

Max Velthoven

The General Anti-Abuse Rule of Article 6 of the EU Anti-Tax Avoidance Directive

IBFD DOCTORAL SERIES

82

The General Anti-Abuse Rule of Article 6 of the EU Anti-Tax Avoidance Directive

Why this book?

This book is a thorough study of an important new phenomenon in EU tax law: the general anti-abuse rule of article 6 of the EU Anti-Tax Avoidance Directive (ATAD GAAR). The book provides a historical account of the evolution of the directive, situating its emergence in the context of the financial crisis and subsequent tax reform initiatives. It explores how the ATAD GAAR was developed as part of these initiatives.

The ATAD GAAR aims to address tax avoidance practices that, while legally compliant based on the wording of corporate tax law, ultimately undermine the object and purpose of the law. Member States are required to incorporate the ATAD GAAR into their national tax systems. This book evaluates these requirements and explores the wider impacts on Member States' tax systems.

This book spans issues associated with the ATAD GAAR, such as legal interpretation, national sovereignty and practicalities around enforcement. It discusses how the ATAD GAAR is the codification and expansion of existing anti-abuse concepts in EU law and considers future developments in this area. Specific attention is paid to the Dutch implementation of the provision. All of this makes this comprehensive work a valuable resource for scholars, legal practitioners and policymakers.

A key novelty of this study is its approach to legal research, which builds on the philosophies of Karl Popper and the physicist David Deutsch, often referred to as "critical rationalism". This school of thought strongly upholds Socrates' motto of "I know that I know nothing" and seeks to apply it to all of modern science. The innovative approach of this book is most clearly employed in its later parts but can be felt throughout. A pleasant result of the book's no-nonsense philosophy is that many readers find it a surprisingly accessible read on a topic which may seem rather tax-technical at first glance.

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Max Velthoven

This book is based on the thesis submitted for a doctoral degree
at the University of Amsterdam



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Table of Contents

Acknowledgements	xv
List of Abbreviations	xvii
Chapter 1: Introduction	1
1.1. What is the research problem?	7
1.1.1. An introduction to general anti-abuse rules	7
1.1.2. The research topic	9
1.1.3. The research problem	13
1.1.4. Aim and approach of the research	16
1.1.5. Overview of the research	24
Chapter 2: The History of the ATAD GAAR	29
2.1. A brief introduction to the 2008 financial crisis and its impact in Europe	31
2.2. Momentum for international tax reform	33
2.2.1. The OECD BEPS project	33
2.2.2. Momentum for tax reform in the EU	35
2.2.3. BEPS in the EU: The ATAD	37
2.3. Prior attempts to harmonize GAARs within the European Union	38
2.3.1. The early days: The 1975 proposal and subsequent proposals	38
2.3.2. The EU Code of Conduct Group for Business Taxation	38
2.3.3. The Commission's recommendations	39
2.3.4. The Commission's C(C)CTB proposals and the GAAR in the EU Parent-Subsidiary Directive	40
2.4. The process that resulted in the adoption of the ATAD GAAR	42
2.4.1. A short history of the ATAD	42
2.4.1.1. The start	42
2.4.1.2. Overall reception and controversial provisions	43
2.4.1.3. The fastest direct tax directive?	44
2.4.1.4. Adoption	46

2.4.2.	The ATAD GAAR	46
2.5.	Conclusion	48
Chapter 3:	EU Law as It Stood Prior to the ATAD GAAR	51
3.1.	General principles and other related concepts in EU law	54
3.1.1.	What empowers the CJEU to bring principles inside the EU legal order?	55
3.1.2.	What is the source of general principles?	55
3.1.3.	Why is there a need for general principles?	57
3.1.4.	When does a concept qualify as a general principle?	58
3.1.4.1.	The first requirement: Generality	58
3.1.4.2.	The second requirement: Weight	59
3.1.4.3.	The third requirement: Non-conclusiveness and minimum context	60
3.1.5.	Interim conclusion: General principles of EU law	60
3.2.	The debate on the prohibition of abuse of law in European (tax) law	61
3.3.	Is the concept of the prohibition of abuse of law a general principle of European (tax) law?	64
3.3.1.	The general/interpretative debate: A false dichotomy?	64
3.3.1.1.	Introduction to the dichotomy	64
3.3.1.2.	De la Feria's view	64
3.3.1.3.	Critique of the dichotomy	65
3.3.1.4.	Conclusion	66
3.3.2.	The first challenge: The role of principles	66
3.3.2.1.	Introduction to Alexy's theory on principles and rules	67
3.3.2.2.	Gaining understanding through collision	68
3.3.3.	The anti-abuse concept as the outcome of the balancing of principles	71
3.3.4.	The second challenge: Constitutional constraints	74
3.3.4.1.	Introduction to Leczykiewicz' constitutional critique	74
3.3.4.2.	<i>3M</i>	75
3.3.4.3.	Critique of <i>Cussens</i>	79
3.4.	Conclusion	81

Chapter 4:	The Changes Brought by the ATAD GAAR	85
4.1.	The directive as a legal instrument of EU law	86
4.1.1.	Primary and secondary legislation	86
4.1.2.	Directives: An introduction	87
4.1.3.	Directives and horizontal/vertical direct effect	89
4.1.4.	Indirect effect: The interpretation of directives and of national law	90
4.1.5.	Conclusion	91
4.2.	Alignment with the existing anti-abuse concept	92
4.2.1.	The ATAD GAAR provision	94
4.2.1.1.	Article 6 ATAD	94
4.2.1.2.	The preamble to the ATAD GAAR, paragraph 11	94
4.2.1.3.	Article 1 ATAD	95
4.2.1.4.	The preamble to Article 1 ATAD, paragraph 4	95
4.2.1.5.	Article 3 ATAD	95
4.2.1.6.	“For purposes of calculating the corporate tax liability”	95
4.2.1.7.	“Shall ignore an arrangement or a series of arrangements”	96
4.2.1.8.	“For the main purpose or one of the main purposes of obtaining a tax advantage”	98
4.2.1.9.	“That defeats the object or purpose of the applicable tax law”	99
4.2.1.10.	“Are not genuine having regard to all relevant facts and circumstances”; “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”	101
4.2.1.11.	“Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law”	102
4.2.2.	Applications of the ATAD GAAR that restrict the freedoms	103
4.2.3.	Conclusion and visualization of the alignment	105
4.3.	The ATAD GAAR operates as a rule, not as a principle	107
4.3.1.	Back to Alexy's theory	107
4.3.2.	Implications for the ATAD GAAR	109
4.3.3.	Conclusion	110

