

The Anti-Abuse Turn in EU Tax Law: Rethinking Taxpayer Protection and Legal Certainty

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1. Introduction

Over the last decade, EU tax law has been transformed by anti-abuse measures, notably the Anti-Tax Avoidance Directive (ATAD), with its General anti-abuse rule (GAAR) and special anti-abuse rules (SAARs) influenced by the OECD/G20 BEPS Project. Concurrently, Court of Justice of the European Union (CJEU) case law has increasingly shifted toward substance-based and contextual assessments.

While anti-abuse mechanisms have become increasingly integrated and enforceable, taxpayer safeguards have remained comparatively underdeveloped. This evolution creates tension with legal certainty, particularly where assessments rely on broad standards. This article examines tax certainty through the lens of the rule of law and the expansion of anti-abuse reasoning in EU tax law.

2. Tax Certainty and the Rule of Law

Tax certainty is fundamentally rooted in the rule of law and is closely connected to legality, predictability and the protection of legitimate expectations. In tax matters, these guarantees are particularly relevant due to the coercive nature of taxation and the complexity of cross-border structures. Legal certainty requires that taxpayers can reasonably foresee the tax consequences of their conduct, even though absolute certainty can never be fully achieved. Consequently, the CJEU recognizes legal certainty and the protection of legitimate expectations as general principles of EU law

The rule of law supports the uniform application of EU law within the internal market and is closely connected to legality, predictability and the protection of legitimate expectations. In this context, the CJEU has consistently recognized legal certainty and the protection of legitimate expectations as general principles of EU law, for instance in [Case 98/78. Racke](#) and [Case C-183/14. Salomie and Oltean](#).

In parallel, the [Charter of Fundamental Rights of the European Union \(CFREU\)](#) and the [European Convention on Human Rights \(ECHR\)](#) provide broader frameworks for legality, effective judicial protection and the protection of property rights within the European legal order. In particular, article 47 of the CFREU guarantees the right to an effective remedy and a fair trial, while articles 6 and 13 of the ECHR protect fair trial guarantees and the right to an effective remedy before national authorities. In tax matters, article 1 of Protocol No. 1 of the ECHR is also relevant, as it protects the peaceful enjoyment of possessions, including against disproportionate interferences (through taxation). Still, the practical application of these guarantees to taxation often remains limited. Under article 35(1) of the ECHR, access to the European Court of Human Rights depends on the prior exhaustion of domestic remedies,

reflecting the subsidiary nature of the Convention system. Likewise, article 51(1) of the CFREU restricts the application of the Charter to situations in which Member States are implementing EU law. Thereby, their application is conditioned by the structural limits of the legal system, particularly in cross-border and EU competence-sensitive contexts.

Legal rules inevitably contain a degree of indeterminacy, particularly when broad concepts are applied to sophisticated economic situations. However, the [Venice Commission Rule of Law Checklist](#) identifies accessibility, foreseeability, stability and protection against arbitrariness as core elements of legal certainty. The Venice Commission also stresses that discretionary powers must remain constrained by legality, proportionality and the protection of legitimate expectations, which become particularly relevant in the context of open-ended anti-abuse standards.

Tax certainty should therefore be understood as a fundamental legal guarantee closely connected to taxpayer protection. However, while taxpayer safeguards within the EU legal order largely continue to depend on fragmented constitutional guarantees, general principles and soft law instruments, anti-abuse mechanisms have become progressively more integrated and enforceable.

3. Expansion of Anti-Abuse

EU tax law has progressively moved toward an anti-abuse-oriented paradigm, driven by the OECD/G20 BEPS Project and political emphasis on effective taxation. This shift has strengthened substance-over-form reasoning and broader anti-abuse standards across legislation and CJEU case law.

Some tax directives have progressively incorporated anti-abuse mechanisms, particularly the [Parent-Subsidiary Directive \(PSD\)](#), with the [2015 amendment](#) to article 1(2) of the PSD allowing Member States to deny directive benefits to arrangements that are not genuine and do not reflect economic reality. Similar anti-abuse reasoning has also emerged through the [Interest and Royalties Directive \(IRD\)](#) case law.

Still, the Anti-Tax Avoidance Directive (ATAD) represents the central legislative expression of this turn, institutionalizing anti-abuse reasoning through a mandatory GAAR in article 6 of the ATAD, requiring Member States to disregard non-genuine arrangements designed to obtain tax advantages contrary to the object or purpose of the law. However, the open-ended structure of the ATAD GAAR also increases interpretative uncertainty and judicial discretion, namely where anti-abuse assessments depend on extensive factual assessments and discretionary administrative reasoning, especially in a context of expanding tax transparency and reporting obligations.

The evolution of the CJEU abuse-of-law doctrine has followed a similar path. In [Case C-196/04, Cadbury Schweppes](#), the Court adopted a narrower and more certainty-oriented approach by limiting abuse to wholly artificial arrangements lacking economic reality. By contrast, [Joined Cases C-116/16 and C-117/16, T Danmark](#) and [C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1](#) (commonly known as the Danish cases), marked a significant shift towards broader substance-based and contextual assessments. The Court denied PSD relief based on insufficient economic substance and absence of beneficial ownership, relying on indicators such as conduit structures, rapid pass-through payments and lack of genuine economic activity. The doctrine therefore evolved into a broader substance-based and contextual approach, blurring the distinction between beneficial ownership and abuse of law. While strengthening anti-abuse enforcement, the judgments also intensified concerns regarding predictability, legal certainty and legitimate expectations.

