Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies

The article aims to demonstrate how EU law and the OECD are establishing a unifying conceptual framework in which the two different seminal phenomena, “tax abuse” and “aggressive tax planning”, can be acknowledged in the new (global) operating environment. The purpose of this article is to critically assess the meaning of these concepts, broadly used in several EU and OECD soft law instruments. These concepts cannot be completely formalized or objectified, but the resulting uncertainty of their application can be reduced to an acceptable level. In the search for a useful reference point to delimit tax abuse from aggressive tax planning, particular attention is paid to the definitions conveyed (and the wording used) by EU institutions and the OECD. Indeed, the purpose of this article is also to establish a starting point for the discussion on linguistic discrepancies that can arise, and it provides for a preliminary categorization of them. Further to the analysis of these discrepancies, the article explains the reciprocal influences between the European Union and the OECD, and highlights how the promotion of a theoretical understanding and careful empirical handling of the relevant practices should enrich the discussion and foster consistent implications. In particular, how consensus on the development of a linguistic and conceptual framework could enhance the resolution of some issues is emphasized and, more specifically, to what extent EU law allows the BEPS Project to be applied in the EU area, knowing that EU institutions cannot provide for any ex ante guarantee on the compliance of BEPS with EU law. To ensure that the important goals of global tax coordination – that the implementation of the BEPS Project implies – are achieved, this contribution aims to delineate preliminary clarifications in these areas.

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1. **The Legal Context**

1.1. **The principle of tax efficiency as prohibition of double non-taxation**

Under the pure economic meaning of the principle of international tax efficiency, taxation should be neutral and affect taxpayers’ business choices as little as possible, including the election of the place of income production.\(^1\) This principle is part of the institutional manifesto of the European Union and prevents Member States from creating tax obstacles to exercising the freedom of movement in the EU area.

However, the tax efficiency principle implies not only the states’ duty to refrain from excessively interfering with taxpayers’ affairs, but it also provides the right of the States to discourage situations that may give rise to unfair competitive advantages for some taxpayers against others, thereby resulting in ineffective allocations of resources and inequity consequences.\(^2\) In other words, tax efficiency should not only be considered in terms of the prohibition of double taxation, but also in terms of the prohibition of double non-taxation. This idea has recently been fostered by initiatives taken by different international institutions (namely the

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G20,3 the United Nations,4 the OECD,5 the International Monetary Fund,6 the European Union7 and the US government8), bringing increasing awareness to the fact that “[t]axation should produce the right amount of tax at the right time, while avoiding both double taxation and unintentional non-taxation”9.


1.2. A common concern: “Saving the pie”

The trigger for this “revival” of the principle of tax efficiency (intended as the prohibition of double non-taxation) was a concern over the undesired effects created by certain cross-border opportunities, usually indicated with an a-systematic range of qualifiers (including, for example, “sophisticated”, “creative”, “unacceptable”). These tax planning opportunities, while not resulting in (unlawful) tax evasion, may “reach a point beyond which it cannot be tolerated within a legal system intended to conform to principles of justice”.

In particular, under the spotlight are practices orchestrated by multinationals (MNEs) that take advantage of international tax standards and domestic tax systems, which are no longer in line with the changing global business environment.

The EU Commission recognizes this situation as follows:

over time … the tax planning structures have become ever-more sophisticated. They develop across various jurisdictions and effectively, shift taxable profits towards states with beneficial tax regimes.

The same description is provided by the OECD, according to which such “international schemes are more likely to be specifically designed for a particular taxpayer or transaction and may involve multiple parties and tax benefits in different jurisdictions, which can make these schemes more difficult to target with domestic hallmarks”.

Indeed, this phenomenon has the following hallmarks:

– it involves cross-border transactions since, according to the present competitive business model, innovative firms compete more effectively globally; and
– it is difficult to detect by single tax administrations since transnational income is much more “hybrid” than in the past, as created by no-place activities and carried out by profit and no-profit entities in a “borderless” economy. Indeed, provided that tax systems
operate on the basis of a fiction (i.e. the fact that “every item of income has its source in a physical, geographical, jurisdiction in which it is liable to tax”15), the growing volume of intergroup trade and the “scale without mass” process make the relationship with the States’ territories rather shadowy, thereby avoiding the material links which give consistency to this relationship.16 Consequently, this “stateless income”17 is decoupled from the notion of source taxation.

