

Dutch implementation of the European ATAD GAAR

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Abstract

This paper illustrates and comments the implementation of art. 6 ATAD in the Dutch tax system. After a brief description of the content of the European GAAR, an analysis of the Dutch national GAAR is provided and compared with art. 6 ATAD, evaluating the choice by the Netherlands not to adopt any other general provision for the implementation of the European general anti-abuse rule.

Keywords: ATAD I; GAAR; anti-tax avoidance provisions; implementation; the Netherlands; *fraus legis*.

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1. Introduction

The Anti-Tax Abuse Directive (ATAD)¹ was proposed by the European Commission as part of a group of reforms aiming at fighting base erosion and profit shifting (BEPS) in taxation² by preventing abusive practices. The ATAD's personal scope is significantly broad and includes all individuals subject to corporate income tax (CIT) in one or more EU Member States, covering also entities situated in an EU country and owned by companies located in non-EU states. This implies that, differently from any other European tax law directive,³ the ATAD requires no other element for its applicability apart from tax liability on company-income.⁴

This paper specifically focuses on art. 6 of the ATAD and its implementation in the Netherlands.

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1. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market (ATAD I), 2016 O.J. (L 193/1).
2. See D. SMIT, *The Anti-Tax avoidance Directive (ATAD)* in P. WATTEL at al. (editors) *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Seventh Edition, 2018, 486.
3. Council Directive (EU) 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States (Parent-Subsidiary Directive), 2011 O.J. (L 345/8) and Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States (Interest & Royalties Directive), 2003 O.J. (L 157/49). Actually, the difference between the Parent-Subsidiary Directive or the Interest and Royalty Directive and the ATAD is evident considering that the formers aim at preventing double taxation on dividends and interest/royalties respectively, whereas the ATAD aims at preventing abuse of tax law. See Parent-Subsidiary Directive, Preamble at paragraph 3; Interest and Royalty Directive, Preamble at paragraph 1–4; ATAD, *id.*, Preamble at paragraph 1.
4. See ATAD, *supra* nota 1, art. 1. However, some specific articles of the directive reduce the scope of application only to associated entities. Art. 7 of the ATAD is an example.

A different but relevant question is about the exact meaning of *tax liability*. A theory supported by literature affirms as irrelevant the fact that the taxpayer actually pays corporate income tax due to zero taxable base or zero tax rate. Instead, it is important that the individual falls within the general definition of taxpayer under national tax law. Consequently, subjectively tax-exempt entities, such as tax-exempt pension funds, seem to be excluded from the personal scope of the ATAD. See SMIT, *supra* note 2, 492.

2. ATAD Art. 6

In spite of the fact that the ATAD already contains four specific anti-abuse provisions,⁵ EU Member States decided to include a general anti-abuse rule (GAAR) which is embedded by art. 6 of the directive. As a result, the ATAD contains two different types of provisions: one with a general and the other with a specific scope of application. While the GAAR seems to aim at preventing tax avoidance as in the meaning of EU law,⁶ the other provisions are better focused on preventing BEPS via aggressive tax planning when this unfairly benefit from tax system misalignments among European Member States and also non-EU countries.⁷ Another peculiarity distinguishing art. 6 from the other provisions is that the former cannot be considered as a *de minimis* rule.⁸

When calculating the corporate tax liability of an entity, art. 6 requires each Member State to ignore an arrangement or a series of arrangements which, having been put into place for the main

5. For example ATAD, *supra* note 1, art. 4, 5 and 7.

6. The author refers to the definition of tax abuse or tax avoidance as implied in the EU concept of abuse of law (or abuse of right). In the ECJ case-law, the term abuse of law indicates any practice improperly using national or international provisions in order to obtain benefits otherwise not due and which are against the *ratio* of those provisions (see G. BIZIOLI, *Taking EU Fundamental Freedoms Seriously: Does the Anti-Tax Avoidance Directive Take Precedence over the Single Market?*, in *ecTax Review*, vol. 3, 2017, 170). The ECJ used this concept in many cases related to abuse of the EU fundamental freedoms, e.g. Judgement of 3 December 1974, Van Binsbergen, C-33/74, ECLI:EU:C:1974:131, paragraph 13, Judgement of 9 March 1999, Centros, C-212/97, ECLI:EU:C:1999:126, paragraph 24 and, within the tax field, Judgement of 12 September 2006, Cadbury Schweppes, C-196/04, ECLI:EU:C:2006:544, paragraph 51. Here, the ECJ interpreted the abuse of EU fundamental freedoms as consisting in some artificiality in the arrangement the taxpayer put into place and having the goal to avoid domestic taxation. Therefore, the Court clarified that any abuse of law is at stake when the requirements necessary to have access to the EU fundamental freedoms are only formally (not substantially) satisfied, against the spirit of the EU law. In 2012, the same abuse of law doctrine was confirmed by the European Commission in the EC Recommendations on Aggressive Tax Planning (O.J. L 338/41, paragraph 4.5), where the term abuse is described as “an artificial arrangement or an artificial series of arrangements whose essential purpose is the avoidance of taxation or benefiting of a tax reduction.” With little variation, the same definition is contained in art. 1 (1)(2) and (3) of the Parent-Subsidiary Directive and in art. 6 of the ATAD.

However, the term abuse seems different from the term aggressive tax planning under the EC Recommendations just mentioned above. In paragraph 2 of the same, it is said that “aggressive tax planning [...] consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability.”

7. See A.P. DOURADO, *The EU Anti-Tax Avoidance Package: Moving Ahead of BEPS?*, in *Intertax*, vol. 44, issue 6–7, 2016, 441; A.P. DOURADO, *The Interest Limitation Rule in the Anti-Tax Avoidance Directive (ATAD) and the Net Taxation Principle*, in *ecTax Review*, vol. 3, 2017, 117; BIZIOLI, *id.*, 172. Bizioli argues that, due to the different purpose of art. 4, 5, 7, 8 e 9 ATAD compared to art. 6 ATAD, the formers cannot be defined as anti-avoidance provisions. Indeed, they aim at guaranteeing that the taxpayer’s income is taxed at least once. Also, art. 5 on exit tax aims at balancing taxing right allocation between the exit country and the host country. This doctrine could be linked to the point stressed by the same Bizioli and according to which the ATAD does not distinguish between aggressive tax planning and tax avoidance (see at 171).

