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EFFECTIVENESS AND CONSTITUTIONAL STANDARDS AS A BARRIER TO THE CORRECT IMPLEMENTATION OF THE EUROPEAN GENERAL ANTI-ABUSE RULE

Abstract: *A key element in the fight against tax avoidance within the European Union has been the obligation for all Member States to introduce a harmonised general anti-abuse rule (GAAR). This article explores the interplay between the Polish constitutional standards regarding the GAAR, the need to ensure its effectiveness and EU standards derived from Art. 6 of the ATA Directive and the case law of the Court of Justice of the European Union (CJEU). The analysis concludes that, while the subjective test was implemented correctly, Poland failed to properly implement Art. 6 of the ATA Directive in relation to the genuine activity test and the objective test. The Constitutional Tribunal established a very high standard for the protection of taxpayers' rights, which hinders the proper implementation of the GAAR and conflicts with the case law of the CJEU and the provisions of the ATA Directive.*
Keywords: general anti-abuse rule, GAAR, constitutional standards, ATA Directive, CJEU case law, incorrect implementation, effectiveness

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INTRODUCTION

The adoption of Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATA Directive)[1] represents one of the most significant legislative developments in recent

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[1] Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193.

years. Among its key provisions is the general anti-abuse rule (GAAR), codified in its Art. 6. The transposition and harmonisation of the GAAR have sparked considerable controversy due to the varied approaches to anti-abuse rules across the Member States (MSs). While some countries boast a long-standing tradition of such regulations, others have relied primarily on doctrines shaped by case law. In certain jurisdictions, anti-abuse rules were either entirely absent or introduced only recently.[2]

Poland first enacted a GAAR in 2003, but the provision was repealed in 2004 following a ruling by the Constitutional Tribunal.[3] For the next twelve years, the Polish legal system operated without any general anti-avoidance rule. This absence coincided with growing internal and external challenges. Domestically, tax avoidance resulting from aggressive tax planning was on the rise,[4] due in part to the lack of a GAAR. Internationally, both the EU and the OECD exerted increasing pressure on MSs to introduce general anti-abuse measures into their legal systems.[5] This external pressure stemmed not only from the global shift against aggressive tax planning, but also from efforts to curb harmful tax competition by jurisdictions that had yet to implement anti-abuse legislation. Poland eventually reintroduced a GAAR in 2016, following a recommendation issued by the European Commission in 2012.[6] The provisions were subsequently revised in 2018 to bring them more closely in line with the wording of Art. 6 of the ATA Directive.[7]

This article aims to demonstrate that Poland has incorrectly implemented Art. 6 of the ATA Directive in relation to the genuine activity test and the objective test, while the subjective test has been implemented correctly. The flawed implementation stems from two sometimes conflicting tendencies: the commitment to uphold the standards set by the Constitutional Tribunal and the determination to ensure that the GAAR remains an effective tool in combating tax avoidance for the tax

[2] For an overview of countries that have implemented the ATA Directive's GAAR, *see* V. Dafnomilis, *Overview of the Implementation of the Anti-Tax Avoidance Directive into Member States' Domestic Tax Laws*, PwC, Rotterdam: 2020, p. 24.

[3] Polish Constitutional Tribunal, judgment of 11 May 2004, K 4/03.

[4] R. Piekarz, A. Miarkowski, *Znikające miliardy. Jak transfer dochodów za granicę drenuje polski budżet. Raport* [Disappearing Billions: How Income Shifting Abroad Drains the Polish Budget. A Report], Centrum Analiz Klubu Jagiellońskiego, Warszawa: 2015; R. Dover, B. Ferrett, D. Gravino, E. Jones, S. Merler, *Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union. Part I: Assessment of the Magnitude of Aggressive Corporate Tax Planning*, European Parliamentary Research Service, Brussel: 2015; K. Bąkowska, M. Gniazdowski, M. Lachowicz, *Horyzont optymalizacji – geneza, skala i struktura luki w podatku CIT* [The Horizon of Optimization – The Genesis, Scale and Structure of the CIT Gap], Polski Instytut Ekonomiczny, Warszawa: 2019.

[5] First, the EC issued its Recommendation on aggressive tax planning, followed by the ATA Directive.

[6] Commission Recommendation of 6 December 2012 on aggressive tax planning [2012] OJ L 338/41.

[7] The subject of this article is the current provisions of the GAAR. Previously applicable regulations will be omitted, as the current regulation implemented the ATA Directive.

authorities. Meeting the requirements set by the Constitutional Tribunal in its 2004 judgment, including the overly detailed specification of vague terms, could narrow the material scope of the GAAR and, as a consequence, render it no longer an effective tool for protecting the fiscal interests of the state.

The subject of the general anti-abuse rule continues to generate active discussion in both domestic and international legal doctrine. The proper implementation of the GAAR has already been addressed in the scholarly literature, particularly in the work of Błażej Kuźniacki.[8] However, this study adopts a distinct perspective and arrives at partially different conclusions regarding the correctness of Poland's implementation of Art. 6 of the ATA Directive. Crucially, the purpose of this article is not limited to identifying specific instances of flawed transposition. Rather, it seeks to uncover the root causes of these shortcomings, which, as mentioned above, lie in the attempt to reconcile two potentially conflicting objectives: adherence to the constitutional standards set by the Constitutional Tribunal and the desire to ensure that the GAAR remains an effective instrument in combating tax avoidance. Striving to meet the constitutional requirements articulated in the Tribunal's 2004 judgment – particularly the demand for detailed specification of vague legal terms – may unduly narrow the material scope of the GAAR and, consequently, undermine its practical effectiveness in safeguarding the fiscal interests of the state. An appreciation of the Polish constitutional context – marked by an especially high standard of taxpayer protection – will enable foreign readers to understand how this very standard gives rise to practical difficulties in the implementation of the GAAR.

1. THE PROHIBITION OF ABUSE OF LAW AS A GENERAL PRINCIPLE OF EU LAW

The prohibition of abuse of law, at its core, prevents taxpayers from invoking rights or benefits derived from EU law in a manner that defeats the purpose for which such law was established. In the case law of the Court of Justice of the European Union (CJEU), this principle has gradually been affirmed as a general principle of EU law.[9] Most MSs' legal traditions contain some concept of preventing abuse of rights (e.g. the German concept of *Missbrauch des Rechts* or the French *abus de droit*),[10] and the EU principle builds upon the shared elements of these traditions.

[8] B. Kuźniacki, *Poland's Implementation of EU GAAR Compromises Constitutional and EU Principles*, 49(3) Intertax 237 (2021).

[9] G. Butler, K.E. Sørensen, *The Prohibition of Abuse of EU Law: A Special General Principle*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, Edward Elgar Publishing, Cheltenham: 2022, pp. 402–422.

[10] A. Lenaerts, *The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law*, 18(6) European Review of Private Law 1121 (2010), pp. 1125–1126.

Likewise, the prohibition of abuse of law is firmly embedded in public international law.[11] It is usually conceptualised as a corollary of the overarching principle of good faith, enshrined, inter alia, in Arts 26 and 31(1) of the Vienna Convention on the Law of Treaties.[12] As such, it qualifies as a "general principle of law recognised by civilised nations", which the International Court of Justice applies pursuant to Art. 38(1)(c) of its Statute.[13] In the international tax sphere, this general principle influences the shape of modern anti-abuse instruments, including Art. 6 of the ATA Directive and Art. 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).

The CJEU's case law on the prohibition of abuse of law initially developed outside the field of tax law (e.g. in the context of internal market freedoms), and was subsequently shaped through key rulings in tax matters. In the field of direct taxation, the principle arises primarily in two contexts: in the realm of EU secondary law (tax directives), where taxpayers seek tax advantages conferred by directives (exemptions, tax neutrality in cross-border mergers, etc.), and in the realm of EU primary law (the fundamental freedoms of the internal market), where MSs justify anti-abuse measures that restrict cross-border activities.