4.4.	Interaction between the tests of the ATAD GAAR	110
4.4.1.	Introduction	110
4.4.2.	Deeper dive into the tests of the anti-abuse concept	111
4.4.2.1.	Doctrinal issues in the anti-abuse test	111
4.4.2.2.	The railroad theory	113
4.4.2.3.	IJzerman's theory of the dialectical process	115
4.4.2.4.	All observations are theory laden	116
4.4.2.5.	The dialectical process of the anti-abuse test	117
4.4.3.	Conclusion	122
4.5.	The CJEU and the ATAD GAAR	122
4.5.1.	Introduction	122
4.5.2.	Level of involvement of the CJEU	124
4.5.2.1.	Scenario 1: No competency whatsoever	125
4.5.2.2.	Scenario 2: The final verdict	127
4.5.2.3.	Scenario 3: The checklist approach	128
4.5.2.4.	Scenario 4: General rules and indicators of abuse	129
4.5.3.	Conclusion	135
4.6.	Is the ATAD GAAR a minimum requirement or a complete harmonization of GAARs?	136
4.6.1.	Introduction	136
4.6.2.	Policy goal of the ATAD GAAR	136
4.6.3.	Article 3 ATAD and the overall setup of the ATAD	138
4.6.4.	Interim conclusion	140
4.6.5.	When does EU law require consistent interpretation?	141
4.6.6.	Short digression: The scope of EU law and the CJEU's mandate	143
4.6.7.	Conclusion	144
4.7.	Timing, transactions, taxes and taxpayers	144
4.7.1.	Introduction	144
4.7.2.	Timing	145
4.7.2.1.	Direct effect	145
4.7.2.2.	Indirect effect	147
4.7.3.	Taxes	148
4.7.3.1.	Taxes in scope of the ATAD GAAR	148
4.7.3.2.	Taxes relevant for the avoidance motive	151
4.7.3.3.	Expansion of the CJEU's jurisdiction to cases without nexus with EU law	153
4.7.3.4.	What is the demarcation line between the prevention of abuse and "regular" tax law?	163

4.7.3.5.	Conclusion	164
4.7.4.	Taxpayers and third parties	165
4.7.4.1.	Introduction	165
4.7.4.2.	The ATAD GAAR and third-party transactions	166
4.7.4.3.	VAT case law	167
4.7.4.4.	Conclusion	168
4.7.5.	The nuclear option: Can taxpayers benefit from the GAAR?	168
4.7.5.1.	Introduction	168
4.7.5.2.	Literal reading of the GAAR	169
4.7.5.3.	Theoretical foundation	171
4.7.5.4.	Alternative sanction	172
4.7.5.5.	Conclusion	173
4.8.	Who can and who is obliged to invoke the ATAD GAAR?	173
4.8.1.	Introduction	173
4.8.2.	Tax authorities	174
4.8.3.	The judiciary	176
4.8.4.	Conclusion	177
4.9.	The ATAD GAAR and state aid	178
4.9.1.	Introduction	178
4.9.2.	The <i>Engie</i> case	180
4.9.2.1.	Introduction to fact pattern	180
4.9.2.2.	Decision by the European Commission	182
4.9.2.3.	The General Court's judgement	184
4.9.2.4.	Criticism of the Commission's decision and the General Court's ruling	185
4.9.2.5.	Conclusion of the Advocate General to the Court of Justice	186
4.9.3.	The CJEU's final verdict in <i>Engie</i>	187
4.9.4.	Does the ATAD GAAR limit the relevance of the <i>Engie</i> decision?	189
4.9.5.	Amount to be recovered	193
4.9.6.	Conclusion	194
4.10.	Conclusion	195

Chapter 5: Fraus Legis as the Dutch Implementation of the ATAD GAAR	197
5.1. The Dutch concept of fraus legis	198
5.1.1. A brief history of fraus legis	199
5.1.2. The place of fraus legis in the legal order	201
5.1.3. Some relevant aspects of fraus legis	202
5.1.3.1. The consequences of the application of fraus legis	203
5.1.3.2. Criteria developed in fraus legis case law	203
5.1.3.3. Fraus legis and penalties	204
5.1.4. Conclusion	205
5.2. The chosen manner of implementation	206
5.2.1. Parliamentary history	206
5.2.2. Responses to chosen method of implementation	207
5.2.2.1. Policymakers and other related stakeholders	208
5.2.2.2. Tax scholars	209
5.2.2.3. Analysis	210
5.2.3. Conclusion	213
5.3. The consequences of the ATAD GAAR: One EU anti-abuse concept in Dutch corporate income tax	214
5.3.1. Introduction	214
5.3.2. Illustrative example	215
5.3.3. Conclusion	222
5.4. Minimum or full harmonization of fraus legis?	222
5.4.1. Introduction	222
5.4.2. Analysis	223
5.4.3. Conclusion	227
5.5. Timing, transactions, and the nuclear option	227
5.5.1. Introduction	227
5.5.2. The light obligation of <i>Adeneler</i>	228
5.5.3. Back to the nuclear option: Fraus legis in favour of the taxpayer?	229
5.5.4. Conclusion	230
5.6. Fraus legis and <i>Dzodzi</i> : Are the Dutch gates wide open?	231
5.6.1. Refresher: The <i>Dzodzi</i> case law	231