8. Considering the concept of abuse as defined by the ECJ and the impossibility for Member States to impose more restrictive criteria, it seems to be unlikely that Member States will be allowed to implement national GAARs more restrictive than art. 6 ATAD. Actually, the same art. 6 appears too much restrictive of the EU fundamental freedoms if compared to the ECJ abuse of law doctrine (see L. DE BROE, D. BECKERS, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice’s Case Law on Abuse of EU Law*, in *ecTax Review*, vol. 3, 2017, 141; F. DEBELVA, J. LUTS, *The General Anti-Abuse Rule of the Parent-Subsidiary Directive*, *European Taxation*, vol. 55, 2015, 231).

Differently, see S. MELKONYAN, F. SCHADE, *Flow-Through Holding Companies in Light of the Parent-Subsidiary Directive: The Thin Line between Tax Planning and Tax Abuse*, in *Intertax*, vol. 47, issue 6–7, 2019, 599–600 (even if they explicitly refer to the Parent-Subsidiary Directive GAAR, their comments can be easily taken into account also for the ATAD GAAR due to the similarity in content between the two GAARs, as explained by the same authors here mentioned). They stress that art. 6 ATAD has a *de minimis* rule, so that Member States can implement more restrictive national GAARs (as apparently confirmed by art. 3 ATAD). Therefore, the main purpose of art. 6 ATAD is to establish a minimum anti-abuse rule, forcing Member States not having any national similar provision to implement it. However, who is now writing considers important to highlight that, even considering art. 6 as a *de minimis* rule, national GAARs will not be allowed to be more restrictive than the standards identified by the ECJ within the abuse of law doctrine, which actually are already not fully respected by art. 6. This last note makes it evident that in practice it is unlikely that national GAARs can be more restrictive than ATAD art. 6.

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.⁹

This implies the application of three cumulative tests. If all of them are satisfied, the national tax authority is obliged to ignore the specific arrangement when calculating the tax liability according to national tax law.¹⁰ The three tests are¹¹:

- Artificiality;
- Purpose;
- Inconsistency with the object or purpose of national tax law.

The first test is explained by art. 6(2) according to which an arrangement is not genuine when it is not realized for valid commercial reasons reflecting economic reality.¹² Any commercial reason seems to be important to this purpose, once it is proven via objective factors assessable by third parties.¹³

The second test refers to the main purpose of the taxpayer when he puts into place the arrangement. More specifically, it is assessed whether (one of) his main intention(s) is obtaining a tax advantage. Considering the difficulty at verifying subjective motives, the ECJ generally links this test to the artificiality test and assesses the taxpayer's purposes by objective factors assessable by third parties (e.g. the absence of any economic substance in the arrangement; deviations from regular transfer pricing guidelines).¹⁴

The third test requires that the tax advantage motivating the arrangement is a benefit which otherwise would not be granted by national tax law, so that the purpose is in contrast with the object or goal of the national tax system. This analysis should be based on specific circumstances related to the specific case and in light of the actual applicable national tax rule.¹⁵

3. Dutch Reaction

In the Tax Plan 2019 presented by the Dutch Minister of Finance to the lower house of the Dutch national parliament, it is stated that a GAAR as required by the ATAD will not be introduced because this requirement is deemed to be met by the Dutch *fraus legis* concept, developed under case law. This concept applies to constructions which are held to be against the aim and purpose

9. ATAD, *supra* n. 1, art. 6(1).

10. ATAD, *supra* n. 1, art. 6(3).

11. See D. SMIT, *The Anti-Tax avoidance Directive (ATAD)* in P. WATTEL at al. (editors), *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Student Edition, 2018, 271.

12. ATAD, *supra* n. 1, art. 6(2).

13. This is in line with constant ECJ case-law. See for example Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 74; Judgment of 21 February 2008, *Part Service*, C-425/06, ECLI:EU:C:2008:108, paragraph 45; Judgment of 21 February 2006, *Halifax and Others*, C-255/02, ECLI:EU:C:2006:121, paragraph 81.

14. See Judgment of 12 September 2006, *Cadbury Schweppes e Cadbury Schweppes Overseas*, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544) paragraph 67; Judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, Rep. 2007 I-02107 (EU:C:2007:161), paragraph 80 ss. See also SMIT, *supra* note 11, 272 and DE BROE, *supra* note 8, 143.

15. The identification of the purpose of national tax law is not always easy, especially when there is no parliamentary preparatory-work documentation available or when the same appears unclear or ambiguous. See DE BROE, *supra* note 8, 142 on this point. This is true in spite of the fact that the ATAD GAAR does not require to take distance from traditional interpretative rules, as confirmed by M. LANG, S. HEIDENBAUER, *Wholly Artificial Arrangements*, in F. VANISTENDAEL et al. (editors), *A Vision of Taxes Within and Outside European Borders*, Kluwer Law International 2008, 607.

of a law.¹⁶ The court-developed GAAR was introduced in a case of 26 May 1926¹⁷ and is currently the only applicable GAAR in the Netherlands.¹⁸

3.1. The National GAAR in the Netherlands

By reviewing the Dutch corporate tax system, it appears evident the rule by which artificial or simulated transactions should be ignored by tax authorities and courts. The concept generally used is that of substance over form, so that the determination of facts rather than the form seems relevant. A specific provision which embeds this general rule is the *fraus legis* concept, which represents the Dutch version of the European abuse of law doctrine.