Moreover, domestic rules for international taxation (originating from the principles developed by the League of Nations in the 1920s)18 and international tax coordination tools19 (such as the “pas de deux” of bilateral double taxation conventions) are still grounded in an environment marked by “a lower degree of economic integration across borders, rather than today’s environment of global taxpayers”.20 This environment of global taxpayers is characterized by the increasing importance of intellectual property as a value driver and by constant developments in information and communication technologies.21

The combination of these factors produces a complexity22 at the domestic level, which an international tax system increases. This complexity manifests itself in the following way: the interface amongst tax treatments provided by different states produces not only undesired frictions (namely, double taxation, as the contemporary and legitimate exercise by two different jurisdictions of the “right to tax” that may result in overlapping taxation rights), but also unforeseen loopholes (generating situations of double non-taxation or negative taxation).

16. See L.G. Ogazón Juárez & R. Hamzaoui, Common Strategies against Tax Avoidance: A Global Overview, in International Tax Structures in the BEPS Era: An Analysis of Anti-Abuse Measures sec. 1.2.2. (M. Cotrut et al. eds., IBFD 2015), Online Books IBFD, according to which, “the physical presence requirement – which is still a prerequisite under tax treaties for a non-resident person to be taxable in another country – is no longer necessary in order to conduct business in a foreign jurisdiction”.
17. This expression is taken by E.D. Kleinbard, Stateless Income, Florida Tax Review 11, p. 699 (2011).
20. OECD BEPS Report, supra n. 5.
21. The “Double Irish with a Dutch Sandwich” is noted, meaning the structure that some MNEs have used to reduce or eliminate their tax liabilities in countries in which they conduct substantial economic activity. The concept involves two Irish companies and a Dutch company interposed (or “sandwiched”) between them. The arrangement “typically involves the transfer of valuable intellectual property rights in respect of which tax deductible royalties are paid and utilizes specific concessionary features of the domestic tax systems of the countries in which the multinational group’s key entities in the arrangement are located” K.J. Holmes, International Tax Avoidance, in International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application (Second Revised Edition) (IBFD 2014), Online Books IBFD.
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According to the OECD, the reason for this unsatisfactory result is rooted in the (or a) concept of sovereignty which “underpins the stable tax framework within which governments have been able to facilitate arrangements that allowed for the benefits of globalization to flow to all market economies.” Indeed, several states, were not accustomed to considering the impact that the other states’ tax measures can produce on a certain situation. These states have used their tax systems to “compete” with other states, in order to attract foreign direct investments.

Notwithstanding the manner in which tax bases have been eroded, the result has forced international organizations and governments “to collaborate more intensively through a hard law multilateral instrument”. “Saving the pie” has become a fresh policy imperative.

1.3. BEPS as “costs of divergence”

The costs of divergence have caused the current and unprecedented degree of convergence in international taxation. These “avoidable” costs are commonly labelled as “BEPS” practices, i.e. base erosion and profit shifting, which refers to a bewildering variety of techniques (e.g. multiple deductions of the same loss, double-dip leases, mismatch arrangements, loss-making financial assets artificially allocated to high-tax jurisdictions), and are carried out by cross-border businesses, in distorting competition.

This “cost name” (i.e. BEPS) expresses clearly the ideas of:
- “movement” (“profit shifting”, suggesting income flowing due the detachment of tax location from the location of business activity); and
- “effect” (“base erosion”, representing the financial consequence on states’ revenue balances).

23. It may be questioned whether the OECD is referring to “the concept of sovereignty” or to “a concept of sovereignty”. On this difference, see R.J. Jeffery, The changing global economy: the role of sovereignty and jurisdiction in the creation and elimination of distortions to trade associated with international taxation (Kluwer 1998).
25. Countries are “competitive” in the sense that “[t]hese countries’ economic growth benefited from their comparative advantages in world trade in goods and services, and from their economic and social institutions”. Y. Brauner & P. Pistone, The BRICS and the Future of International Taxation, in BRICS and the Emergence of International Tax Coordination (Y. Brauner & P. Pistone eds., IBFD 2015), Online Books IBFD.
29. It could be questioned to what extent BEPS can be considered “avoidable”. According to Judge Houghton, as quoted in A.R. Ilersic, Tax Evasion in the United Kingdom, 27 Can. Tax Journal, p. 696 (1979), tax avoidance is “an inevitable offshoot” in tax system “which seeks to ensure that the citizen and his advisers may know exactly where they stand”.
The OECD defines BEPS as “tax planning strategies that exploit gaps and mismatches in tax rules to make profits ‘disappear’ for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid”.33

Current international tax law provides two concepts to explain this income-fading phenomenon.