5.6.2. Which Dutch taxes are within the regular scope of the ATAD GAAR?	232
5.6.3. Was the Dutch legislature aware of the potential application of <i>Dzodzi</i> ?	232
5.6.4. What would be the consequences of <i>Dzodzi</i> application?	234
5.6.5. What was the landscape before the ATAD GAAR?	237
5.6.6. Analysis: Which case law determines the <i>Dzodzi</i> application?	238
5.6.7. Conclusion	240
5.7. Procedural consequences of the implementation through fraus legis	240
5.7.1. Introduction	240
5.7.2. The Dutch tax authorities	242
5.7.3. The Dutch judiciary	244
5.7.3.1. Introduction	244
5.7.3.2. Provisions of public order	247
5.7.3.3. Uncharted territory	248
5.7.4. Conclusion	250
5.8. Consequences for the state aid framework for the Netherlands	251
5.8.1. Change brought by the ATAD GAAR	251
5.8.2. Consequences of <i>Engie</i>	252
5.8.3. Conclusion	254
5.9. Conclusion	254
Chapter 6: The ATAD GAAR and Better Law	257
6.1. Introduction to Popper's <i>The Open Society</i>	258
6.1.1. Some remarks up front	258
6.1.2. Why <i>The Open Society</i> ?	261
6.1.3. The removal of bad ideas in science	263
6.1.4. The removal of bad ideas in society: <i>The Open Society</i>	266
6.1.5. Three examples of societies that are clearly not open societies	267
6.1.5.1. The static societies: Sparta and the Easter Islanders	267
6.1.5.2. The philosopher-king: <i>The Matrix</i> and <i>The Allegory of the Cave</i>	269

6.1.5.3.	Self-correction without admitting error: <i>1984</i>	274
6.1.6.	Conclusion: What does the open society look like?	278
6.2.	The loss of sovereignty resulting from the ATAD GAAR	281
6.2.1.	Introduction	281
6.2.2.	The loss of sovereignty resulting from the ATAD GAAR	282
6.2.3.	The loss of sovereignty and <i>The Open Society</i>	283
6.2.4.	Conclusion	284
6.3.	Piecemeal social engineering and the ATAD GAAR	285
6.3.1.	Brief introduction to piecemeal social engineering	285
6.3.2.	What was the <i>problem</i> the ATAD GAAR was intended to solve?	288
6.3.3.	Has the goal of the ATAD GAAR been achieved? Why or why not?	291
6.3.4.	Was there any consideration given to unintended consequences?	293
6.3.5.	How are the unforeseen consequences being monitored?	296
6.3.6.	Conclusion	298
6.4.	Self-correction as a normative criterion	298
6.4.1.	Introduction	299
6.4.2.	Self-correction issues for the ATAD GAAR	300
6.4.3.	How could self-correction be improved?	306
6.4.4.	Conclusion	308
6.5.	The convergence of GAARs across the European Union	308
6.5.1.	Scope of the ATAD GAAR and potential expansion	309
6.5.2.	What elements of the GAAR will converge?	311
6.5.3.	What to think about this consequence	312
6.5.4.	Conclusion	313
6.6.	One last problem: Where are all the anti-abuse cases?	314
6.6.1.	Introduction: A recurring theme	314
6.6.2.	The missing anti-abuse cases	314
6.6.3.	Potential explanations	317
6.6.4.	How to solve the puzzle	318

6.6.5.	Conclusion	321
6.7.	Conclusion	321
Chapter 7:	Summary and Conclusions	325
7.1.	The general anti-abuse rule of article 6 of the EU Anti-Tax Avoidance Directive	325
7.2.	The history of the ATAD GAAR	325
7.3.	The changes brought by the ATAD GAAR	326
7.4.	Other consequences of the ATAD GAAR	327
7.5.	The Dutch implementation of the ATAD GAAR	328
7.6.	The ATAD GAAR and better law	329
7.7.	Problems for further research	331
Chapter 8:	Appendix: The Founding Documents of the ATAD GAAR	333
8.1.	The relevant Commission recommendations and communications	333
8.1.1.	Communication of March 14, 2000	334
8.1.2.	Communication of December 19, 2006	335
8.1.3.	Communication of December 10, 2007	335
8.1.4.	Recommendation of December 6, 2012	336
8.1.4.1.	The preamble	337
8.1.4.2.	The recommendation	338
8.2.	The C(C)CTB GAARs	341
8.2.1.	The GAAR in the 2011 CCCTB proposal	341
8.2.2.	The GAAR in the 2016 CCCTB proposal	342
8.3.	The GAAR in the EU PSD and the CJEU's case law	344
8.4.	The legislative history of the ATAD GAAR	345
8.4.1.	The draft Council proposal of November 20, 2015	345
8.4.2.	The Council proposal of December 2, 2015	346

8.4.3.	The Commission proposal of January 28, 2016	347
8.4.4.	The first presidency compromise, dated March 4, 2016	348
8.4.5.	The second Presidency compromise, dated March 18, 2016	348
8.4.6.	The third Presidency compromise, dated April 6, 2016	349
8.4.7.	The fourth discussed compromise, dated April 15, 2016	350
8.4.8.	The fifth Presidency compromise, dated April 25, 2016	350
8.4.9.	The sixth Presidency compromise, dated May 4, 2016	350
8.4.10.	The seventh presidency compromise, dated May 10, 2016	351
8.4.11.	The eighth presidency compromise, dated May 10, 2016	351
8.4.12.	The ninth presidency compromise, dated May 13, 2016	352
8.4.13.	Further versions	352
8.5.	Conclusion	353
References		355