The *fraus legis* is an interpretation method developed in case law and according to which an arrangement is considered to be abusive (*fraus legis*) when i) its predominant purpose is avoiding taxation (subjective test), ii) it is considered artificial and iii) the objective and purpose of the tax law would be violated if that arrangement is taken into account for tax reasons (normative test). For the purpose of this test, it is evident the relevance of the spirit of the applicable tax law rather than its exact wording. Under the subjective test, the reason for the taxpayer to enter into a legal arrangement should not be to frustrate Dutch taxation. The envisaged tax benefit should not be the only reason or the predominant motive: the taxpayer should also have a commercial motive.¹⁹

In the case of a set of transactions, it is possible that some steps of the plan have a business motive, but some others are (almost) only driven by tax reasons. Here, the ‘multiple-ways doctrine’ comes into play. It implies that “taxpayers are allowed to choose the most beneficial arrangement from a tax point of view. However, if they have different options, the decisive reason for choosing a certain option may not be the avoidance of taxation.”²⁰

Foreign taxation can also be relevant in order to determine whether a certain arrangement is contrary to the object and purpose of Dutch legislation. For example, if a Dutch company tries to artificially erode the Dutch tax basis by creating interest costs (e.g. by means of an acquisition), then the normative requirement would not be met if the corresponding interest income were to be taxed abroad in the hands of the group company at a ‘reasonable’ tax rate.²¹ The Dutch Supreme Court has analysed also the hypothesis that the legislator could have been aware of the possibility of there being an improper use of a provision but still did not make any changes to the legislation. While at the beginning the Court considered the *fraus legis* inapplicable in this case,²² more recently the Court changed its opinion, making the transaction invalid.²³

In order to maintain valid proportionality standards, the abuse of law procedure may be used only as a last resort and the arrangement in dispute may be converted to the closest equivalent which

16. Netherlands Tax plan 2019 – Corporate Income Tax (19 Sept. 2018) IBFD Documents.

17. Dutch Supreme Court, 26 May 1926, NJ 1926, 723.

18. R. KOK, I. MOSQUERA VALDERRAMA, *Anti-Avoidance Measures of General Nature and Scope – GAAR and other Rules. The Netherlands*, in IBFD Cahiers de Droit Fiscal International, Vol. 103A, 2018, 6.

19. *See id.*, who stresses that if the result of a transaction, apart from the tax benefits, is negative, then that is a clear indication that the only reason for entering into the transaction was the tax reason. Compare Dutch Supreme Court, 2 March 1988, BNB 1988/135. According to IJzerman, some examples of commercial motives accepted by the Supreme Court are (i) foreign tax motives: to avoid foreign taxes; (ii) the creation of a holding company structure; and (iii) business succession or acquisition. *See* R.L.H. IJZERMAN, *Form and Substance in Tax Law. The Netherlands*, in IBFD Cahiers de Droit Fiscal International, Vol. 87A, 2002, 460.

20. S.J.C. HEMELS, *Netherlands in GAARs*, in M. LANG et al. (editors), *A Key Element of Tax Systems in the Post-BEPS Tax World*, Online Books IBFD, 2016, section 21.2.1.

21. *See* Dutch Supreme Court, 10 March 1993, BNB 1993/194; Dutch Supreme Court, 10 March 1993, BNB 1993/196; Dutch Supreme Court, 23 August 1995, BNB 1996/3; Dutch Supreme Court, 8 February 2002, BNB 2002/118. *See also* M. BOTERMAN, B. VAN DER GULIK, *The Taxation of Foreign Passive Income for Groups of Companies. The Netherlands*, in IBFD IFA Cahier, Vol.98A, 2013, 505.

22. *See*, for example, Dutch Supreme Court, 11 December 1991, BNB 1992/62.

23. *See*, for example, Dutch Supreme Court, 15 March 2013, BNB 2013/151.

does not give rise to an abuse.²⁴ This implies that the application of *fraus legis* will not and cannot always be used by the tax authority to tackle tax avoidance or aggressive tax planning.²⁵ First of all, the transaction could be ignored on the basis of the ‘sham transaction doctrine,’ according to which “the substantive relationships between parties must be examined on the basis of what they have actually agreed on, and not on the basis of a different perception thereof that they may attempt to present to third parties. The tax authority faces the task of determining the actual will of the parties, which is sometimes difficult to prove in law. The problem is therefore how to determine the actual agreement and the relationships that result from this agreement. [...] Obviously, for the application of tax law, the actual relationship between the parties is at issue, and not their misrepresentation of the facts. Only after a configuration of facts has been cleansed of simulated relationships, can it be given a tax characterisation and interpretation. Once this has taken place, the question may be raised whether *fraus legis* is involved.”²⁶ Secondly, the fiscal qualification is important. “If the tax consequences of a certain legal form are not acceptable in light of the economic result and in light of the object and purpose of the tax law, it can be justified that, for tax purposes, the legal reality is replaced by a fiscal reality. An example of this is the qualification of financing instruments.”²⁷ Once established the facts, the next step for tax authorities and courts is to look at the verbatim wording of the law to determine the tax consequences of the factual pattern involved. Here, interpretations methods are relevant in order to determine the tax consequences. Finally, only after all normal interpretation methods have been exhausted, *fraus legis* is considered. In this sense *fraus legis* is an *ultimum remedium*.²⁸

Another important feature is that the *fraus legis* concept in the Netherlands is applicable only to transactions for which the motive of the taxpayer is to prevent the levying of Dutch tax by creating arrangements that are contrary to the object and purpose of Dutch legislation. As a result, in the case of an international mismatch causing (partial) avoidance of taxes owed to the Netherlands, the *fraus legis* test is not applicable unless the structure contravenes the object and purpose of the law.²⁹

A natural consequence of being the *fraus legis* a last remedy is that the application of specific anti-

24. Netherlands - Corporate Taxation, sec. 10.1 (1 Nov. 2019) IBFD Country Analysis; IJZERMAN, *supra* note 19, at 452, 455.

25. In the Netherlands, there is no legal definition of tax avoidance and aggressive tax planning. It can be argued that generally the OECD description of tax avoidance is applied in the Netherlands. See KOK, *supra* note 18, 8.

As a confirmation of the possible failure to tackle some cases of tax avoidance, see BOTERMAN, *supra* note 21, 504, who underlines that *fraus legis* have not been very effective targeting instruments in relation to the relocation of passive income within groups of companies, against which specific SAARs has been implemented by the Dutch legislator in the national CITA. On the contrary, the same author stresses the relevance of the *fraus legis* to challenge certain international restructuring resulting in Dutch base erosion due to interest payments to low-taxed creditors.

