g20-insights.org/policy_briefs/tax-certainty/ (visited 7.10.2021).

143 The uniqueness of economic conditions brought about by COVID-19 has led to practical challenges for taxpayers and tax administrations in applying and administering the arm's length principle and transfer pricing rules. For taxpayers, these challenges increase uncertainty (see OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020-September 2021, https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020 september-2021.htm, visited 11/11/2021).

144 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

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gimes more effective, using APAs more extensively, enacting mandatory disclosure of information as well as appropriate safeguards in case of anti-avoidance tax rules, improving withholding tax collections and treaty relief procedures and enhancing programs and procedures for resolving international tax disputes, such as mutual agreement procedure and arbitration[145].

The interaction of various domestic tax systems, as a result of the evolving and ever-increasing cross-border activity, apart from leading to double taxation in some instances, can also leave mismatches, resulting in the generation of income, that remains untaxed, to the extent that it is not subject to tax anywhere. BEPS strategies take advantage of these mismatches in order for double non-taxation to be achieved[146]. These phenomena lead to the distortion of competition and investment decisions and result in lack of fairness.

The rapid developments at international and EU level in the field of coordinated action to combat tax avoidance and tax abuse through artificial schemes causing tax base erosion and profit shifting, which are reflected in the increasing tendency of introducing GAARs into national tax systems around the world are likely to significantly affect taxpayers and tax administrations globally in the future. The impact of this attempt makes it imperative for all stakeholders to be properly informed about the new perspectives in this sensitive area of tax law[147].

Moreover, in view of the current highly digitalized international tax environment which has necessitated the introduction of new tax rules that have totally reformed the traditional international tax framework, new challenges arise for tax certainty which should be faced effectively.

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145 IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2017 (p.41- 60), 2018 (p. 9).

146 Mindy Herzfeld, The CJEU Takes On the OECD, Highlights, New Analysis, Tax Notes International, Tax Analysts, JANUARY 13, 2014, pgs. 107-111. See also J. Prebble, Exploiting Form in Avoidance by International Tax Arbitrage – Arguments Towards a Unifying Hypothesis of Taxation Law, 17 Asia-Pacific Tax Bull. 1 (2011), as concerns the concept of international tax arbitrage. Special attention should be drawn to the terminology used. According to Paolo Piantavegna, the most correct term is "loopholes" for this kind of mismatches. Since loopholes are considered to be an unintentional imperfection in the law, if a taxpayer takes advantage of a tax provision exploiting a legislative "loophole", the taxpayer's behavior may be challenged by tax authorities. On the contrary, gaps in tax laws imply the inapplicability of a rule and the impossibility to use the integration by analogy 113 to tax and use the ECJ's jurisprudence as a gap filler. In other words, the borderline between loopholes and gaps is that the former can be contrasted with legal interpretation, whereas the latter cannot. For further details see also G.S. Cooper, *Taxation by Analogy* (Sydney Law School – Legal Studies Research 2010). Loopholes and gaps in a domestic tax system may represent a source of ATP behaviour per se. However, also in cross-border transactions, they may cause ATP situations, arising from the interaction of two or more domestic tax systems. Indeed, ATP may also be shaped in the form of a "mismatch arrangement" (which is, in turn, sometimes due to loopholes and/or gaps in one or more tax systems). See Paolo Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies, World Tax Journal (WTJ), February 2017, pg.47-98, Paolo Piantavigna, Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies, World Tax Journal (WTJ), February 2017, pg.47-98, Vasiliki Athanasaki, 'A Critical Approach to GAARs in the Greek and EU Tax Law', (2019), 28, EC Tax Review, Issue 4, pp. 183-195, https://kluwerlawonline.com/journalarticle/EC+Tax+Review/28.4/ECTA2019022.