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Amsterdam, March 2025

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List of Abbreviations

AG	Advocate General
ATAD	EU Anti-Tax Avoidance Directive
BEPS	base erosion and profit shifting
C(C)CTB	Common (Consolidated) Corporate Tax Base
CCTB	Common Corporate Tax Base
CFC	controlled foreign company
CITA	Dutch Corporate Income Tax Act 1969
CJEU	Court of Justice of the European Union
Council	Council of the European Union
Commission	European Commission
ECB	European Central Bank
EU	European Union
ECHR	European Convention on Human Rights (formally, European Convention for the Protection of Human Rights and Fundamental Freedoms)
FISC	Subcommittee on Tax Matters of the European Parliament's Committee on Economic and Monetary Affairs
GAAR	general anti-abuse rule
IMF	International Monetary Fund
MDR	Mandatory Disclosure Rules
OECD	Organisation for Economic Co-operation and Development
PSD	Parent-Subsidiary Directive
TAXUD	EU Directorate-General for Taxation and Customs Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Chapter 1

Introduction

This story begins at the Place du Luxembourg in Brussels. The place is home to the European Parliament and at the heart of the city's European quarters. Every Thursday night, the square fills with civil servants of the EU and other members of the "Brussels Bubble". They come here for one last after-work drink before departing for Athens, Dublin, or Stockholm for the weekend. Closing one's eyes and going back in time to June 2016, the last week of the six-month EU presidency of the Netherlands, it is not difficult to imagine the Dutch EU delegation sitting at one of the square's rather interchangeable bars, drinking their happy-hour Heinekens before boarding the last train home.

What were these government officials toasting to? To six months of hard work, no doubt. The Presidency of the Council of the European Union serves as the pacemaker of the EU's legislative process: organizing meetings, brokering compromises, and ensuring overall continuity¹ – *cleaning the pipes and keeping the sludge moving*, so to speak.² However, the Dutch delegation had more to celebrate than just blood, toil, tears, and sweat. The Dutch presidency achieved tangible results. One achievement of particular pride was the political agreement on the first EU Anti-Tax Avoidance Directive (ATAD), reached just before the end of the presidency.³

This research analyses this piece of legislation. Specifically, the topic of this study is the general anti-abuse rule (GAAR) included in article 6 of the directive (ATAD GAAR). This provision obliges all EU Member States to have a GAAR in their corporate tax systems and to apply this GAAR as of January 1, 2019. The ATAD GAAR targets certain tax avoidance schemes,

1. <https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/>, last retrieved in January 2025.

2. Frank Underwood, the main character in Netflix' House of Cards, describes his role as majority whip in congress: "My job is to clean the pipes and keep the sludge moving, but I won't have to be a plumber much longer."

3. Presidency compromise of June 13, 2016, no. 10039/16, FISC 100, ECOFIN 585; Press release Council of the EU, Economic and Financial Affairs Council, 17 June 2016, see <https://www.consilium.europa.eu/media/22927/st10324en16v2.pdf>, last retrieved in July 2023; the author refers to a video in which the Dutch Minister of Finance Dijsselbloem shared his contention with the agreement on the directive: <https://nos.nl/artikel/2112496-dijsselbloem-eu-belastingafspraken-zijn-echt-bindend>, last retrieved July 2023.

applying to arrangements designed to achieve a tax benefit which, although in line with the law, would be contrary to its purpose. The question arises as to what the consequences of the ATAD GAAR will be, particularly given that most Member States already had a similar concept in their corporate tax systems.

The research topic was identified, but *how* will the study approach this subject? To answer this question, it is necessary to go further back in time and travel to another European capital. The research approach has its roots in early-twentieth-century Vienna. At the time, Vienna was still the cosmopolitan capital of the Austro-Hungarian Empire, a form of government often compared to the EU.⁴ This period, chronicled by Stefan Zweig as Vienna's "golden age of security", came to an abrupt end with the start of the First World War in 1914.⁵ This was also the time and place in which the philosopher of science Karl Popper grew up and laid the foundations of his philosophy. This research introduces a new approach to legal science based on Popper's philosophy, often referred to as "critical rationalism".

Karl Popper (1902-1994) was an Austrian-British philosopher, academic, and social commentator,⁶ considered one of the most influential philosophers of science of his time.⁷ Not only did Popper's life span most of the twentieth century, but he was also closely connected to some of its key developments, both historical and scientific. To paraphrase the Dutch writer

4. De Gruyter even wrote an entire book on the similarities between the EU and the former Habsburg/Austro-Hungarian Empire, see Caroline De Gruyter, *Beter Wordt Het Niet: Een Reis Door Het Habsburgse Rijk En de Europese Unie* (Amsterdam: De Geus, 2022); Morris writes: "The most appealing aspect of the Austro-Hungarian Empire, at least in retrospect, was its European cosmopolitanism [...] It was closer to the European Community of the twenty-first century than to the British Empire of the nineteenth, and possess still, at least for romantics like me, a fragrant sense of might-have-been." See Jan Morris, *Trieste and the Meaning of Nowhere*, First Da Capo Press edition (New York: Da Capo Press, 2002), 46.; for Vienna's cosmopolitanism in relation to Popper, see Malachi Haim Hacohen, "Dilemmas of Cosmopolitanism: Karl Popper, Jewish Identity, and 'Central European Culture,'" *The Journal of Modern History* 71, no. 1 (March 1999): 105-49, <https://doi.org/10.1086/235197>.; Roth's classic *The Radetzky March* contains various scenes in which the Austro-Hungarian Empire reminds us of the current EU, see Joseph Roth and Nadine Gordimer, *The Radetzky March*, trans. Joachim Neugroschel, Paperback edition (New York, NY: The Overlook Press, 2002).

5. Stefan Zweig, *The World of Yesterday*, trans. Anthea Bell (Lincoln: University of Nebraska Press, 2013), chap. 1.

6. John Watkins, "Karl Raimund Popper 1902-1994," *Proceedings of the British Academy* Volume 94: Lectures and Memoirs (1996): 645-84.

7. <https://iep.utm.edu/pop-sci/>, last retrieved in August 2023. See also Brian Magee, *Popper* (London: The Woburn Press, 1974).