26. IJZERMAN, *supra* note 19.

27. See KOK, *supra* note 18, 9, 10, giving the example in which if a loan (from a civil law point of view) has various equity-like elements, it can be qualified as equity for tax purposes, notwithstanding the legal form agreed by the parties.

28. See KOK, *supra* note 18, 10.

29. An example of this is, as described by, is the Dutch Supreme Court decision here illustrated (Dutch Supreme Court, 17 December 2004, BNB 2005/169). A Dutch BV, via an external acquisition, acquired the shares in a company that was no part of the group. In order to finance this acquisition, the Dutch BV took out a loan from a related Irish company. The loan was interest-free. In accordance with the arm’s length principle, deemed (at-arm’s-length) interest costs on an interest free loan were taken into account in the Netherlands. However, in Ireland, no deemed interest income had to be taken into account. This resulted in an international mismatch: a deemed deduction of interest costs in the Netherlands and no corresponding interest pick-up in Ireland. The Dutch tax authorities tried to challenge the deemed deduction on the basis of the concept of *fraus legis*. The Dutch Supreme Court decided that *fraus legis* could not be applied: neither the fact that the taxpayer could also have used equity (instead of a debt) to finance the acquisition, nor the fact that no interest pick-up on the loan happened in Ireland, could result in the conclusion that deducting the deemed interest costs was contrary to the object and purpose of the legislation.

The case presented above was a real problematic legal loophole leading to evident base erosion of the Dutch corporate tax base. Therefore, in 1997 the Dutch legislator introduced a specific anti-base-erosion provisions (article 10a CITA). See KOK, *supra* note 18, 18–19.

avoidance rules (SAARs) by courts and tax authorities is preferred to the application of *fraus legis*. It should also be specified that for the application of *fraus legis*, the tax administration bears the burden of proof³⁰ and that the existence of *fraus legis* does not involve in itself the imposition of a penalty.³¹

3.2. Dutch National GAAR vs. ATAD Art. 6

At this point, it is necessary to analyse the *fraus legis* concept against art. 6 of the ATAD.

The first question that may arise is if there is any difference with respect to the personal scope of application of the two rules. Since the *fraus legis* seems applicable to all taxpayers³² and art. 6 is applicable to all taxpayers subject to corporate income tax in the EU, both scopes of application seem broad enough and compatible.

Referring to the anti-abuse systems created by each rule, they also appear compatible. Both art. 6 and the Dutch *fraus legis* are based on two tests: the first one is the subjective test investigating the motive of the taxpayer; the second one is the normative test investigating the compatibility of the arrangement and its purpose with the object and purpose of the applicable national law. So far, it is possible to recognize evident correspondence between the two rules.

Art. 6 ATAD additionally counts a third test on the artificiality of the arrangement(s) put into place by the taxpayer. This test seems to be absent in the Dutch *fraus legis*. However, “artificiality seems implied in *fraus legis* cases, because tax implications in cases involving genuine economic activity would seem to be discoverable by means of regular methods of fact finding and interpretation in Dutch tax law. *Fraus legis*, at least implicitly, seems eligible to be invoked by the Dutch tax authorities only in cases in which legal arrangements that lack substance have been set up.”³³

Referring to the burden of proof, none of the two rules explicitly mention its regulation. Dutch courts are called upon to divide the burden of proof in an equitable manner (*redelijke bewijslastverdeling*). This generally means that “the tax administration will have to provide evidence with regard to any elements that would result in an increase of the tax burden, whereas the taxpayer involved is required to show evidence with regard to any elements that point to the opposite. In *fraus legis* cases, this means that it will be first up to the tax authorities invoking *fraus legis* to show proof of, for instance, the artificiality of the tax structure.”³⁴ In the lack of any specification about the topic in art. 6 ATAD, it can be assumed that its provision must be interpreted in line with the ECJ case law, according to which national tax authorities have to prove the abuse,³⁵ whereas the taxpayer must have guaranteed the concrete possibility to prove the absence of abuse and the genuine commercial reason of his construction, with no temporal and administrative impediment to this right.³⁶

A relevant issue refers to the objective scope of the two rules. On the one hand, it has been stressed as the *fraus legis* case law rule does not cover aggressive tax planning making use of international

30. Dutch Supreme Court, 13 December 1995, BNB 1996/89.

31. See KOK, *supra* note 18, 14.

32. No reference to the contrary is made by authors commenting the *fraus legis* rule and here already mentioned.

33. M. DE WILDE, C. WISMAN, *The Netherlands*, in A.P. DOURADO, *Tax Avoidance Revisited in the EU BEPS Context*, IBFD EATLP International Tax Series, 2017, section 19.2.1.3.3.

34. *Id.*, at section 19.2.1.4 and HEMELS, *supra* note 20, 214.2.5.

35. See A.G. Mazák Opinion, C-451/05, ELISA, Rep. 2007 I- 08251 (ECLI:EU:C:2007:253) paragraph 102.

36. Judgement of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, Rep. 2007 I-02107 (EU:C:2007:161), paragraph 82, as commented by P. VAN OS, *Interest Limitation under the Adopted Anti-Tax Avoidance Directive and Proportionality*, in *ecTax Review*, vol. 4, 2016, 185. As elements of proof that the taxpayer can provide to the court it is possible to include: valid commercial reasons, economic substance of the arrangement, coherence between legal appearance and substance, the economic ratio supporting the arrangement. See P. VALENTE, *Costruzione “genuina” e “sostanza economica” nei principi comunitari*, in *Il Fisco*, vol. 7, 2017, 662.

mismatches (e.g. transfer pricing mismatch,³⁷ hybrid entity mismatch, hybrid income mismatch).³⁸ On the other hand, the text of art. 6 ATAD contains such a broad wording context that it lets suppose any abusive practice is included in the GAAR,³⁹ with no exception for cross-border disparities. However, this broadness is not shared by the ECJ, whose case-law has outlined an anti-abuse doctrine in which the usage of countries' tax systems mismatches by the taxpayer in order to achieve tax benefits does not constitute abuse of law in so far as the arrangement put into place by the taxpayer has economic substance.⁴⁰ In order to have coherence within the EU law, consistency in the interpretation is necessary and implies the need to interpret art. 6 ATAD in accordance with the ECJ case law and its abuse of law doctrine.⁴¹ Under this premise, the Dutch *fraus legis* would be compatible with art. 6 considering the actual relevance that the artificiality concept plays also in the Dutch GAAR.⁴² Moreover, the declared plan of the Netherlands to implement ATAD 1 and 2 should anyway ensure the introduction of SAARs in the Dutch tax system against abusive practices based on hybrid international disparities.⁴³