Currently, the prohibition of abuse of law serves two essential functions.[14] Firstly, it acts as an interpretative tool of EU law, filling legal gaps and ensuring the coherence and effectiveness of the Union legal order. Secondly, in exceptional cases, the principle operates as a higher-ranking interpretative canon that requires national authorities to disapply domestic provisions insofar as their application would facilitate abusive practices. For the purposes of this article, particular importance lies in identifying the standard applied by the CJEU with respect to the prohibition of abuse of law. The roots of the EU GAAR can be found in the case law of the Court, which, over the years, has shaped this of abuse of rights as a general principle of EU law,[15] and the GAAR should be seen as a (partial) codification of the

[11] On the abuse of rights in international law, *see* M. Byers, *Abuse of Rights: An Old Principle, A New Age*, 47(2) McGill Law Journal 389 (2002).

[12] Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[13] Statute of the International Court of Justice (adopted on 26 June 1945, entered into force on 24 October 1945), 33 UNTS 993.

[14] R. de la Feria, *EU General Anti-(Tax) Avoidance Mechanisms*, in: G. Loutzenhiser, R. de la Feria (eds.), *The Dynamics of Taxation: Essays in Honour of Judith Freedman*, Hart Publishing, Oxford: 2020, pp. 155–184. De la Feria even describes the prohibition of abuse as an "overriding rule of law" that may justify a *contra legem* interpretation; For a more nuanced perspective, *see* W. Schön, *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective*, Max Planck Institute for Tax Law and Public Finance, Munich: 2019, pp. 13–14, available at: https://ssrn.com/abstract=3490489 (accessed 30 June 2025).

[15] *E.g.* A.M. Jimenez, *Towards a Homogeneous Theory of Abuse in EU (Direct) Tax Law*, 66(4–5) Bulletin for International Taxation 270 (2012), available at: https://ssrn.com/abstract=2392512 (accessed 30 June 2025); A. Ballancin, F. Cannas, *The Development of the Doctrine of Abuse of Law and the Danish Cases: Time*

jurisprudential standard. Furthermore, this case law will be relevant in answering the question of how a MS should proceed in the event of non-implementation or incorrect implementation of a directive.

The first case on the abuse of rights was *Van Binsbergen*,[16] which was non-tax in nature and concerned the regulation of the public profession. The CJEU held that freedom guaranteed under Art. 59 (of the Treaty Establishing the European Economic Community) cannot be invoked for the purpose of "avoiding the professional rules of conduct which would be applicable to him if he were established within that State."

In the field of tax law, the issue of abuse of rights first arose in *Imperial Chemical Industries*.[17] The CJEU stated that "the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits." In this case, the question of abuse of rights served merely as a justification raised by a MS to restrict the freedom of establishment for a system of corporate tax group relief.

The real breakthroughs in terms of the doctrine of abuse of rights were three judgments: *Emsland-Stärke*,[18] *Halifax*[19] and *Cadbury Schweppes*.[20] The *Emsland-Stärke* case admittedly did not concern tax matters, but in this ruling the CJEU developed a test invoked in subsequent judgments. According to the Court, a finding of abuse requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, as well as a subjective element consisting of the intention to obtain an advantage from the Community rules by artificially creating the conditions laid down for obtaining it. The doctrine of abuse of rights established in *Emsland-Stärke* was first extended to tax law in the *Halifax* VAT case. The CJEU agreed that the doctrine of "abuse of Community law" could also be applied in tax law, even though it was not regulated by secondary law. This is how abuse of law was subsequently understood and defined in direct taxation

to Shift the Focus from Non-Genuine Arrangements to Single (Abusive) Transactions?, 30(2) EC Tax Review 70 (2021); R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, 29(4) EC Tax Review 142 (2020); R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a General Principle of EC Law Through Tax*, 45(2) Common Market Law Review 395 (2008). *But see* D. Leczykiewicz, *Prohibition of Abusive Practices as a "General Principle" of EU Law*, 56(3) Common Market Law Review 703 (2019).

[16] Case C-33/74 *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131.

[17] Case C-264/96 *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, EU:C:1998:370.

[18] Case C-110/99 *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, EU:C:2000:695.

[19] Case 255/02 *Halifax and Others v. Commissioners of Customs & Excise*, EU:C:2006:121.

[20] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, EU:C:2006:544.

cases, such as *Cadbury Schweppes*. The cases were of a different nature, however, as the CJEU used the principle of abuse of law as an instrument of judicial review of national legal provisions and not as a basis for counteracting abuse of law in the form of a judicial doctrine.

In the case of direct taxation, the CJEU did not at first consider the prohibition of the abuse of law as a basis for anti-abuse. In both *Kofoed*[21] and *3M Italia*[22] it stated that MSs are not obliged to combat abusive practices in the field of direct taxation if no anti-abuse national legislation is present. This decision was reversed in judgments known as the Danish "beneficial ownership" cases.[23] According to the CJEU:

> In the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights [...] where they are invoked for fraudulent or abusive ends.[24]

In justifying the change in its position, the CJEU referred to the *Italmoda* case, from which it follows that the prohibition of abuse of law is a general principle of the EU. Thus, if the conditions required to obtain the advantage are met only formally, the MSs are obliged to refuse to grant the advantage, even if a MS has not transposed the anti-abuse provisions into domestic legislation. This goes against the principle of an "inverse vertical direct effect" (*estoppel*), which precludes imposing obligations stemming from a non-transposed Directive against an individual,[25] as

[21] Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408, paras. 46, 48.

[22] Case C-417/10 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v. 3M Italia SpA*, EU:C:2012:184, para. 32.

[23] For a critical assessment of these judgments, *see generally* L. De Broe, S. Gommers, *Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases*, 28(6) EC Tax Review 270 (2019); S. Baerentzen, *Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest – A New Test to Disentangle Abuse from Real Economic Activity?*, 12(1) World Tax Journal 3 (2020); A. Zalasiński, *The ECJ's Decisions in the Danish "Beneficial Ownership" Cases: Impact on the Reaction to Tax Avoidance in the European Union*, 2(4) International Tax Studies 1 (2019); J. Korving, L.C. van Hulten, *Case Law Note: Svig og Misbrug: The Danish Anti-Abuse Cases*, 47(8) Intertax 793 (2019). It is also worth considering a more nuanced view, according to which the Danish beneficial ownership cases did not overturn the ruling in *Kofoed*, but instead relied on a different, autonomous legal basis: the general principle of EU law prohibiting abuse, which does not require transposition into national law (*see* Zalasiński, *supra* note 23, p. 9).

[24] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others v. Skatteministeriet*, EU:C:2019:134, para. 111; Joined Cases C-116/16 and C-117/16 *Skatteministeriet v. T Danmark and Y Denmark Aps*, EU:C:2019:135, para. 83.

[25] De Broe, Gommes, *supra* note 23, pp. 272, 274–275. *See also* Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, para. 9; Case C-148/78 *Criminal proceedings against Tullio Ratti*, EU:C:1979:110, paras. 22–23; Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408,

this would infringe on the general EU law principle of legal certainty.[26] The CJEU thus emphasises the prevention of abuse over the principle of legal certainty in the context of tax avoidance. As taxpayers approach the boundaries of abusive behaviour, the protective scope of legal certainty diminishes. For instance, Judith Freedman argues that legal certainty "should not be the overriding aim" and suggests that in such cases it may even be undesirable.[27] At the same time, reference should be made to the judgment in *X GmbH*,[28] which examined the compatibility of Germany's controlled foreign company legislation with the free movement of capital under Art. 63 TFEU. In this ruling, the CJEU stated that MSs may invoke anti-abuse considerations as justification, provided that the national measures comply with the principle of proportionality. This translated the abuse doctrine to the Treaty freedoms. Importantly, the standard for identifying abuse adopted in this case was aligned with that applied in the Danish beneficial ownership cases.