Recently, [Case C-228/24, Nordcurrent Group UAB](#), consolidated this trend, confirming that abuse assessments are not confined to purely artificial entities but require a comprehensive analysis of business purpose.

The increasing reliance on fact-intensive case-by-case analysis makes anti-abuse enforcement more effective but less foreseeable. In this sense, the evolution of EU anti-abuse reasoning reflects a broader methodological shift, whereby assessments increasingly depend on ex post evaluations of economic reality and business purpose rather than on formally predetermined legal criteria. Although such an approach may strengthen the effectiveness of anti-abuse enforcement, it may simultaneously reduce the degree of ex ante predictability traditionally associated with legal certainty. As a consequence, legal uncertainty may even discourage legitimate cross-border activity or lead to excessively cautious compliance practices, since in more complex international structures, taxpayers may find it increasingly difficult to anticipate how the boundary between acceptable tax planning and abusive arrangements will ultimately be interpreted.

The same tension is also visible in the recent [EU “decluttering” agenda](#), which reflects growing institutional concern regarding the cumulative complexity generated by overlapping anti-abuse rules, reporting obligations and compliance frameworks within the EU tax acquis. In this context, simplification, clarity and legal certainty have increasingly emerged as explicit policy objectives, notably in response to the interpretative uncertainty and administrative burden resulting from those successive layers of anti-abuse legislation and transparency obligations. The decluttering debate therefore illustrates a broader institutional recognition that effective anti-abuse enforcement must remain compatible with foreseeability, proportionality and coherent regulatory design. In this sense, the debate may also be understood as an implicit acknowledgment that excessive regulatory complexity can itself undermine legal certainty and the effective functioning of the internal market.

4. Is the Balance Shifting? A Fundamental Rights Perspective

Taxpayer protection remains fragmented, distributed across national constitutions, EU law and regional human rights frameworks. While the CFREU and ECHR provide essential guarantees, their application to tax matters is often indirect or limited by structural constraints. Supranational taxpayer protection therefore presents important structural limitations, particularly as article 35(1) of the ECHR requires the exhaustion of domestic remedies before access to the ECtHR. Notably, article 51(1) of the CFREU restricts the Charter’s application to instances in which Member States are implementing EU law.

As a consequence, although the CJEU has recognized a connection between tax enforcement and fundamental rights – particularly in cases like [Case C-617/10, Åkerberg Fransson](#) – the protection remains scope-dependent. Cases such as [Joined Cases C-469/18 and C-470/18, IN and JM v. Belgische Staat](#) clarify that factual connections to EU law do not automatically trigger Charter protections, illustrating the considerably less structured and scope-dependent protection of taxpayers within EU law.

Furthermore, international and European human rights frameworks have generally avoided recognizing taxpayers’ rights as an autonomous category of rights holders in their relationship with taxation. Several supranational initiatives have nevertheless attempted to strengthen taxpayer protection through soft law instruments and non-binding guidance, including the [European Commission’s Guidelines for a Model for a European Taxpayers’ Code \(2016\)](#), although their practical effect remains limited.

Therefore, taxpayer protection within the EU legal order remains largely indirect and fragmented, relying primarily on broader fundamental rights guarantees and general principles of EU law, such as legal certainty, proportionality and the protection of legitimate expectations, rather than on a coherent framework of taxpayers’ rights. As a consequence, taxpayer protection frequently depends on the interaction between national constitutional safeguards, EU general principles and supranational human rights frameworks, contributing to a structurally fragmented system of protection. This fragmented protection framework raises growing concerns regarding predictability, legal certainty and the overall coherence of taxpayer protection.

Notwithstanding, the CJEU plays a central role in reconciling the effectiveness of EU law with the rule of law, legal certainty and equal treatment within the internal market. In tax matters, this balancing function also requires ensuring that effective anti-abuse enforcement remains compatible with legal certainty, proportionality and effective judicial protection. Ultimately, the future development of EU tax law will depend on the European legal order to reconcile robust anti-abuse enforcement with a sufficiently stable and coherent framework of taxpayer protection.

This article does not suggest that anti-abuse legislation or CJEU case law should remain static. On the contrary, the fight against abusive tax practices constitutes an important objective within the EU legal order. However, such evolution should preserve an appropriate balance between effective anti-abuse enforcement and taxpayers' fundamental rights and the rule of law guarantees of legal certainty, proportionality and effective judicial protection.

Ultimately, the central challenge is whether the current EU framework remains capable of reconciling effective anti-abuse enforcement with a sufficiently predictable and coherent system of taxpayer protection. The future development of EU tax law will therefore depend on the capacity of the European legal order to ensure that anti-abuse enforcement remains compatible with the fundamental guarantees inherent to the rule of law.

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