37. With reference to transfer pricing mismatches, it is interesting to note how much relevant they can be. The revision of payment value (e.g. interest rate) according to the arm's length (ALS) principle involves both the payer and the payee set up in two different jurisdictions. It may be the case that the other tax jurisdiction adopts a different view on the case involving the financing transaction. This may initiate transfer pricing mismatches, producing double taxation or double non-taxation outcomes. Double non-taxation may arise, for example, in cases involving a foreign debtor associated entity taking on non-ALS loans from a Dutch creditor affiliate entity, whereby the debtor deducts the agreed-upon interest rate (because its jurisdiction evaluates the interest amount in compliance with the ALS principle), whereas only an ALS interest amount is taxed in the Netherlands (because the Dutch tax authority considers the agreed interest rate too high and, consequently, it adjusts it in accordance with the ALS principle). Such a mismatch does not seem to be eligible to be neutralized on the basis of *fraus legis*, because the ALS loan doctrine operates in a domestically consistent manner (see DE WILDE, *supra* note 33, section 19.2.1.5.3). As it will be analysed in this paper, there are doubts also on the possibility to solve the mismatch via the EU GAAR (and the new EU-consistent interpretation of the Dutch *fraus legis* rule), since its application requires the lack of economic substance in the arrangement set up by the taxpayer.

38. See KOK, *supra* note 18, 10–11 and Dutch Supreme Court, 17 December 2004, BNB 2005/169.

39. See M. DE WILDE, *Is the ATAD's GAAR a Pandora's Box?*, in P. PISTONE, D. WEBER, *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD Books, 2018, section 14.1.

40. Judgement of 12 September 2006, Cadbury Schweppes e Cadbury Schweppes Overseas, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544) paragraph 54, 36; Judgement of 11 December 2003, Barbier, C-364/01, Rep. 2003 I-15013, paragraph 71.

It may be interesting to add that according to DE BROE, *supra* note 8,142, 143, there is a difference between the ECJ case-law and the EU GAAR also with regard to the economic substance test. This difference lays in the terms used to describe the same, considering that the ECJ does refer to "wholly artificial arrangements" (see for example judgement C-196/04, Cadbury Schweppes), whereas art. 6 ATAD refers to "non-genuine constructions." According to G. ESCALAR, *Per una Rilettura Critica della Nozione Unionale di Abuso del Diritto Fiscale*, in Corr. Trib., 2019, 298, the difference now mentioned is not just a misuse of words, but a real difficult issue since the EU GAAR does not require the presence of a wholly artificial arrangement (economic substance) and the absence of economic reasons, but only the latter. If the absence of economic reasons is sufficient to make an arrangement non-genuine, this would be in contrast with the ECJ case-law where it is stated that the EU freedom of establishment can be exercised by the taxpayer even only for mere tax reasons as far as the arrangement used has economic substance (enough number of employees, assets, real economic activity carried out. See judgement of 12 September 2006, Cadbury Schweppes e Cadbury Schweppes Overseas, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544)). The Danish cases actually follow this path, referring to both economic substance ("purely artificial," "formal or artificial transaction") and valid economic reasons. On this point, see E. DELLA VALLE, F. FRANCONI, *Beneficiario Effettivo e Divieto di Pratiche Abusive nelle Sentenze "Danesi"*, in Il Fisco, vol. 16, 2019 and joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraph 127; joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraph 100.

Valid economic reasons and economic substance seem to be two different concepts also according to VALENTE, *supra* note 36, 660, who stresses that the former refers to a subjective element concerning the reason of the transaction, whereas the latter refers to an objective element made of certain indicators and representing the coherence between the economic tools used and the economic purposes declared.

41. SMIT, *supra* note 2; BIZIOLI, *supra* nota 6, 172, who cites the Explanatory Memorandum of the ATAD, quoting: "[i]n compliance with the acquis, the proposed GAAR is designed to reflect the artificiality test of the CJEU where this is applied within the Union."

42. See DE WILDE, *supra* note 33, section 19.2.1.3.2 and 19.2.1.3.3.

43. Netherlands - Corporate Taxation, sec. 7.1.1. and 7.5.1 (1 Jan. 2020) IBFD Country Analysis. See also M.E. LUKKIEN,

On this last aspect, it could be added that, considering the large scope of the EU GAAR, its broad wording and the general nature of GAARs (which is to tackle gaps left by SAARs,⁴⁴ without affecting the applicability of the latter),⁴⁵ art. 6 ATAD could be used to tackle mismatches, always giving priority to any SAARs already existing on the matter (e.g. art. 9 ATAD 2 for hybrid mismatch) and intervening only when such rules fail in their anti-tax avoidance purpose. Doubtlessly, art. 6 would be able to tackle mismatch only whether its artificiality test and purpose test are satisfied,⁴⁶ being also relevant the previously mentioned ECJ jurisprudence on international mismatch and abuse of law.⁴⁷ As a consequence, being mismatches mainly created by legal disparities among states, the EU GAAR could not be able to prevent double non-taxation in those cases where the taxpayer takes advantage of the same via genuine structures, exercising his right to arrange the legal structure of his business affairs in a tax-efficient way via the EU freedom of establishment.⁴⁸ However, this

A. ROELOFSEN, *Assessing BEPS: Origins, Standards and Responses. The Netherlands*, in IBFD Cahiers de Droit Fiscal International, Vol. 102A, 2017, 561.