Subsequent rulings have not altered the essence of the prohibition of abuse of law as a general principle of EU law. Nonetheless, two post-2019 judgments in the area of direct taxation merit attention: *Lexel AB*[29] and *X BV*.[30] The former concerned the denial of deductions for interest paid to an affiliated French company under Swedish rules aimed at combating base erosion. The Court found that the Swedish legislation imposed a disproportionate restriction on the freedom of establishment, as it did not allow taxpayers to demonstrate that their transactions were genuine and commercially justified, thereby failing to specifically target only wholly artificial arrangements. A key element of the ruling was the Court's suggestion that a loan granted on arm's-length terms should not, in itself, be considered artificial. This understanding, however, was clarified in *X BV* (Dutch Interest Barrier), where the Court held that debt to an affiliated entity, even if subject to an arm's-length interest rate, may indeed form part of a wholly artificial arrangement if it lacks genuine economic substance. For anti-abuse rules to be considered proportionate, taxpayers must be given an effective and practical opportunity to demonstrate that their transactions are genuine. At the same time, wholly artificial arrangements remain subject to the prohibition of abuse of law, even if they are structured on arm's-length terms.

para. 45; and, more recently, Case C-425/12 *Portgás – Sociedade de Produção e Distribuição de Gás SA v. Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, EU:C:2013:829, para. 22.

[26] See an extensive critique of the direct application of the general principle of abuse of EU law: J. Englisch, *The Danish Tax Avoidance Cases: New Milestones in the Court's Anti-Abuse Doctrine*, 57(2) Common Market Law Review 503 (2020).

[27] J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, 4 British Tax Review 332 (2004), p. 333.

[28] Case C-135/17 *X-GmbH v. Finanzamt Stuttgart - Körperschaften*, EU:C:2019:136.

[29] Case C-484/19 *Lexel AB v. Skatteverket*, EU:C:2021:34.

[30] Case C-585/22 *X BV v. Staatssecretaris van Financiën*, EU:C:2024:238.

Considering CJEU case law, the prohibition of abuse is a general principle of EU law, and this applies to tax law as well. In the case of both indirect and direct taxation, it is a basis for MSs to prevent abuse. As a general principle, it serves to aid the interpretation of EU law to fill the gap so as to safeguard the coherence of EU law.[31] Moreover, in light of the CJEU case law, the principle prohibiting abuse may exceptionally justify interpretations that deviate from the explicit literal wording of legal provisions (*contra legem* interpretation).[32] This allowed the CJEU to disregard the doctrine of *estoppel* and, as a result, serve as autonomous legal grounds for preventing abuse.

2. THE GAAR (ART. 6 OF THE ATA DIRECTIVE)

The first European anti-abuse rules may be found in the Merger Directive of 1990[33] and the Interest and Royalties Directive of 2003.[34] These directives contain two types of anti-abuse provisions. The former refers to national domestic or agreement-based anti-abuse rules, while the latter allows for the refusal to apply or withdraw the benefit of a directive where it appears that one of the operations has tax evasion or tax avoidance, as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance.[35]

Plans to introduce a GAAR first emerged in 2012. The European Commission announced an Action Plan to strengthen the fight against tax fraud and tax evasion, encouraging MSs to introduce a GAAR.[36] The Commission then issued a recommendation on aggressive tax planning, indicating the desired shape of a common GAAR,[37] the wording of which reflected the model developed in the *Emsland-Stärke*, *Halifax* and *Cadbury Schweppes* rulings.

The European Commission, in implementing base erosion and profit shifting (BEPS) actions, decided to additionally require MSs to implement a GAAR. The shape of the rule under Art. 6 of the ATA Directive deviated from the standard

[31] De Broe, Gommes, *supra* note 23, p. 277.

[32] De la Feria, *supra* note 15, p. 142.

[33] 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] OJ L 310/34.

[34] 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 [2003] OJ L 157.

[35] The anti-abuse provision was cited from the Merger Directive. The Interest and Royalties Directive contains similar provisions, although worded a little differently.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the 27 January 2012, *Trade, growth and developmentTailoring trade and investment policy for those countries most in need*, COM(2012)22 final: "An Action Plan to strengthen the fight against tax fraud and tax evasion".

[37] Commission Recommendation of 6 December 2012 on aggressive tax planning [2012] OJ L 338/41.

developed by the CJEU (primarily in terms of the subjective test) and more closely resembled the principle purpose test (PPT) developed under BEPS or the specific anti-abuse rules in the Merger Directive and the Interest and Royalties Directive.

According to Art. 6 of the ATA Directive, for the purposes of calculating the corporate tax liability, a MS shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. Such 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.

Art. 6 of the ATA Directive thus consists of three elements: an arrangement, a tax advantage and abuse. The first two elements are formulated relatively broadly to identify as many abusive patterns as possible. Only the third premise is significantly narrower so as to capture and eliminate only undesirable tax schemes. It is the way in which abusiveness is defined that is the most controversial, and for this reason it will be considered more extensively here.

The element of abusiveness consists of three tests: the subjective test ("main purpose or one of the main purposes of obtaining a tax advantage"), the objective test ("defeats the object or purpose of the applicable tax law") and the genuine activity or economic substance test or the artificiality test ("an arrangement or a series of arrangements which [...] are not genuine having regard to all relevant facts and circumstances").

The subjective test sets a relatively low threshold of abuse relating to "the main purpose or one of the main purposes of obtaining a tax advantage", given that in many jurisdictions, this level was significantly lower.[38] Legislators in various legal orders have used the following phrases: sole, essential, or dominant purpose, or one of the purposes to obtain tax advantage.[39] The CJEU jurisprudence was similar, setting the threshold at the level of a "sole or essential/predominant" purpose.[40]

It seems that setting the threshold of protection for the corporate tax base so high may have had two justifications. The first was to maintain consistency between

[38] B. Kuźniacki, *The GAAR (Article 6 ATAD)*, in: W. Haslehner, K. Pantazatou, G. Kofler, A. Rust (eds.), *A Guide to the Anti-Tax Avoidance Directive*, Edward Elgar Publishing, Cheltenham: 2020, p. 143.

[39] The lawmaker may calibrate the subjective test ranging from "sole purpose" through a "significant", "primary", "main", "paramount", "predominant", "dominant", "ruling", "prevailing", "decisive", "principal" or "most influential" purpose, ending with "one of the purposes" or "a purpose". For more on the subject, along with a comparative discussion on GAAR in Australia, New Zealand, the UK and South Africa, *see* P. Rosenblatt, *General Anti-Avoidance Rules for Major Developing Countries*, Wolters Kluwer, Deventer: 2015, pp. 47–53.

[40] Raising the threshold of protection for the corporate tax base in the subjective test in the EU GAAR has been criticised in the literature. *E.g.* S. Govind, I. Lazarov, *Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law*, 47(10) Intertax 852 (2019), pp. 858–859. Similarly,

the EU GAAR and the PPT test developed under BEPS.[41] Second, a similar level of protection was applied in specific anti-abuse rules in the Merger Directive and the Interest and Royalties Directive. It should be emphasised that the subsequent jurisprudence of the CJEU has been adapted to the new threshold set by the ATA Directive. In the Danish beneficial ownership cases, the CJEU used the phrase "principal objective or one of its principal objectives".[42] It seems that the work of the OECD, secondary EU legislation and the global trend toward tightening measures against tax avoidance have influenced the shift in the CJEU's previous jurisprudential standard.