147 Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

The key challenge of this «global tax restoration», which is also called "Global Tax Reset"[148] will be the short-term and long-term measures to counter tax avoidance based on the real content, the real nature and the economic substance of the transactions, while ensuring fair taxation and transparency. At the same time, even instruments that have traditionally led to tax certainty, such as the tax rulings in the field of transfer pricing, are now extensively challenged. This fact totally alters their initial function and creates greater uncertainty. In ensues that there is an intense need to balance the coordinated efforts to combat tax avoidance and tax abuse with the necessary developmental measures that need to be taken to make states competitive, while providing incentives to encourage and facilitate entrepreneurial activity. The target of striking a balance between these two components is at the core of the goals to be achieved in the near future.

What is now being sought for states is the securing and- as far as possible- the broadening of their tax base, instead of the increase of the effective tax rates imposed. The traditional tax systems should be properly adjusted to this new reality, as they do not correspond to the ever-evolving business environment. The expansion of harmful tax practices, as well as the amendments in the definitions of nexus and permanent establishment, among others, make it imperative for the tax legislator to take into account the factor of tax certainty which is very usually at stake. The protection of taxpayers' rights should not be negotiable[149]. Moreover, the fundamental EU freedoms should be totally respected. In this respect, the mutual agreement procedure (MAP)[150] could also contribute in this goal, especially when it entails the adoption and introduction of a mandatory, binding arbitration clause, which would further increase and enhance tax certainty[151]. The central elements of the process of designing new, up-to-date tax rules that can reflect all the developments described above is the alignment of value creation with the eco-

148 «Global Tax Reset», see Deloitte, Global Tax Reset, Transfer Pricing Documentation Summary, May 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-global-tax-reset-transfer-pricing-documentation-summary.pdf (visited on 26.06.2017).

149 See also Blazej Kuzniacki, Poland's Implementation of EU GAAR Compromises Constitutional and EU Principles, Intertax Volume 49, Issue 3, (p. 237), Gabriela Capristano Cardoso, Balancing Tax Transparency and Tax Certainty: Reporting Obligations for Unilateral Safe Harbours Under DAC 6, Intertax Volume 49, Issue 8/9, (p. 691).

150 See also Action 14 of the OECD BEPS Action Plan on Base Erosion and Profit Shifting and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union and Katerina Perrou, 'Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive', (2019), 47, Intertax, Issue 8, pp. 715-724, https://kluwerlawonline.com/journalarticle/Intertax/47.8/TAXI2019070, K Perrou, The Ombudsman and the process of resolution of international tax disputes–protecting the "invisible party" to the MAP, World Tax Journal: WTJ 10 (1), 99-129. Particularly with regard to Action 14 on Mutual Agreement Procedure, the OECD/G20 Inclusive Framework on BEPS: Progress Report July 2020-September 2021, (https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020 september-2021.htm, visited 11/11/2021), states that *"As the need for tax certainty increases, this minimum standard is critical to ensuring that tax disputes are resolved in a timely, effective and efficient manner. In total, 82 stage 1 peer review reports and 45 stage 1 + stage 2 peer monitoring reports have now been finalised. As a result of the peer review, there has been a significant increase in the number of resolved MAP cases in almost all jurisdictions under review, and access to MAP has been expanded and streamlined.".* According to the same progress report, the Action 14 minimum standard has had a greater impact on MAP and tax certainty more broadly, and many countries and jurisdictions are working to address deficiencies identified in their respective reports.

151 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

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nomic results and the focus on the real substance, without, at the same time, any sacrifice of the tax certainty, which would significantly impede business activities and, consequently, would have severe adverse impact on economic growth[152]. In light of the above, it is indisputable that a new era inaugurates for the evolving and constantly changing global tax environment[153].

152 Katerina Savvaidou, Vasiliki Athanasaki, Contemporary challenges of tax certainty in the ever-evolving tax environment: digital tax, GAARs and tax rulings in the field of fiscal state aid, International Tax Law Review (Rivista di Diritto Tributario Internazionale), Sapienza University of Rome, No. 2/2021.

153 Vasiliki Athanasaki, GAARs: Sui generis tax provisions or just a simple reminder of proper interpretation of law?, Journal of International Taxation, Vol. 32, No. 11, November 2021, p. 52-64, republished at Journal of Taxation, Vol. 135, No. 5, November 2021, p. 17-27.

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