44. For example, it is stated in literature that art. 9 ATAD 2 presents many unclear issues and unsolved gaps. The provision covers many types of mismatch: imported mismatches, hybrid transfers, reversed hybrid mismatches and dual-resident mismatches. Furthermore, it contains rules targeting some permanent establishment mismatches (allocation mismatches, disregarded permanent establishment mismatches, deemed payment mismatches.). The measures also extend to third-country mismatches. However, ambiguity is detected when both the head office state and the permanent establishment state are involved, since it is not clear which one of the two should be named as ‘payee jurisdiction,’ obliged to apply the defensive rule. This could lead to some lack of action preventing the resolution of double non-taxation. Moreover, art. 9(4) ATAD 2 allows Member State an opt-out resolution with regard the application of the defensive rule to some specific hybrid mismatches re-called by the provision. While the reason of such opt-out option is unknown to some authors, it is stressed how it could lead to harmful tax competition among Member States and could deny the solution of international disparities. Furthermore, some doubts arise also when considering structures in which a payment is made between the parent company and the subsidiary, but involving also the subsidiary’s permanent establishment in another state. This was the case in the Dutch Royalty Sara Creek, apparently falling outside the scope of art. 9(9)(f) because there was no “deemed payment between the head office and the permanent establishment,” being also uncertain if this case could still be covered by art. 2(9)(e) at some conditions. It is an additional point of discussion the application of EU anti-hybrid mismatch rules against international tax treaty provisions (e.g. when the income of the permanent establishment in another state is taxed by the head office state in order to prevent double non-taxation). While it is generally affirmed that under the loyalty principle Member States have the duty to facilitate the achievement of EU’s tasks via implementing EU primary and secondary law obligation, art. 9(5) ATAD 2 neutralizes the application of the defensive rule in case “the Member State is required to exempt the income under a double taxation treaty entered into by the Member State with a third country.” This means that obligations under tax treaties between a Member State and a third country are given priority even if this conflicts with the EU law. For all the points here mentioned, see S. PANCHAM, *Permanent Establishment Mismatches under ATAD II*, in P. PISTONE, D. WEBER, *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD Books, 2018.

Finally, another problematic issue about art. 9 ATAD 1 and 2 is linked to its implementation in practice. Especially in case of imported mismatch, where a third tax jurisdiction is involved, the exchange of information among countries is important, together with evident and essential reliance on information transmitted by taxpayers. This could make it difficult in practice to correctly apply the rules conceived. See B. PEETERS, *Imported Mismatches*, in P. PISTONE, D. WEBER, *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD Books, 2018, section 20.3.2.1.

45. See Preamble to the ATAD, paragraph 11.
46. Differently from the hybrid anti-mismatch rule in art. 9 ATAD 1 and 2, which is described as “mechanical by nature, in the sense that an intention or a motive is not a requirement for the measures to be applied,” neither any artificiality assessment. See G. FIBBE, *Hybrid Mismatch Rules under ATAD I & II*, in P. PISTONE, D. WEBER, *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study*, IBFD Books, 2018, section 18.2. However, testing the presence of any real economic activity carried out in a country could be useful for the ECJ, according to its Philips Electronics case-law, in order to assess which state should preferably allow the deduction of a loss. This interpretation seems apparently contrary to the wording of art. 9 ATAD 2. See FIBBE, *id.*, section 18.5 and judgement of 6 September 2012, Philips Electronics, C-18/11, ECLI:EU:C:2012:532.
47. Judgement of 12 September 2006, Cadbury Schweppes e Cadbury Schweppes Overseas, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544) paragraph 36; Judgement of 11 December 2003, Barbier, C-364/01, Rep. 2003 I-15013, paragraph 71.
48. This could be argued in the light of the ECJ case-law (e.g. judgment of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas, C-196/04, EU:C:2006:544, paragraph 50; judgment of 29 November 2011, National Grid Indus, C-371/10, EU:C:2011:785, paragraph 84; judgment of 24 November 2016, SECL, C-464/14, EU:C:2016:896, paragraph 60). See also DE WILDE, *supra* note 39, section 14.2.1.

By the mechanism on which art. 9 ATAD 1 and 2 is based, it is assumed that an individual taxpayer is responsible for an abusive use of intra-states conflicts (see PEETERS, *supra* note 44, section 20.2). Art. 6 is based on a different mechanism,

interpretation of art. 6 ATAD could still force Dutch courts to interpret the *fraus legis* concept as tackling also intra-states mismatch exploited by arrangements lacking economic substance.

The most problematic phenomenon would still be transfer pricing mismatches, since they could be hardly caught by art. 6 ATAD being they dependant on national implementation of the arm's length principle and on national tax authority's decisions.

The recent Danish cases⁴⁹ decided by the ECJ in 2019 could have interesting implications on the Dutch *fraus legis*. They do not take so much distance from ECJ's previous case-law, for example the Cadbury case.⁵⁰ Both cases define the abuse of tax law under EU law by referring to "wholly/fully artificial" arrangements.⁵¹ Even if some differences can be detected in the terms used to identify the purpose of the taxpayer,⁵² this discrepancy cannot constitute a real contrast considering the ECJ tendency to use the different expressions interchangeably⁵³ and the need of uniformity in the interpretation of the EU concept of abuse, as confirmed by the European Court itself.⁵⁴ However, the first innovative point made by the ECJ in the Danish cases relates to the chance for the tax authority of a Member State to detect a tax-avoidance situation even if there is no general anti-abuse provision prohibiting the abusive structure. This is possible by appealing to the EU general legal principle against the abuse of law, which is based on European primary law.⁵⁵ What are the effect on the Dutch *fraus legis*? Similarly to Denmark⁵⁶ and differently from Italy,⁵⁷ the Netherlands do not have a written general anti-abuse provision, but they do have a case-law based rule. In the 2018–2019 obligation to implement the EU GAAR into Member State's tax systems,⁵⁸ this rule has been declared by the Dutch government to be sufficient in order to comply with the mentioned

where assumptions are generally not allowed, as confirmed by ECJ case-law (see for example: joint judgements of 20 December 2017, Deister Holding and Juhler Holding, C-504/16 and C-613/16, ECLI:EU:C:2017:1009, paragraph 62; judgement of 7 September 2017, Eqiom and Enka, C-6/16, ECLI:EU:C:2017:641, paragraphs 30–32). Thus, being a mismatch generally derived from conflicts between two or more different tax jurisdictions, art. 6 ATAD can intervene only if the tax avoidance purpose of the taxpayer and the lack of substance of the structure are proven.

49. Joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134; Joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135.
50. Judgement of 12 September 2006, Cadbury Schweppes e Cadbury Schweppes Overseas, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544).
51. Joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraph 109; Joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraph 81, 108. Judgement of 12 September 2006, Cadbury Schweppes e Cadbury Schweppes Overseas, C-196/04, Rep. 2006 I-07995 (ECLI:EU:C:2006:544) paragraph 51.
52. Joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraph 127; Joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraph 100.
53. Also within the same Danish case, compare paragraphs 100 and 108 of the joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135. See also judgement of 21 February 2006, Halifax and Others, C-255/02, Rep. 2006 I-01609 (ECLI:EU:C:2006:121) paragraph 59–60, 69 and 75; judgement of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, Rep. 2007 I-02107 (EU:C:2007:161) paragraph 77 and 81; judgement of 10 November 2011, Foggia – SGPS, C-126/10, Rep. 2011 I-10923 (ECLI:EU:C:2011:718) paragraph 35.
54. Judgement of 5 July 2007, Kofoed, C-321/05, Rep. 2007 I-05795 (ECLI:EU:C:2007:408) paragraph 38; judgement of 7 September 2017, Eqiom and Enka, C-6/16, ECLI:EU:C:2017:641; judgement of 8 March 2017, Euro Park Service, C-14/16, ECLI:EU:C:2017:177. See also A. CORDEWENER, *Anti-Abuse Measures in the Area of Direct Taxation: Towards Converging Standards Under Treaty Freedoms and EU Directives?*, in *ecTax Review*, vol. 26, 2017, 66.
55. Joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraph 96; Joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraph 70.
56. Joint judgements of 26 February 2019, N Luxembourg 1, C-115/16, C-118/16, C-119/16 and C-299/16, ECLI:EU:C:2019:134, paragraph 24; Joint judgements of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraph 31.
57. See DELLA VALLE, *supra* note 40, section 3.
58. ATAD, *supra* note 1, art. 11(5).

obligation. Also this paper proves it true.

While admitting that the Netherlands have a national GAAR embracing the EU anti-abuse concept and subject to EU interpretation, it can be said that the Danish cases imply the inclusion of the beneficial owner concept in the Dutch *fraus legis*. This relates to the second innovative point made by the European Court in the cases here in comment, according to which the concept of beneficial owner should be applied also in dividend transactions as anti-abuse tool even if not explicitly mentioned by the Parent-Subsidiary Directive⁵⁹. This reconstruction seems to derive from the EU primary law and it seems to be possible thanks to the necessity to interpret the Parent-Subsidiary Directive in line with the European general (primary law) principle of non-abuse of law.

Renewing the interpretation of the ATAD also in the light of this new jurisprudence, it arises the necessity to read the same, and not only the Parent-Subsidiary Directive, in line with this extended version of the ECJ abuse of law doctrine, including the concept of beneficiary owner also in the EU GAAR. This would imply the inclusion of the same concept also in the Dutch national GAAR which, as implementing the EU GAAR into the Dutch national system, has to be interpreted in accordance with the whole ECJ jurisprudence on tax abuse. Consequently, even when not directly stated by any national law, the Netherlands have to deny national tax benefits when these are grantable on the basis of a scheme including an artificial intermediary which is not the effective beneficial owner of a dividend distribution.

Furthermore, it is relevant to compare the EU GAAR and the Dutch *fraus legis* in terms of application-effects. It is evident that in both cases no fine is expected to be applied on the taxpayer. At the same time, the most difficult aspect seems to relate to one of the *fraus legis*'s most peculiar features. The effect of the Dutch GAAR application is the ignorance of the legal appearance of the abusive arrangement at stake, followed by the "reconstruction of the facts of the case with a view to its substance to arrive at an application of the tax law in accordance with its spirit."⁶⁰ Does art. 6 ATAD allow the same reconstructive effect? The matter seems to be clarified by the wording of the provision and the interpretation of the ECJ case law on the abuse of law doctrine. According to the former, "if all the three tests [of art. 6] are met, the arrangements [...] must be ignored. On that basis, the tax liability must subsequently be calculated in accordance with national law."⁶¹ By interpreting this in light of the ECJ case law and in compliance with the European principle of proportionality,⁶² the application of anti-abuse rules limiting the EU freedoms of the taxpayer should be applied only to the extent that is sufficient and necessary on order to stop the abuse. This would imply that national tax law rules (consequently, also national tax benefit) should be applied by the tax authority in accordance with the actual reconstructed substance of the facts at stake.

Finally, exploring the geographic scope of the EU conform interpretation, it is interesting to inspect whether Dutch courts are required to apply an EU conform interpretation of the *fraus legis* also outside the traditional geographic scope of application of the EU law. When referring to the latter, it is generally affirmed that the EU law is mandatory only in EU situations, namely cross-border

59. Parent-Subsidiary Directive, *supra* note 3. This can be assumed by reading paragraphs 81, 111–113 of the joint judgments of 26 February 2019, T Denmark, C-116/16 and C-117/16, ECLI:EU:C:2019:135. See also DELLA VALLE, *supra* note 40, section 3.