Mulisch: Popper was the twentieth century.⁸ Born an Austrian Jew in 1902, Popper witnessed the consequences of the First World War and the resulting demise of the Austro-Hungarian Empire.⁹ While in Vienna, he was dubbed the "official opposition" of the Vienna Circle, a group of philosophers including Neurath and Carnap.¹⁰ Facing growing anti-Semitism in Austria, Popper moved to New-Zealand in 1937, where he remained during the entirety of the Second World War.¹¹ After the war, he relocated to the UK and was appointed professor at the London School of Economics. Popper lived in the UK until his death in 1994.

True to his maxim that *philosophers should be generalists*, Popper's works span a broad range of topics, including the philosophy of science, democracy, neuroscience, history, and quantum physics.¹² Popper debated these topics with some of the most famous minds of his time, including Einstein, Russell, and Wittgenstein.¹³ Popper was a near-witness to some of the century's great discoveries, such as general relativity and quantum physics. He also took a keen interest in questioning dominant theories of the time, including Marxism, logical positivism, and relativism.¹⁴

8. "I am the Second World War", said Mulisch, son of an Austrian-Hungarian father who collaborated with the Nazi regime and a German-Jewish mother. The Second World war had a major influence on Mulisch and many of his books have the war as (one of) the central theme(s). See <https://www.trouw.nl/nieuws/harry-mulisch-ik-ben-de-oorlog~b02d9e6f/>, last retrieved July 2023.

9. Karl Popper, *Unended Quest: An Intellectual Autobiography; [with Updated Bibliography]*, 1. publ. in Routledge classics with updated bibliography, Routledge Classics (London New York: Routledge, 2002).

10. Popper writes: "Neurath used to call me 'the official opposition' of the Circle, although I was never so fortunate as to belong to it." See Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge*, 5th rev. and corr. ed. (London: Routledge, 1995), Chapter 11: The demarcation between science and metaphysics.

11. Popper, *Unended Quest*.

12. For a range of Popper's works, reference may be made to his intellectual autobiography, see: Popper.; as well as Magee, *Popper*. Popper has often voiced his strong preference for generalist scientists, see: Karl Popper and Mark Notturmo, *The Myth of the Framework: In Defence of Science and Rationality* (Hoboken: Taylor and Francis, 2014), Chapter 4: Science: problems, aims, responsibilities.

13. These topics and people are covered in Popper's intellectual autobiography, see Popper, *Unended Quest*. Also: David Edmonds and John Eidinow, *Wittgenstein's Poker: The Story of a Ten-Minute Argument between Two Great Philosophers* (New York: Ecco, 2002).

14. See, for example: Edmonds and Eidinow, *Wittgenstein's Poker*.; Popper, *Unended Quest*.; and Karl Popper, *The Open Society and Its Enemies: New One-Volume Edition* (Princeton University Press, 2013), <https://doi.org/10.1515/9781400846672>; Karl Popper, *The Logic of Scientific Discovery*, Special Indian Edition (London: Routledge, 2010).

Popper's major contributions include works on the growth of knowledge, such as *The Logic of Scientific Discovery* and *Conjectures and Refutations*.¹⁵ To the general public, he is best known for his *falsification principle* and, to a lesser extent, for his book *The Open Society and Its Enemies*.¹⁶ This research introduces aspects of Popper's critical rationalism to EU tax science. Reference is made to other books for a more elaborate introduction to his most important works¹⁷ and from others who worked with him and developed his ideas, including Deutsch, Shearmur, Agassi, Magee, and Wendt.¹⁸ The aim is to contribute to the refinement and application of Popper's ideas in new ways.

The choice of critical rationalism as a research approach emerged at the outset of this study while searching for a normative method to critically examine the research topic. At that moment, Wendt's dissertation provided an important insight, arguing that legal science had yet to appreciate many of the important lessons of Popper's critical rationalism.¹⁹ Before this, Popper's work was unfamiliar to the author, an irony exemplified by years of crossing the Karl Popper Bridge in Amsterdam daily without knowing whom it was named after.²⁰

After studying Wendt's dissertation and Popper's works, it became clear that Wendt was right: Popper's ideas could benefit not just this research but tax science in general, particularly in light of recent debates on the

15. Popper, *The Logic of Scientific Discovery*; Popper, *Conjectures and Refutations*, chap. Chapter 11: The demarcation between science and metaphysics.

16. See Popper's books in the previous footnotes. For the "Falsification Principle" the author specifically refers to Popper, *The Logic of Scientific Discovery*, Chapter IV (Falsifiability).

17. Magee, *Popper*; Popper, *Unended Quest*. Edmonds and Eidinow, *Wittgenstein's Poke*; Jeremy Shearmur, ed., *The Political Thought of Karl Popper* (London New York: Routledge, 1996). For Popper's works, reference is made to the Popper books in the prior footnotes.

18. The most influential books of Popper's for this research are: Popper, *The Open Society and Its Enemies*.; Popper, *The Logic of Scientific Discovery*.; Popper, *Conjectures and Refutations*. The most important books of the others are Magee, *Popper*.; Ivar Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief: = The method of jurisprudence from a critical rationalist point of view* (Zutphen: Uitg. Paris, 2008).; David Deutsch, *The Beginning of Infinity: Explanations That Transform the World*, Always Learning. Pearson (New York: Penguin Books, 2012).; Shearmur, *The Political Thought of Karl Popper*.

19. Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief*. The author is grateful for Maarten de Wilde's reference to the dissertation on which this book is based.