The objective test requires that an arrangement or a series of arrangements resulting in a tax advantage defeat the object or purpose of the applicable tax law. This means that it is enough for an arrangement to defeat either the scope of the tax law or what it was intended to achieve. Ostensibly, this means that the test has a broader application than if the lawmaker had required the two conditions be met simultaneously. However, the literature points out that because the object and purpose of taxation are closely linked, it is difficult to imagine them occurring separately.[43] In some legal orders, there are also significant doubts about the meaningfulness of transposing the object of the applicable tax law, which has a different meaning in various legal cultures.[44]

The ATA Directive uses the wording "non-genuine" instead of "artificial". However, legal scholars[45] hold that these concepts should be considered identical and

raising of the threshold of protection in the subjective test in the PPT clause has been criticised under EU law. *See* E. Kemmeren, *Where is EU Law in the OECD BEPS Discussion?*, 23(4) EC Tax Review 190 (2014), pp. 192–193; D. Beckers, L. De Broe, *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*, 26(3) EC Tax Review 133 (2017), p. 142.

[41] The approximation of the wording of the PPT clause and the EU GAAR may have been intended to avoid the accusation of incompatibility with EU law on the grounds of the disproportionality of different treatment of cross-border and domestic situations. *See* A. Báez Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test – What Have We Gained from BEPS Action 6?*, 45(6) Intertax 432 (2017), pp. 444–446. The approximation of the EU principle of abuse to the PPT clause seemed to have been foreseen by Ana Paula Dourado (A.P. 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*, 43(1) Intertax 42 (2015), pp. 56–57).

[42] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16 *N Luxembourg 1 and Others v. Skatteministeriet*, EU:C:2019:134, para. 127; Joined Cases C-116/16 and C-117/16 *Skatteministeriet v. T Danmark and Y Denmark Aps*, EU:C:2019:135, para. 100.

[43] Kuźniacki, *supra* note 38, p. 148.

[44] B. Kuźniacki, *Dekodowanie hipotezy GAAR: przesłanki intencji i sprzeczności oraz relacje między nimi, cz. 1* [Decoding the Hypothesis Underlying GAAR: Conditions of Intention and Unlawfulness and the Relationships Between Them, Part 1], 6 Przegląd Podatkowy 19 (2020), p. 34.

[45] The literature on the subject postulates that this concept should be understood in the context of the CJEU's elaborate definition of artificiality. *See* Kuźniacki, *supra* note 38, pp. 148, 155. The same understanding was suggested in the Commission's proposal – Proposal for a Council Directive of 28 January

understood in accordance with the CJEU's case law on artificiality. The artificiality test relates to an arrangement or a series of arrangements which is not genuine in light of all relevant facts and circumstances. According to Art. 6(2) of the ATA Directive, an arrangement or a series thereof shall be regarded as non-genuine to the extent that it has not been put in place for valid commercial reasons which reflect the economic reality. Under a note on the Application of the "Minimum Level of Protection",[46] the definition of a "non-genuine arrangement" does not set any minimum standard. MSs may draft their GAAR beyond what is "non-genuine", but the definition of "non-genuine" should remain unchanged. This makes sense, given that the notion of artificiality originates from CJEU jurisprudence, where the prohibition of abuse of law was recognised as a general principle of the EU. For this reason, the definition of artificiality – at least in the context of relations between MSs – should be understood as setting a maximum, rather than a minimum, standard of protection within the meaning of Art. 3 of the ATA Directive.

Finally, in the definition of "non-genuine arrangement", it is worth noting that the phrase "to the extent that" means that the arrangement may be wholly or partly artificial. Naturally, this gradation of artificiality also entails a reduced scope of the GAAR's application. For instance, if there is an artificial transfer of passive payments between genuine entities, then the GAAR will only be able to be applied to these transferred payments. In this way, the GAAR may be applied precisely, referring only to elements of an artificial nature.

3. CONSTITUTIONAL STANDARD

In 2003, the first Polish GAAR was introduced in Art. 24b of the Tax Ordinance to provide a legal basis for combating tax avoidance.[47] The GAAR read as follows:

> Tax authorities and tax inspection authorities, when deciding tax cases, shall disregard the tax consequences of legal acts if they prove that no significant benefits other than those resulting from a reduction in the amount of the tax liability, an increase in the loss, an increase in the overpayment or a tax refund could be expected from the performance of such acts.[48]

2016, *laying down rules against tax avoidance practices that directly affect the functioning of the internal market*, COM(2016) 26 final, for example, recital 9.

[46] DG TAXUD, *Note on the Application of the "Minimum Level of Protection"*, 18 March 2016, p. 3.

[47] Act of 29 August 1997 – Tax Ordinance [2021] JoL 2021, 1540 as amended.

[48] All translations from Polish into English are by the author of this article unless otherwise noted.

Due to the conciseness of the GAAR and the use of vague terms, it caused much controversy and was quickly reviewed by the Constitutional Tribunal.[49] The GAAR, as presented, was found to be incompatible with the standard of specificity of legal provisions (Art. 2, in conjunction with Art. 217 of the Polish Constitution[50]). The Tribunal made it clear that the lawmaker is entitled to enact a GAAR in principle, but that it must nevertheless follow constitutional norms. The Constitutional Tribunal set three basic conditions for declaring a GAAR compatible with the Polish Constitution:

- the premises for understanding (interpreting) a given vague term should not be determined by subjective elements;
- the use of vague terms should be accompanied by the need to give them such content as to guarantee the uniform application of law;
- the meaning of vague terms should not be determined by the authorities, as this would lead to impermissible lawmaking on the part of those authorities.

At this point, it is worth noting that the Constitutional Tribunal was not stating these criteria for the first time. It had previously referred to them as a standard in analogous rulings concerning the prohibition of abuse of rights[51] under the Civil Code.[52] In that case, however, the Tribunal found Art. 5 of the Civil Code to be consistent with the Constitution, pointing out, among other things, the key role of case law. Despite invoking the same criteria, the Tribunal adopted a completely different approach in the case of the GAAR, which justifies the claim that a certain jurisprudential standard has emerged with regard to anti-abuse regulations in tax law.

In the view of the Constitutional Tribunal, imprecise and vague statutory provisions pose a risk of violating the freedoms and rights of individuals and citizens. Legal provisions that create uncertainty regarding the rights and obligations of their addressees must be deemed incompatible with the Constitution. Such regulation fails to meet the requirement of predictability of decisions based on it, and may consequently lead to impermissible lawmaking by the authorities applying the law.

The Tribunal assessed a specific version of the anti-abuse clause that was previously in force in the Polish legal system. It explicitly stated that the very phenomenon of a normative legislative reaction to economically harmful practices – especially in the form of a general anti-abuse rule – does not raise constitutional concerns. herefore, the Tribunal did not reject the idea of counteracting abuse of law per se, but rather struck down the specific form in which it had been implemented.

[49] Polish Constitutional Tribunal, judgment of the 11 May 2004, K 4/03.
[50] Constitution of the Republic of Poland of 2 April 1997 [1997] JoL 78, 483, as amended.
[51] Polish Constitutional Tribunal, judgment of the 17 October 2000, SK 5/99.
[52] Act of 23 April 1964 – Civil Code [2024] JoL 1061 as amended.

Despite this declaration, it must be noted that the Tribunal articulated conditions for any future GAAR that, in my opinion, are overly restrictive and, in practice, preclude the creation of an effective GAAR. Firstly, the Tribunal emphasised the necessity of clarifying vague terms in such a way as to ensure uniform application of the law and to eliminate subjective interpretive elements. However, the essence of a general anti-avoidance rule lies precisely in its reliance on open-ended legal terms. Such a clause must retain flexibility to adequately respond to constantly evolving tax avoidance schemes. Excessive precision would render the provision ineffective, as taxpayers could adjust their conduct to avoid falling within its scope.