The first concept has a long legal tradition and implies situations where the taxpayer:
– seeks to rely on a supranational legal right (for example, a freedom of movement provided by the EU Treaty) to circumvent or displace national tax law; or
– seeks to take advantage of rights provided by a supranational rule (for example, provided BY an EU Directive), but in a manner contrary to its intent.

These situations are generally labelled as “international tax abuse”, in the twofold notion of:
– abuse of law (intended as misuse of a norma agendi, i.e. legal rule); and
– abuse of rights (intended as exploitation of facultas agendi, i.e. individual right).34

The same pattern can also be appreciated in “treaty abuse” cases, where the taxpayer:
– tries to circumvent the provisions of domestic tax law, calling for treaty benefits; or
– tries to circumvent the limitations set out in the tax treaty itself (“treaty shopping”),35 in order “to benefit from treaty benefits”36 under “inappropriate circumstances”.37

Indeed, tax treaties have been shown to be “very vulnerable to taxpayer abuse” by facilitating the use of artificial legal structures aimed to secure the benefits of both the advantages available under domestic laws and the relief granted under tax treaties.38

Apart from tax abusive practices, it is recognized that complexity “also favours aggressive tax planning, which may trigger deadweight losses for the economy”.39 Indeed, the perception by tax administrations of unacceptable practices of reducing taxation, resulting in “fiscal degradation” (which do not amount to international tax abuse), has led to the introduction

(University of Chicago Law School 2014).

35. Treaty shopping is defined as “the situation where a person who is not entitled to the benefits of a tax treaty makes use – in the widest meaning of the word – of an individual or of a legal person in order to obtain those treaty benefits that are not available directly”. Treaty Shopping, in IBFD International Tax Glossary (J. Rogers-Glabush, ed., 6th rev. ed., IBFD 2009), Glossary IBFD.
37. Action 6 Final Report, supra n. 5, at 17, where “treaty shopping” is defined as “arrangements through which a person who is not a resident of a Contracting State may attempt to obtain benefits that a tax treaty grants to a resident of that State”. See R.S. Avi-Yonah & C. HJI Panayi, Rethinking Treaty Shopping: Lessons for the European Union, in Tax Treaties: Building Bridges between Law and Economics (M. Lang et al. eds., IBFD 2010), Online Books IBFD. A deeper analysis of treaty abuse will be developed at sec. 2.3.
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of the new concept of “aggressive tax planning” (hereinafter ATP) as one means of assisting states to recover from their economic downturns.41

If “abuse” is a meaningful concept related to the historical aspect of law, ATP might be considered as a meaningless expression.42 Generally speaking, it refers to cases where the taxpayer exploits the disharmony coming from the interaction of two or more tax jurisdictions for the purpose of reducing his tax liability.

This concept has been embodied by EU law since 2012, when the EU Commission announced the preparation of an action plan setting out concrete steps “to enhance administrative cooperation and to support the development of the existing good governance policy, the wider issues of interaction with tax havens and of tackling aggressive tax planning”, besides “recurrent fraud schemes and trends”.43

To summarize, it can be argued that BEPS refers to two different situations, namely “aggressive or abusive transactions, arrangements, or structures” (Emphasis added)44 developing across various jurisdictions to effectively shift taxable profits towards states with favourable tax regimes, which do not result in purely domestic tax transactions.45 At the international level, these “undesirable” practices (considered together) cannot be totally formalized or objectified, as they can occur within one single coherent tax system.46 The expression “abuse and ATP” is currently the most widely used expression to meet the need of “speaking the same language” on this worldwide phenomenon.