20. https://nl.wikipedia.org/wiki/Karl_Popperbrug, last retrieved in June 2023.

state of (Dutch) tax science.²¹ Other tax scholars have also incorporated Popper's ideas into tax science.²² Popper himself acknowledged that the choice for critical rationalism is ultimately not a purely rational choice but an *ethical* one, motivated by the belief that it leads to better science and a better world.²³ However, this choice is not dogmatic – if a superior approach emerges, it should be embraced. Popper summarizes the critical rationalist attitude in the statement: "I may be wrong and you may be right, and by an effort, we may get nearer to the truth."²⁴

Critical rationalism is also emphatically non-authoritarian – there is no hiding behind other thinkers, even if they are as bright as Popper or his followers. This means that reliance on Popper or another Popperian as an ultimate authority is not a valid defence. Accountability for the understanding and application of ideas, whether in law, history, or philosophy remains essential. This applies even when referring to Popper or others as the source of

21. For the recent debate on the state of (Dutch) tax science, see, for example, Jan Vleggeert, "Over Onafhankelijkheid, de Verschraving van Het Fiscale Debat En Wat We Daaraan Kunnen Doen (Inaugural Address)," October 30, 2020, <https://scholarlypublications.universiteitleiden.nl/access/item%3A3194980/view>.; Cees Peters, "Tradities En Schools: Op Weg Naar Een Meer Diverse Fiscale Wetenschap," *Weekblad Fiscaal Recht* 2021, no. 223 (2021).; Frits Witpeerd, "Is Er Een Probleem Met de Onafhankelijkheid in de Belastingwetenschap?," *Weekblad Fiscaal Recht* 2021, no. 156 (n.d.); Jan Van de Streek, "Waarheen Met de Onafhankelijke Belastingwetenschap?," *NLFiscaal Opinie* 2021, no. 17 (2021).

22. Maurits Barendrecht, *Recht als model van rechtvaardigheid: beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming* (Deventer: Kluwer, 1992), <https://research.tilburguniversity.edu/en/publications/recht-als-model-van-rechtvaardigheid-beschouwingen-over-vage-en-s>.; C.P.M. Van Houte, "Fiscale Rechtsvinding in Het Fiscaal Verzekeringsrecht," *Weekblad Fiscaal Recht* 1998, no. 459 (1998).; Richard Happé and Hans Gribnau, *Belastingen en ethiek* (Deventer: Kluwer, 2011).; Richard Happé, *Belastingethiek: Een Kwestie van Fair Share*, Geschriften van de Vereniging Voor Belastingwetenschap 243 (Kluwer: Deventer, 2011).; Henk Vording, "Fiscale Beleidsnotities 2014," *Weekblad Fiscaal Recht* 2013, no. 1112 (2013).; Chris Dijkstra, "De Betaalde Tipgever: Een Fiscaal Fremdkörper," *Weekblad Fiscaal Recht* 2016, no. 151 (2016).; Charlie Bruijsten, *Waarschijnlijkheid van Fiscale Rechtsgevolgen: Een Onderzoek Naar Onzekerheid Bij Het Afleiden van Fiscale Rechtsgevolgen En Naar de Waarschijnlijkheid van de Mogelijke Uitkomsten van Onzekere Fiscale Rechtsvindingsvraagstukken*, Fiscale Monografieën 145 (Deventer: Kluwer Juridische Uitgevers, 2016), para. 4.2.; Pieter Rustenburg, *Een Algemene Normtheorie Toegepast Op Open Normen in Het Belastingrecht*, E.M. Meijers Instituut Voor Rechtswetenschappelijk Onderzoek (Den Haag: Boom Juridische uitgevers, 2020).; Daniel Blum, *Normativity in International Tax Law*, vol. 25, WU – Tax Law and Policy Series (IBFD, 2023), <https://doi.org/10.59403/6krqrm>.

23. See, for example, Karl Popper, *A Pocket Popper*, ed. David Miller, Fontana Paperbacks 6414 (London: Fontana, 1983), 36.

24. Popper, *The Open Society and Its Enemies*, chap. Oracular Philosophy and the Revolt Against Reason.

particular propositions.²⁵ There is no escape from criticism, as improvement through criticism is fundamental to critical rationalism. As Wendt writes: “Popperian science is a science for adults”.²⁶

In Popper’s view, all knowledge – including this research – is guesswork and may therefore be mistaken.²⁷ Critical rationalism sees scientific objectivity as an unimportant aspiration and perhaps even as a mistaken concept rather than an attainable certainty. Scientific objectivity certainly cannot reside in any individual researcher.²⁸ While scientists must strive for truth, absolute certainty is never possible, nor can complete freedom from error or bias be claimed.²⁹ One of Popper’s former students, the Israeli philosopher Joseph Agassi, noted that Popper’s greatest achievement was his recognition that Socrates’ motto “I know that I know nothing” should also be the foundation of modern science.³⁰

The only way to approach scientific objectivity is through the social process in which scientists correct each other’s errors.³¹ This social nature of science means that ideas must be put forward in as straightforward a way as possible so that they are open to criticism by others.³² Popper also found that the formulation of scientific propositions (*conjectures*) closely resembles

25. This upfront disclosure applies to the entire book. This means that any reference to Popper or others should not be considered as an appeal to authority.

26. Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief*, 11. Wendt writes (in Dutch): “Deze wetenschap ziet onder ogen dat dergelijke machten een fictie zijn; zij kan de verantwoordelijkheid voor de vraag of dit of dat goed is van zich afschuiven noch van zich afzetten. Het is een wetenschap van volwassenen.” Translation: “This science acknowledges that such forces are not real; this science cannot shrug off the responsibility for what is good nor dismiss this responsibility. It is a science for adults.”

27. Popper, *Conjectures and Refutations*, chap. 11: The demarcation between science and metaphysics.

28. Popper and Notturmo, *The Myth of the Framework*, chap. 4: Science: problems, aims, responsibilities.

29. Popper and Notturmo, chap. 4: Science: problems, aims, responsibilities.

30. Agassi made this remark during a live conversation. Popper has been compared with Socrates more often, for example in Benesch’ book *The Viennese Socrates*, see: Philip Benesch, *The Viennese Socrates: Karl Popper and the Reconstruction of Progressive Politics*, Major Concepts in Politics and Political Theory, vol. 28 (New York: P. Lang, 2012).