Secondly, the Tribunal took a particularly far-reaching position, asserting that vague terms must not be defined by the authorities applying the law, as this would constitute impermissible lawmaking. It explicitly rejected the notion that the interpretation of vague terms underpinning the anti-abuse clause could be developed through the evolving jurisprudence of tax authorities and administrative courts. Yet, in a democratic state governed by the rule of law, the process of applying the law – by both administrative authorities and courts – is the fundamental means by which vague terms are clarified. Tax authorities give meaning to general clauses through decision-making, and the legality of those decisions is subsequently subject to judicial review.

The Tribunal thus questioned the typical functioning of anti-abuse provisions and the role of tax authorities in shaping their meaning, without offering a coherent alternative or providing clear guidelines for constructing a constitutionally compliant, yet effective GAAR. Ensuring the highest possible degree of legal certainty for taxpayers is, of course, a fundamental value in a democratic state governed by the rule of law. In the context of anti-avoidance provisions, this objective can be achieved, for example, through robust procedural safeguards. However, constitutional guidelines should not be formulated in a way that undermines the very essence of the prohibition against abuse of law, thereby rendering the instrument ineffective in practice.

In my view, these demands were overly excessive on the lawmaker, preventing the introduction of an effective GAAR[53] and leading to widespread avoidance of

[53] *See* D. Mączyński, *Wpływ orzecznictwa Trybunału Konstytucyjnego na trwałość instytucji materialnego prawa podatkowego* [Influence of the Constitutional Tribunal's Decisions in Tax Matters on the Stability of Institutions of Substantive Tax Law], 76(3) Ruch Prawniczy, Ekonomiczny i Socjologiczny 23 (2014); E. Drozdowski, *Hydra lernejska, czyli o braku możliwości pogodzenia wyroku Trybunału Konstytucyjnego z instytucją klauzuli przeciwko unikaniu opodatkowania* [The Lernaean Hydra. On the Impossibility of Accommodating the Constitutional Tribunal's Judgment and the General Anti-avoidance Rule], 82(4) Ruch Prawniczy, Ekonomiczny i Socjologiczny 187 (2020), p. 198; E. Prejs, *Nadużycie prawa podmiotowego w prawie podatkowym* [Abuse of Subjective Rights in Tax Law], 20 Przegląd Podatkowy 29 (2006), p. 37; K. Radzikowski, *Obejście prawa podatkowego w najnowszym orzecznictwie sądów administracyjnych* [Tax Law Evasion in Recent Judgments of Administrative Courts], 6 Przegląd Podatkowy 10 (2010), p. 11.

direct taxes during the twelve-year absence of a GAAR in the Polish legal system following the Constitutional Tribunal's judgment. In this situation, the only tool to counteract tax avoidance was through changes in tax regulations, which significantly complicated the tax system. Contrary to the intentions of the Constitutional Tribunal, this did not enhance legal certainty. As a result, no GAAR was enacted in Poland until 2016.

In the following sections of this article, I will argue that these unworkable requirements set by the Constitutional Tribunal – although grounded in a constitutionally protected value – left a lasting, negative imprint on the current Polish approach to anti-avoidance legislation.

4. IMPLEMENTATION OF ART. 6 OF THE ATA DIRECTIVE

The Polish lawmaker faced a difficult challenge: to implement a GAAR as set out in EU legislation while following the standards set by the Constitutional Tribunal. To implement the judgment of the Constitutional Tribunal, the lawmakers decided on numerous legal solutions aimed at increasing legal certainty and securing taxpayer rights. Tax proceedings in cases of tax avoidance and reversed effects of tax avoidance were closely regulated. Also, the Council for the Prevention of Tax Avoidance was created, which is an independent body tasked with giving nonbinding opinions on the appropriateness of the application of GAAR or measures limiting treaty benefits in individual cases. The Council also gives opinions on draft tax laws and amendments to tax laws contained in other normative acts on the prevention of tax avoidance. In addition, a taxpayer may apply to the head of the National Tax Administration for a "safeguard opinion" (a type of advance tax ruling), which protects the taxpayer from the application of the GAAR in a particular scope.

While procedural safeguards play an important role in the application of the law, the correct implementation of the Constitutional Tribunal's judgment is primarily dependent on the construction of the GAAR itself. Therefore, it is crucial to examine whether the concept of abusiveness has been properly transposed into the Polish legal order and to set the current form of the GAAR in the context of constitutional standards. The first version of the 2016 GAAR was largely based on the Commission Recommendation of 6 December 2012 on aggressive tax planning, and the next version under consideration in this article was intended to implement the ATA Directive.

The GAAR regulated in Art. 119a(1) of the Tax Ordinance reads as follows:

> An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its

provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance).

Also, in the case of a genuine activity test, the Polish specified that an arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons (Art. 119c(1) of the Tax Ordinance). In the case of a subjective test, the Polish law states that the assessment of whether gaining a tax advantage was (one of) the main objective(s) of an arrangement shall take into consideration the economic objectives of the arrangement indicated by the party (Art. 119d of the Tax Ordinance).

It is worth noting that, under the Polish legal order, the literal interpretation[54] plays a key role in the interpretation of legal provisions – especially in the case of norms of an invasive nature. Thus, the assessment of the proper transposition of EU provisions should largely refer to the text of the law. The assessment will be carried out separately for each of the tests covered in the GAAR: genuine activity, objective tests and subjective tests.

5. GENUINE ACTIVITY TEST

Art. 6 of the ATA Directive	Art. 119a (1) of the Tax Ordinance
1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance). Art. 119c (1) of the Tax Ordinance An arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons.
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

[54] R. Mastalski, *Miejsce wykładni językowej w procesie stosowania prawa podatkowego* [The Role of Literal Interpretation in the Application of Tax Law], 8 Przegląd Podatkowy 7 (2007); J. Brolik, *Wykładnia prawa podatkowego oraz jej determinanty* [Interpretation of Tax Law and its Determinants], 3 Zeszyty Naukowe Sądownictwa Administracyjnego 54 (2014), p. 56.

Art. 6(1) of the ATA Directive requires the GAAR to be applied to an arrangement or a series of arrangements which are not genuine in light of all relevant facts and circumstances. Art. 6(2) of the ATA Directive defines an arrangement or a series thereof as non-genuine to the extent that it has not been put in place for valid commercial reasons which reflect the economic reality. The Polish lawmaker chose to use the term "artificiality" used by the CJEU rather than the term "non-genuine" derived from Art. 6 of the ATA Directive. Like the ATA Directive, the Polish law also creates a definition of artificiality. However, this definition differs significantly from Art. 6(2) of the ATA Directive. According to Art. 119c(1) of the Tax Ordinance:

> An arrangement shall not be artificial if, based on existing circumstances, it is necessary to assume that an entity acting reasonably and pursuing lawful purposes would adopt that course of action predominantly for justified economic reasons. The reasons referred to in the first sentence shall not include the objective of gaining a tax advantage, contrary to the subject or objective of tax law or its provision.

Firstly, the definition in the ATA Directive is positive, whereas the one in Art. 119c of the Tax Ordinance is negative. Thus, from Art. 6(2) of the ATA Directive, one can determine what artificiality is, whereas from the Polish definition, one only learns what artificiality is not. Consequently, decoding the concept of artificiality is only possible by applying *argumentum a contrario*. The introduction of a negative definition creates the danger of expanding the scope of the concept of artificiality and introduces uncertainty for the taxpayer regarding its meaning.

Secondly, two new standards are introduced in the Polish definition: an "entity acting reasonably" and an "entity pursuing lawful purposes", absent from the definition of artificiality set in Art. 6(2) of the ATA Directive. It is difficult to understand why the Polish lawmaker added these elements to the definition of artificiality. The lawmaker introduced two additional standards to assess a taxpayer's course of action. However, due to their vagueness, it is difficult to assess whether these modifications raise or lower the minimum standard of protection. The situation does, however, lower the taxpayer's legal certainty.