60. DE WILDE, *supra* note 33, section 19.2.1.2.2.

61. See SMIT, *supra* note 2, 531.

62. See ECJ case-law on the proportionality principle at Judgement of 8 June 2008, Vodafone, C-58/08, ECLI:EU:C:2010:321, paragraph 51; Judgement of 16 June 2015, Gauweiler, C-62/14, ECLI:EU:C:2015:400, paragraph 67; Judgement of 13 March 2007, Test Claimants in the Thin Cap Group Litigation, C-524/04, EU:C:2007:161, paragraph 71–83. See also VAN OS, *supra* note 36, 184 and P. WATTEL, *Conceptual background of the CJEU Case Law in Direct Tax Matters*, in P. WATTEL at al. (editors), *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Seventh Edition, 2018, 633.

cases among Member States.⁶³ This is true for many tax directives, e.g. the Tax Merger Directive,⁶⁴ the Parent-Subsidiary Directive⁶⁵ and the Interest and Royalty Directive.⁶⁶ However, it is not true for the ATAD. Due to the necessity to apply anti-tax abuse rules in the broadest possible way, the subjective scope of the directive stated in art. 1 ATAD includes all taxpayers “that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country.” No mention of any geographical limits. Additionally, a useful instrument of interpretation such as the preamble of the ATAD underlines the importance of applying the EU GAAR in the broadest possible way, ensuring “that the GAAR applies in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ.”⁶⁷ From this wording, it is possible to deduce that Member States domestic implementation of art. 6 ATAD must equally apply to domestic and international situations, rather than only to cross-border cases involving another Member States. This should apply also for the Dutch *fraus legis* concept, so that its interpretation should be in line with the EU GAAR not only when applied to EU cross-border cases, but also to domestic and international situations.

This context goes also further than the ECJ jurisprudence represented by the *Leur-Bloem* case.⁶⁸ There, the application of the EU law within domestic situations is declared possible specifically when a national court considers the intention of the legislator to solve the domestic dispute via domestic law directly or indirectly referring to EU law.⁶⁹ Here, instead, the application of EU law in typically ‘non-EU’ cases is required by the EU legislator itself and it does not depend on the national legislator or national courts’ evaluation. While in the *Leur-Bloem* case the interpretative intervention of the ECJ within the domestic case was highly rebutted in doctrine,⁷⁰ here this intervention could be considered normal and expected in the author’s opinion.

63. This is because Member States, as signatory countries of the EU fundamental treaties, are the only ones which are obliged by EU law and which can benefit from the same (for example, economic advantages within the European Internal Market). A consequence of this within primary law is, for example, the right for European citizens only to exercise the EU fundamental freedoms only within the states of the European Union (with the only exemption of the EU freedom of capital, which can involve also non-EU countries).

64. Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States, 2009, O.J. (L 310/34), art. 1 and 3 and F. BOULOGNE, *The Tax Merger Directive*, in P. WATTEL at al. (editors) *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Seventh Edition, 2018, 282.

65. See Parent-Subsidiary Directive, *supra* note 3, art. 1 and O. MARRES, *The Parent-Subsidiary Directive*, in P. WATTEL at al. (editors) *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Seventh Edition, 2018, 223–230.

66. See Interest and Royalty Directive, *supra* note 3, art. 1 and A. CORDEWENER, *The Interest and Royalty Directive*, in P. WATTEL at al. (editors) *European Tax Law, Vol. 1 – General Topics and Direct Taxation*, Wolters Kluwer Seventh Edition, 2018, 407.

67. ATAD, Preamble paragraph 11.

68. Judgement of 17 July 1997, *Leur-Bloem*, C-28/95, Rep. 1997 I-04161.

69. See F. HOENJET, *The Leur-Bloem Judgement: the Jurisdiction of the European Court of Justice and the Interpretation of the Anti-Abuse Clause in the Merger Directive*, in *ecTax Review*, vol. 4, 1997, 207–210 and Judgement of 17 July 1997, *Leur-Bloem*, C-28/95, Rep. 1997 I-04161, paragraph 34. See also C. GARBARINO, *The Relevance of the Procedural Framework Principles in the Direct Tax Cases of the CJEU*, in *ecTax Review*, vol. 2, 2019, 77; T. DANIELS, *The Relevance of the Procedural Framework Principles in the Direct Tax Cases of the CJEU*, in *ecTax Review*, vol.1, 1999, 41; O. THOMMES, *European Court of Justice Decides Leur-Bloem: the First Case Regarding the Implementation of the EC Merger Directive*, in *Intertax*, vol. 25, 1997; E. WERLAUFF, *Submissions to the European Court on parallel national (tax) laws*, in *ecTax Review*, vol. 1, 1998, 46.

70. See HOENJET, *id.*, 208–209.

4. Conclusive Thoughts

This interesting short journey into the comparison between the ATAD art. 6 and the Dutch national GAAR brought to the conclusion that the two rules seem to be in line.

The Dutch *fraus legis* appears particularly coherent with an ECJ case-law-oriented interpretation of art. 6 ATAD, coherent with the EU primary law as interpreted by the ECJ.

Despite the past lack of frequent application of the *fraus legis* concept by Dutch courts, the implementation by the Netherlands of the OECD BEPS Project⁷¹ and the ATAD can inspire a more extended use of the national GAAR by Dutch tax authorities and courts, via broader interpretation.⁷² Additionally, the nature of the *fraus legis* as a case-law rule makes it particularly flexible and easily adaptable to current international and European trends which push more into tackling tax avoidance and aggressive tax planning.⁷³

The most difficult points of consistency between the ATAD GAAR and the Dutch GAAR could be related to their objective scope (e.g. whether international mismatch are covered or not) and to their reconstructive effect. In this regard, it has been stressed that a similar reconstructive effect can be identified also in the European GAAR, especially when it is interpreted in harmony with the cited ECJ case-law on the abuse of law in the tax field. Referring to the international mismatch issue, this can also be said partially solved considering the obligation on the Netherlands to nationally implement art. 9 ATAD 1 and 2. However, since art. 9 focuses on hybrid mismatches, there is still an open question about other kind of disparities (e.g. international transfer pricing mismatches). Will the general trend to “levy taxation where the value is created,”⁷⁴ which seems embedded also by the ATAD⁷⁵ and consequently must be implemented by the Netherlands, enough? This is still to be assessed. Meanwhile, it could be argued that the broad wording and scope of art. 6 ATAD could allow to tackle mismatch where a non-genuine structure is set up by the taxpayer, positively influencing the interpretation of the Dutch *fraus legis* in this sense.

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71. OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing.
<http://dx.doi.org/10.1787/9789264202719-en>

72. See HEMELS, *supra* note 20, 21.1.3.

73. See for example OECD, *supra* note 71.; EC Recommendation, *supra* note 6.

74. See OECD, *supra* note 71, Action 8–10.

75. See ATAD, *supra* note 1, Preamble paragraph 1.