31. Popper, *The Open Society and Its Enemies*, chap. 23. In particular, the example in which Popper refers to Robinson Crusoe is used to illustrate his point. Popper argues that even if Robinson Crusoe would have grown up alone on his island and would start to make discoveries this would not be science as these discoveries would lack intersubjective criticism.

32. The demand for clarity and simplicity in expression – particularly in intellectual discourse – necessitates rigorous effort and continuous self-discipline. This standard is forcefully set out in Popper and Notturmo, *The Myth of the Framework*, chap. 4:

the ancient activities of mythmaking and storytelling.³³ This might explain occasional digressions. It may also account for misplaced attempts to ease the journey through the ‘exciting’ areas of tax law and the philosophy of science by incorporating humour or references to literature and popular culture.³⁴ Another reason for avoiding overly dry writing is the social nature of error-correction. If criticism is indeed the only way to improvement, it may be beneficial to keep readers engaged (all six of them).

This introduction concludes with an invitation to the reader to share any suggestions, doubts, new insights, and questions that arise while reading this study.

1.1. What is the research problem?

1.1.1. An introduction to general anti-abuse rules

This section introduces the concept of the general anti-abuse rule (GAAR). Readers who are already familiar with the concept may skip this section. The example given below is a particularly effective illustration of a GAAR, as it tends to be received well (or in any case, least badly) when explaining

It is the obvious duty for all intellectuals to work for this revolution – for the replacement of the eliminative function of violence by the eliminative function of rational criticism. But to work for this end, one as to train oneself constantly to write and speak in clear and simple language. Every thought should be formulated as clearly and simply as possible. This can only be achieved by hard work.

33. Popper addresses Kant:

Because, as you said, we are not passive receptors of sense data, but active organisms. Because we react to our environment not always merely instinctively, but sometimes consciously and freely. Because we can invent myths, stories, theories; because we have a thirst for explanation, an insatiable curiosity, a wish to know. Because we not only invent stories and theories, but try them out and see whether they work and how they work. Because by a great effort, by trying hard and making many mistakes, we may sometimes, if we are lucky, succeed in hitting.

See Popper, *Conjectures and Refutations*, chap. 2: The nature of philosophical problems and their roots in science.

34. Although Popper also adopts this approach, inspiration to refer to literature was drawn from reading Piketty’s work some years ago. In one chapter, Piketty brings home the idea of the economic inefficiencies caused by inequality by referring to a scene in a Balzac novel. See Thomas Piketty, *Capital in the Twenty-First Century*: (Harvard University Press, 2014), chap. 7: Inequality and Concentration: Preliminary Bearings, <https://doi.org/10.4159/9780674369542>.

the research to friends and family. The example is inspired by a Dutch court case but has been significantly altered for illustrative purposes.³⁵

Example

Karl Popper and Ludwig Wittgenstein meet at a philosophy conference. Ludwig has designed and built his own house in Amsterdam, the Netherlands. Ludwig tells Karl that he is not happy with the house because the ceiling is too low.³⁶ Coincidentally, Karl, who is not particularly tall, is considering buying real estate. Karl is interested in purchasing Ludwig's house. However, Karl would have to pay Dutch real estate transfer tax on the transfer of the transaction. Max, a tax lawyer with knowledge of Dutch tax law, informs Karl that there is a special rule (an exemption) under which transfer tax does not apply to transfers between spouses. Karl and Ludwig devise the following scheme:

- Karl and Ludwig marry in the morning of a bright summer day.
- Ludwig transfers the apartment to Karl in the afternoon of the same day (tax free).
- Karl and Ludwig file for divorce in the evening of the same day.

A tax inspector discovers the scheme and takes the *couple* to court, arguing that real estate transfer tax is due on the sale. The court begins by examining the facts. Is there reason to doubt whether Karl and Ludwig have *really married*? There is clearly a tax motive behind the marriage. However, the marriage is recognized under civil law: even though it lasted for a short time, it was legally valid for the period it lasted.³⁷ Once the facts are established, the court has several interpretation methods at its disposal to determine the correct interpretation of the law. The starting point is generally a textual interpretation (What is the text of the law?), which can be supplemented

35. Dutch Supreme Court, March 15, 2013, no. 11/05609, ECLI:NL:HR:2013:BY0548. Case has been amended significantly for illustration purposes. For example, the real case was about a registered partnership and not a marriage.

36. "When the house was nearly complete, he [Wittgenstein] insisted that a ceiling be raised 30 mm so that the proportions he wanted (3:1, 3:2, 2:1) were perfectly executed. 'Tell me', asked a locksmith, 'does a millimeter here or there really matter to you?' 'Yes!' roared Wittgenstein." See: <https://www.theguardian.com/books/2002/jan/05/arts.highereducation>, last retrieved July 2023.

37. For example, if Karl would enter into a loan agreement around noon of the same day, Ludwig would also be liable for this debt under Dutch civil law. Ludwig cannot shrug off his liability by telling the debt collector that the arrangement was just a fake marriage to avoid tax.

by other interpretative methods such as a teleological interpretation (What is the purpose of the law?).³⁸ In this case, the court determines that these methods do not undo the tax effect of the scheme.

The tax inspector presents one final argument: the GAAR should apply to the scheme. The GAAR applies if two conditions are met. The first condition is that the main goal of the scheme is to achieve a tax benefit (subjective test). The tax inspector proves that this condition is met, as no other apparent motive for the marriage exists besides tax savings. The second condition is that granting the tax exemption would be contrary to the spirit of the law (objective test). The judge agrees that the exemption was clearly intended to facilitate transfers within genuine marriages that last longer than one day, rather than to allow widespread and repetitive avoidance of transfer tax through a relatively simple scheme.

The court finds that the two conditions are met and applies the GAAR to the scheme. The consequence is that the law is applied *as if the marriage never took place for tax purposes*. In other words, while the marriage legally occurred, it is disregarded for tax purposes. This means that the exemption for transfers between spouses does not apply, and the transfer of the house is taxed as an ordinary transfer of real estate between third parties. Karl must pay real estate transfer tax after all.