The concept of an "entity acting reasonably" is a general clause referring to the standard of reasonableness. It is possible that the Polish lawmaker was inspired by British solutions,[55] where there is a so-called "double reasonableness" test. However,

[55] In the literature there are views that the double reasonableness test in the British GAAR sets a high threshold of abuse – *see* Kuźniacki, *supra* note 38, p. 144. Moreover, it serves as a mean to objectify the UK GAAR – *see* J. Freedman, *The UK General Anti-Avoidance Rule: Transplants and Lessons*, 73(6–7) Bulletin for International Taxation (2019), p. 336; D. Weber, *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 versus the EU Principle of Legal Certainty and the EU Abuse of Law*, 10(1) Erasmus Law Review 48 (2017), p. 49. However, there are also opposing voices among legal scholars pointing out

it is worth noting that the "double reasonableness" test in British law refers not to the concept of artificiality, but to the entire concept of abusiveness. The "double reasonableness" test requires British tax authorities to show that the arrangements "cannot reasonably be regarded as a reasonable course of action". This sets a high threshold for applying the British GAAR and creates a significant taxpayer safeguard. The same cannot be said of the Polish solution, which makes the concept of artificiality difficult to understand because the rationality test is a well-established standard in British law, while it is foreign to Polish legal culture.

The second standard – an "entity pursuing lawful purposes" – is even more problematic, as it introduces a concept that is completely foreign to Polish legal culture. Polish legal culture is familiar with the concept of the "purpose of law" or the "purpose of the provision", which are often combined with purposive interpretation and are part of the objective test in the GAAR. However, it is difficult to understand what "lawful purposes" are and how a catalogue of them could be established.[56] It is possible to speak of a lawful action or an action contrary to the purpose of a provision, but purpose itself cannot be lawful or unlawful. Consequently, the second standard introduces significant problems in understanding it.

The main part of the definition of artificiality is similar in content, although again some differences can be discerned. While the ATA Directive refers to valid commercial reasons which reflect the economic reality, the Polish regulation refers to a course of action adopted predominantly for justified economic reasons. It can be assumed that despite the different wording, these indicate similar regulatory content. An important distinction here is the use of the term "predominantly", which broadens the definition of artificiality in comparison to the European equivalent. The term "predominantly" implies that reasons other than justified economic reasons (tax reasons) reflecting the economic reality must be less significant than commercial reasons. The European GAAR requires only valid commercial reasons reflecting the economic reality; it does not specify what the appropriate balance between valid commercial reasons and tax reasons should be for an arrangement to be considered non-genuine.

In this way, the Polish definition of artificiality unjustifiably deviates from the standard developed by the ATA Directive. Perhaps the use of the phrase "predominantly" was intended as an attempt to transpose the phrase "to the extent" appearing in Art. 6(2) of the ATA Directive. If so, this would be an incorrect transposition of

its shortcomings. Firstly, it is said to be unnecessary, similar to other subjective tests. Secondly, it is seen as too vague, giving too much discretion to tax authorities and courts. Thirdly, it may lead to inequality in the application of the law due to its subjective nature. *See* M. Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU*, Linde Verlag, Wien: 2016, p. 122. *See also* Kemmeren, *supra* note 40, p. 190.

[56] A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe* [Taxes and Tax Law], Wolters Kluwer, Warszawa: 2016, pp. 350–356; D. Birk, *Das Leistungsfähigkeitsprinzip als Maßstab der Steuernormen. Ein Beitrag zu den Grundfragen des Verhältnisses Steuerrecht und Verfassungsrecht*, Deubner, Köln: 1983, pp. 67–70.

the provisions of the ATA Directive. As explained above, the phrase "to the extent that" means that the arrangement may be wholly or partly artificial, and the GAAR should be applied accordingly to the degree of artificiality.

The Note on the Application of the "Minimum Level of Protection" clearly states that the definition of a "non-genuine arrangement" was not drafted as a minimum standard and should be complied with as such, where EU law prescribes that the impact of the GAAR be limited to "non-genuine" arrangements. According to the note, it is possible to enlarge the scope of the GAAR beyond what is "non-genuine" (e.g. by capturing arrangements where there is some element of commercial substance), but the definition of "non-genuine" should remain unchanged. Naturally, the note itself cannot constitute a binding interpretation of EU law. However, given that this definition reflects a well-established line of CJEU case law, it must be agreed that the modification is not permissible.

Considering the above, the modification of the definition introduced in the Polish law is incompatible with EU law. Firstly, the Polish lawmaker modified the definition of a "non-genuine arrangement" of what is prohibited. Secondly, the Polish lawmaker may have narrowed the definition of artificiality, which was drafted as a minimum standard. As mentioned above, the amendments in the Polish law had the potential to broaden the scope of the law. This was achieved through the negative definition of a "non-genuine arrangement" and the use of the term "predominantly". Additionally, the standards for an "entity acting reasonably" and an "entity pursuing lawful purposes" were ambiguous.

The incorrect transposition of Art. 6 of the ATA Directive, through the definition of artificiality, can be explained by two conflicting tendencies: the attempt to comply with the standards derived from the case law of the Constitutional Tribunal and the need to preserve the effectiveness of the regulations.

The attempt to meet the requirements of the Constitutional Tribunal was reflected in the expansion of the negative definition of artificiality, for example, by introducing the standards of an "entity acting reasonably" and an "entity pursuing lawful purposes". This measure was intended to give the appearance of greater precision in the GAAR, which was a fundamental requirement of the Constitutional Tribunal. One cannot help but notice that the additional elements introduced into the definition of artificiality were only meant to give the appearance of meeting constitutional standards. This is because specifying the anti-avoidance rule contradicts its nature and would make it impossible to apply in practice. So as not to limit the scope of the definition of artificiality too much, the additional defining elements are composed of vague terms.

A similar function – namely, to give the appearance of greater precision in the GAAR – is served by the list of fact patterns that may indicate artificial arrangements

found in Art. 119c(2) of the Tax Ordinance. However, this list does not constitute a positive definition of artificiality; rather, it merely indicates that the presence of these fact patterns may suggest that a course of action was artificial, without determining it itself. The listed fact patterns are diverse – some are significantly more likely to suggest artificiality than others (e.g. "elements leading to a result identical or similar to the state existing before the operation was carried out" versus "a pre-tax profit that is negligible in comparison to the tax benefit which does not directly arise from a genuinely incurred economic loss").

For these reasons, it cannot be said that this list affects the normative content of the concept of artificiality. Instead, it should be regarded as a form of interpretative guidance. The list is not discussed in detail in this publication due to its limited scope and lack of relevance to the assessment of the correctness of the transposition of Art. 6 of the ATA Directive. On the other hand, there was a clear tendency on the part of the Polish lawmaker to maintain the effectiveness of the GAAR. This is evidenced by the creation of the negative definition of artificiality and by the addition of the term "predominantly" in the criterion of justified economic reasons.

As a result, the negative definition of artificiality in the Polish law is significantly more complex and difficult to interpret than its EU counterpart. Therefore, the Polish definition of artificiality must be deemed inconsistent with the definition in Art. 6(2) of the ATA Directive.

6. THE OBJECTIVE TEST

Art. 6 of the ATA Directive	Art. 119a(1) of the Tax Ordinance
For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine [...].	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance).
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

Although the implementation of the objective test did not prove to be as complex a challenge as the artificiality test, it nevertheless also generated significant controversy. The key problem turned out to be the proper translation of Art. 6 of the ATA Directive so that it would be understood by the recipient of a legal text embedded in Polish legal culture. According to Art. 6 of the ATA Directive, the objective test obliges a MS to ignore a (series of) arrangement(s) which, having been put in place primarily for obtaining a tax advantage, defeats the object or purpose

of the applicable tax law. The problems in implementation concerned both the phrase "the object or purpose" and the phrase "applicable tax law".

The transposition of the phrase "the object or purpose" has shown that a literal translation of the directive may give rise to numerous interpretative doubts. The problem boils down to the fact that Polish legal science and practice use the concepts of both "the purpose of the law" and "the purpose of the provision." However, legal science is unfamiliar with the phrase "object of tax law or its provision", which is associated with the obligatory structural elements of a tax: its subject, object, base and rate.

Some have criticised the phrase "object of tax law or its provision" as being legislatively incorrect and incomprehensible.[57] Others have stated that this formulation can be rationalised by understanding it to be "the object of taxation according to (a provision of) the law."[58] Also, it was pointed out that it is an artefact of the legislative process and an established expression found in English legal culture.[59] Without questioning the latter view, it should be stated that a concept alien to Polish legal culture should not appear in the transposition of tax law.

The phrase "applicable tax law" was transposed as "tax law or its provision". According to Polish legal culture, the use of the conjunction "or" means that it is sufficient for one of the listed conditions to be met, i.e. either an advantage contrary to the object or purpose of tax law or an advantage contrary to the object or purpose of a tax law provision. This raises the concern that this condition will always be fulfilled, as the primary purpose of any tax law is fiscal. It has been argued by legal scholars that fiscal purpose is inherent in every law and therefore cannot be invoked in the application of a GAAR. Thus, the purpose of a law is to achieve such a state of affairs that the structural principles of the law are fulfilled – that what was to be taxed is taxed.[60] Other academics, however, do not accept this understanding of the premise and consider the transposition erroneous.[61] In their opinion, the correct

[57] B. Brzeziński, M. Kalinowski, A. Olesińska (eds.), *Ordynacja podatkowa. Komentarz praktyczny* [Tax Ordinance: A Practical Commentary], Ośrodek Doradztwa i Doskonalenia Kadr, Gdańsk: 2017, p. 632; M. Guzek, M. Stefaniak, *Klauzula przeciwko unikaniu opodatkowania. Komentarz praktyczny* [General Anti-avoidance Rule: A Practical Commentary], C.H. Beck, Warszawa: 2018, ch. II.1.2.2; M. Kondej, *Sprzeczność korzyści z przedmiotem i celem przepisu ustawy podatkowej jako przesłanka stosowania klauzuli ogólnej przeciwko unikaniu opodatkowania* [Tax Benefit Being Contrary to the Object and Purpose of the Applicable Provision of the Law as Prerequisite for Polish GAAR Application], 12 Polski Przegląd Nauk Społecznych 27 (2018).

[58] H. Filipczyk, *„Sprzeczność z przedmiotem lub celem ustawy podatkowej lub jej przepisu" jako klauzulowa przesłanka unikania opodatkowania* ["Defeating the Object or Purpose of a Tax Act or its Provision" as a Determinant of Tax Avoidance under GAAR], 3 Przegląd Podatkowy 28 (2020), p. 29.

[59] *Ibidem*.

[60] *Ibidem*, p. 30.

[61] Kuźniacki, *supra* note 44, p. 34; A. Ladziński, *Zmiany w ogólnej klauzuli przeciwko unikaniu opodatkowania – powrót do przeszłości* [Changes in the General Anti-avoidance Rule: Back to the Past], 1 Przegląd Podatkowy 22 (2019), p. 26.

transposition of the directive should consist of the enactment of a law with the wording "tax law and its provision", which – somewhat paradoxically – existed before the amendment of the legislation in question. The correct approach to finding the object or purpose of the applicable tax law is to start with a specific provision and end with the tax law as a whole.[62] For this reason, the Polish transposition may raise doubts about compliance with Art. 6 of the ATA Directive.

In this case, once again, the source of the controversial phrase "tax law or its provision" can be traced to the lawmakers' pursuit of the effectiveness of the GAAR. The insertion of the conjunction "or" increases the likelihood of a positive verification of the objective test, and thus the application of the GAAR.

7. THE SUBJECTIVE TEST

Art. 6 of the ATA Directive	Art. 199a(1) of the Tax Ordinance
For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine [...].	An arrangement shall not result in gaining a tax advantage if the gaining of that advantage, contrary in the circumstances concerned to the object or purpose of tax law or its provision, was the main or one of the main purposes for applying that arrangement, and the course of action was artificial (tax avoidance). Art. 119d of the Tax Ordinance The assessment of whether gaining a tax advantage was the main or one of the main objectives of putting into place an arrangement shall be made, taking into consideration the economic objectives of the arrangement indicated by the party.
The underlined text highlights the differences between the Polish law and Art. 6 of the ATA Directive.	

The transposition of the subjective test is far less controversial than that of the other tests. The academic discourse has mainly focussed on whether the literal transposition of the ATA Directive was appropriate in the context of a different line of jurisprudence from the CJEU. As mentioned above, the CJEU used to set the threshold at a sole or predominant purpose. "For this reason, the question arose whether the CJEU case law should be regarded as a general principle of EU law, in which case the provisions of the ATA Directive, as secondary law, would be in conflict with it..[63] Such doubts seem to have been dispelled after the new CJEU rulings in the Danish beneficial ownership cases, and the transposition should now

[62] Kuźniacki, *supra* note 38, p. 149.

[63] A. Olesińska, *Is Polish GAAR Compatible with the Directive 2016/1164 (ATAD)?*, Toruński Rocznik Podatkowy 104 (2017), pp. 111–16; Ladziński, *supra* note 61, p. 24; Kuźniacki, *supra* note 44, pp. 27–28.

be considered to be in compliance with both secondary law and CJEU case law in this respect. The shift in the CJEU's standard should be interpreted as establishing a maximum level of protection of the tax base. Therefore, similarly to the artificiality test, MSs do not appear to have the discretion to raise this standard further, in accordance with Art. 3 of the ATA Directive. It is worth noting that the Polish lawmaker has attempted to specify a subjective test, as opposed to the EU lawmaker. According to Art. 119d of the Tax Ordinance, the assessment of whether gaining a tax advantage was (one of) the main objective(s) of an arrangement shall consider the economic objectives of the arrangement as indicated by the party. In principle, it seems that this provision is largely neutral and expresses the obvious right of the taxpayer to indicate the objective behind the arrangement. Nevertheless, like any superfluous provision, it may give rise to some doubts of interpretation. Tax law has both fiscal and non-fiscal purposes. Thus, if interpreted narrowly, the provision could be seen as limiting the taxpayer's rights to indicate non-economic purposes of their activity, e.g. charitable purposes related to the use of a tax preference.[64]

As in the case of the artificiality test, the lawmaker went beyond the literal wording of the ATA Directive and undertook to further specify it in Art. 199d of the Tax Ordinance. This was an action that, in principle, should not change the understanding of the subjective test or the taxpayer's rights, but may create unnecessary interpretative doubts. The Polish legislators tried to reconcile the tendencies outlined in beginning ofthis article. The first is to correctly transpose Art. 6 of the ATA Directive, and the second is to meet the requirements of specificity arising at least ostensibly from the jurisprudence of the Constitutional Tribunal, without limiting the powers of the tax administration in the fight against tax avoidance.

8. EU LAW PERSPECTIVE

A failure to implement a directive correctly gives rise to certain obligations under EU law. First, if possible, the tax authorities are obliged to make a directive-compliant interpretation of the national regulations. A directive, by itself and without national implementation measures, cannot create obligations for individuals.[65] If this is not possible, then the authority should disregard the national regulation and

[64] M. Guzek, M. Stefaniak, *Klauzula przeciwko unikaniu opodatkowania* [General Anti-avoidance Rule], 11 Monitor Podatkowy 24 (2016), p. 26.