Now that the concept of GAARs has been introduced, the next step is to examine how the specific research topic – the ATAD GAAR – came to be.

1.1.2. The research topic

The 2008 financial crisis and its aftermath generated momentum for tax reform across the world.³⁹ This momentum manifested itself on a global

38. For further reading on the interpretation of (the object and purpose of) EU directives and Dutch law in the context of the anti-abuse provision, see Jasper Korving, "Interpretation of EU (Direct) Tax Directives: The Judges Will Decide," in *The Power to Tax in Europe*, ed. Johan Lindholm and Anders Hultqvist (Hart Publishing, 2023), <https://doi.org/10.5040/9781509964048>; Robert IJzerman, "Netherlands Branch Report," in *Form and Substance in Tax Law: Subject*, ed. Frederik Zimmer and International Fiscal Association, Elektronische Ressource, Cahiers de Droit Fiscal International 87a (The Hague: Kluwer Law International, 2002).

39. Peter Essers, "International Tax Justice between Machiavelli and Habermas," *Bulletin for International Taxation* 68, no. 2 (January 10, 2014), <https://doi.org/10.59403/3t58j8t>; P.K. Schmidt, "The Role of the Anti-Tax Avoidance Directive in Restoring Fairness – A Proper Step towards Ensuring Sustainability of the International Tax Framework?," in *Tax Sustainability in an EU and International Context*, ed. Group for Research on

level in the base erosion and profit sharing (BEPS) project of the OECD.⁴⁰ BEPS is defined as “tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax”.⁴¹ The first deliverable of the BEPS project was a package of reports containing various measures against tax avoidance. For example, the package included measures limiting the tax deductibility of interest payments.⁴²

After these deliverables were published, the question arose as to how to implement their outcomes in the European Union. As a first step in the implementation process, the Council requested the Commission to provide a proposal for incorporating the BEPS measures into EU law.⁴³ The Commission subsequently presented a proposal for a directive – commonly referred to as the ATAD – which combined several BEPS measures with others that were not part of BEPS.⁴⁴ A key feature of directives is that they oblige EU Member States to achieve certain results but allow flexibility in how these results are attained.⁴⁵ This means that Member States must transpose the directive into national law unless national law already achieves the intended outcome.⁴⁶

European International Taxation, Cécile Brokelind, and Servaas van Thiel (Amsterdam, The Netherlands: IBFD, 2020); Daniel Smit, “The Anti-Tax-Avoidance Directive (ATAD),” in *European Tax Law. Volume 1: General Topics and Direct Taxation / Edited by Sjoerd Douma, Otto Marres, Hein Vermeulen, Dennis Weber*, ed. S.C.W. Douma et al., Eighth edition (Alphen aan den Rijn: Wolters Kluwer, 2023).

40. OECD 2013, Action Plan on Base Erosion and Profit Shifting, OECD Publishing.

41. See <<https://www.oecd.org/tax/beps/about/>>, retrieved 1 November 2020.

42. See OECD BEPS Action 4 report on Limiting Base Erosion Involving Interest Deductions and Other Financial Payments.

43. Council of the European Union (2015) – Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), 2 December 2015, No. 14544/15; General Secretariat of the Council of the European Union (2015) – Council Conclusions on BEPS, 8 December 2015, no. 14947/15; Smit, “The Anti-Tax-Avoidance Directive (ATAD),” 655.

44. European Commission (2016) – Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, January 28, 2016, COM/2016/026 final – 2016/0011 (ATAD 1-proposal).

45. Article 288 TFEU; Elspeth Berry, Matthew J. Homewood, and Barbara Bogusz, *Complete EU Law: Text, Cases, and Materials*, 4th ed. (Oxford University Press, 2019), 113, <https://doi.org/10.1093/he/9780198836216.001.0001>; Marios Costa and Steve Peers, *Steiner & Woods EU Law*, 14th ed. (Oxford University Press, 2020), 67, <https://doi.org/10.1093/he/9780198853848.001.0001>.

46. Berry, Homewood, and Bogusz, *Complete EU Law*, 113; Smit, “The Anti-Tax-Avoidance Directive (ATAD),” sec. 19.2.

On July 12, 2016, the Member States unanimously adopted the ATAD in the Council of the European Union.⁴⁷ By doing so, Member States committed to implementing the directive in their tax systems. The research topic concerns one of the ATAD provisions that is not an implementation of BEPS: the ATAD GAAR of article 6 of the ATAD.⁴⁸ In the previous section, a GAAR application in real estate transfer tax was examined. The ATAD GAAR obliges Member States to implement and apply a GAAR in their corporate tax systems as of 1 January 2019.⁴⁹

Corporate taxpayers such as limited liability companies, cannot arrange a wedding to save corporate income tax (although mergers are an option).⁵⁰ As this study will show, there are various other ways in which companies engage in tax-saving strategies. The ATAD GAAR obliges Member States to apply a GAAR to such arrangements where applicable, preventing corporate taxpayers from achieving tax savings that fall within the scope of the GAAR. The preamble to the ATAD states: “GAARs feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specially targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules.”⁵¹

The text of the ATAD GAAR is as follows:

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.

47. 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, OJ L 193, 19.7.2016, p. 1-14 (ATAD).

48. OECD 2013 (BEPS 6 report on treaty abuse) mentions the concept of a domestic general anti-abuse rule on page 17 but only does so as part of its recommendation to (also) include anti-abuse provisions in tax treaties.

49. Article 11, paragraph 1 ATAD.

50. For an interesting example of mergers and their corporate tax effects, see Dutch lower court Amsterdam, no. C/13/670122 / HA ZA 19-832, NTFR 2021/2555. The close reader will find two names in this court case which are also mentioned in this book.

51. Preamble 11 ATAD.



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