[65] *See e.g.* Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV*, EU:C:1987:431, paras. 12–14; Case C-168/95 *Criminal proceedings against Luciano Arcaro*, EU:C:1996:363, paras. 41–42; Case C-321/05 *Hans Markus Kofoed v. Skatteministeriet*, EU:C:2007:408, para. 45.

apply the directive directly, under the condition that the provisions of the directive are unconditional and sufficiently precise.[66]

The primacy and direct application of EU law is based on the principles of efficiency and loyalty.[67] The directive-compliant interpretation of the national regulation in connection with the incorrect implementation of Art. 6 of the ATA Directive is questionable in this context, and it should be considered on a case-by-case basis. For example, as indicated above in the case of the artificiality test, the Polish law both potentially expanded and narrowed the definition of artificiality in various instances. A directive-compliant interpretation of the expansion of the artificiality test is possible because it narrows the definition and, consequently, does not impose additional obligations on the taxpayer. The opposite is the case if the definition is narrowed: a directive-compliant interpretation would lead to the imposition of new obligations on the taxpayer.

Considering recent CJEU case law in the Danish beneficial ownership cases, this line of conduct should be modified. Since the prohibition of abuse of law is a general principle of the EU, it seems that the directive-compliant interpretation of the national regulation should prevail, even if it involves the imposition of new obligations on the taxpayer. The taxpayer should therefore expect that the GAAR, as in Art. 6 of the ATA Directive, will be applied in any situation.

It remains an open question whether the directive-compliant interpretation should apply only to the extent that the GAAR is harmonised by the ATA Directive (corporate taxation) or perhaps also to other areas of Polish tax law. According to the well-established doctrine in the *Dzodzi* line of cases,[68] the CJEU's jurisdiction to give a preliminary ruling is not restricted to the scope of Community law, but also extends to cases governed by national law that refer to certain Community provisions or concepts. Assuming that this doctrine also applies to the GAAR,[69]

[66] Case 8/81 *Ursula Becker v. Finanzamt Münster-Innenstadt*, EU:C:1982:7. *See also* Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, EU:C:1991:4, para. 11; Case C-62/00 *Marks & Spencer plc v. Commissioners of Customs & Excise*, EU:C:2002:435, para. 25; Case C-138/07 *Belgische Staat v. N.V. Cobelfret*, EU:C:2009:716, para. 58.

[67] Case C-6/64 *Costa v. ENEL*, EU:C:1964:66; C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

[68] Opinion of Advocate General Mancini to Case C-166/84 *Thomasdünger GmbH v. Oberfinanzdirektion Frankfurt am Main*, EU:C:1985:208; Opinion of Advocate General Darmon to Joined Cases C-297/88 and C-197/89 *M. Dzodzi v. Belgium*, EU:C:1990:274, paras. 8–16; Opinion of Advocate General Darmon to Case C-231/89 *Krystyna Gmurzynska-Bscher v. Oberfinanzdirektion* Köln, EU:C:1990:276, paras. 5–14; Opinion of Advocate General Tesauro to Case C-346/93 *Kleinwort Benson Ltd. v. City of Glasgow District Council*, EU:C:1995:85, paras. 16–28; Opinion of Advocate General Jacobs to C-130/95 *Bernd Giloy v. Hauptzollamt Frankfurt am Main-Ost*, EU:C:1996:332, paras. 24–82; Opinion of Advocate General Jacobs to Case C-306/99 *Banque Internationale pour l'Afrique Occidentale SA (BIAO) v. Finanzamt mr GroBunternehmen in Hamburg*, EU:C:2001:608, paras. 40–71.

[69] For a discussion of various applications of the Dzodzi doctrine depending on how the GAAR is implemented, *see* A. Báez, *A PAN-European GAAR? Some (Un)Expected Consequences of the Proposed EU Tax Avoidance Directive Combined with the Dzodzi Line of Cases*, 2 British Tax Review 143 (2016).

the directive-compliant interpretation should be applied not only to corporate taxation, but also to other types of tax covered by the GAAR.

CONCLUSION

Poland has faced considerable difficulties transposing Art. 6 of the ATA Directive, particularly regarding key elements such as the genuine activity and objective tests. The deviations introduced by the Polish lawmaker share a common trait: an expansion of regulation that reflects an attempt to align with the Constitutional Tribunal's standards. However, these efforts have created a stark contradiction with the case law of the CJEU and the Directive's provisions, most notably in the artificiality test. By prioritising the Constitutional Tribunal's stringent requirements, Poland has undermined the principle of effectiveness of EU law, making the application of the GAAR outlined in Art. 6 significantly more challenging and less effective.

The Polish lawmaker deliberately avoided fully implementing the Constitutional Tribunal's judgment. Instead, it adopted vague expressions and negative definitions, only giving the appearance of compliance with constitutional standards. This approach stemmed from the fact that the full implementation of the judgment would have obstructed the introduction of an effective GAAR, including the one envisaged in Art. 6 of the ATA Directive. To reconcile these conflicting objectives, changes were made to the objective test and the artificiality test so as to enhance the GAAR's effectiveness. However, the tension between these two opposing goals – ensuring GAAR effectiveness and adhering to the Constitutional Tribunal's judgment – has resulted in the Polish GAAR being inconsistent with Art. 6 of the ATA Directive. As a consequence, the Polish GAAR is significantly more difficult to interpret than its European equivalent.

This situation stems from a fundamental clash between two distinct legal cultures. The Polish constitutional tradition gives priority to the legal certainty of the individual taxpayer over the prevention of abuse of law. This is achieved through the primacy of literal interpretation and the extensive requirements imposed by the Polish Constitutional Tribunal on the GAAR. The European legal acquis, with the case law of the CJEU on the prohibition of abuse of rights and a different approach to purposive interpretation, has moved in the opposite direction. The result of this clash of legal cultures is that there are problems correctly transposing Art. 6 of the ATA Directive in Poland.

In the EU, there is a clear consensus – both politically (embodied in the ATA Directive) and legally (as demonstrated by the Danish beneficial ownership cases) – that the GAAR is an essential tool for combating tax avoidance. However, its implementation is not without challenges. The GAAR inherently introduces

a degree of legal uncertainty, making it vital to avoid unnecessary regulations that exacerbate this uncertainty – an issue evident in the Polish GAAR. Firstly, the incorrect transposition of the Directive into Poland's legal framework has resulted in significant interpretative challenges for taxpayers navigating the law's provisions. This is particularly problematic in the context of Poland's legal tradition, which heavily relies on linguistic interpretation, leaving average taxpayers ill-equipped to adopt a directive-compliant approach. Secondly, the *Dzodzi* doctrine further complicates the landscape by raising questions about the extent to which European law should apply – whether solely to corporate tax or also to other taxes within the GAAR's scope. If the latter applies, a directive-compliant interpretation would need to extend to these additional taxes. Domestically, this scenario clashes with the constitutional principles of legal certainty and the specificity of legal provisions.

In conclusion, the case law of the Polish Constitutional Tribunal has significantly shaped the current form of the Polish GAAR – largely to its detriment. The attempt to balance legal certainty with effectiveness has resulted in an excessively complex and, in parts, misaligned implementation of Art. 6 of the ATA Directive. The Polish experience illustrates a broader lesson: not every legal instrument – particularly in the area of tax law – must elevate legal certainty above all other principles, including the prohibition of abuse. Taxpayers engaging in aggressive tax planning cannot, and arguably should not, expect complete certainty regarding the outcomes of their arrangements. This does not mean that legal safeguards should be abandoned; on the contrary, institutional and procedural mechanisms play a crucial role in ensuring fairness and predictability. Paradoxically, however, the Polish GAAR – through its overregulation and technical intricacy – offers less legal certainty than its more balanced and functional European counterpart.