The purpose of this article is to critically assess the linguistic uses of these concepts, as adopted by the OECD and EU law via several instruments. The goal is to ascertain whether a unifying conceptual framework has been established in such a changing legal environment in which “tax administrations and courts show some considerable variations in the levels of tax planning that they will tolerate”.47 In particular, this article considers the BEPS Reports, endorsed by the G20,48 and the comprehensive package adopted in 2012 and 2013 by the EU

41. In the recent past, the OECD has identified a number of avenues to better assess tax compliance risks, such as those described in Tackling Aggressive Tax Planning, supra n. 5.
42. Useful attempts to establish a meaningful notion of ATP are made in academic literature, as discussed in sec. 2.5. In particular, see infra n. 136. On the relationship between ATP and “international tax arbitrage”, see sec. 2.4.2.
45. Some competitive disadvantages may also arise when competing enterprises are subject to different levels of taxation in their home jurisdiction, but that issue is beyond the concerns raised by BEPS. See OECD/G20, Addressing the Tax Challenges of the Digital Economy – Action 1: 2014 Deliverable, p. 108 (OECD/G20 2014) and Action 1 Final Report, supra n. 5, at 84.
48. In Oct. 2015, the OECD announced that the G20 Finance Ministers expressed full support for the latest BEPS proposals during a meeting on 8 Oct. 2015 in Peru.
Commission of both legislative\(^{49}\) and non-legislative\(^{50}\) initiatives aimed to effectively tackling cross-border issues.

In search of a useful reference point to distinguish tax abuse from ATP, particular attention is paid to the definitions conveyed (and the specific wording selected) by the EU institutions and the OECD. Indeed, the purpose of this article is also to establish a starting point for discussions on the linguistic discrepancies that may arise and to provide a preliminary categorization of these discrepancies.

Accordingly, after defining the distinctions between tax abuse and ATP, underlying the central role of “circumvention” in tax abuse practices (see section 2.2.) and the pattern of ATP (which implies “loopholes”, “gaps”, “mismatches” and “frictions”) (see section 2.4.), the linguistic features of tax abuse and ATP are described. In particular, the article will focus on the distinction between (undue) “tax benefits” and “advantages” and on what amounts to “aggressiveness”.

On the basis of the linguistic notions of “signifier”, “signified” and “referent”,\(^{51}\) a preliminary categorization of linguistic discrepancies in EU and OECD legal instruments will be provided to identify cases of the overlap of tax abuse and ATP, and to describe how the current (soft) lawmaking process in international tax law works (see section 3.4.).

Whether it is possible to find common grounds in abuse and ATP concepts is another issue to be discussed. On the basis of the functions ascribed to the two concepts, it is argued that a sort of “artificiality criterion” is implied by both notions, even if the “degree of artificiality” requested in EU law and by the OECD remains an open issue (see section 4.4.).

In the final section, highlighted is how the promotion of a theoretical understanding and careful empirical handling of the relevant practices would enrich the discussion and foster consistent implications (see section 5.).

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50. In 2012, the European Commission adopted an Action Plan (European Commission Action Plan (COM(2012) 722), supra n. 43) setting out over 30 measures to combat tax fraud and tax evasion now and in the future, which includes concrete steps to help protect Member States’ tax revenues against ATP (EC Recommendation on ATP (C(2012) 8806), supra n. 12), as well as tax havens (Commission Recommendation regarding Measures Intended to Encourage Third Countries to Apply Minimum Standards of Good Governance in Tax Matters, C(2012) 8805 Final (European Commission 2012) [hereinafter EC Recommendation on Good Governance in Tax Matters (C(2012) 8805)]). Moreover, the Commission has set up the “Platform for ‘Tax Good Governance, Aggressive Tax Planning and Double Taxation’, which aims to develop, with the cooperation of stakeholders’ representatives, further initiatives to promote good governance in tax matters in third countries, to tackle aggressive tax planning and to identify and address double taxation.

51. These terms are explained in sec. 3.4.
2. “Tax Abuse” and “Aggressive Tax Planning”: Preliminary Distinctions

2.1. Introduction

In the context of BEPS, the understanding of “tax abuse” and “ATP” is increasingly interrelated, although it is arguable as to whether their distinguishing features are as straightforward to define. The present section addresses the meaning and scope of these concepts, analysing their linguistic use in EU law and the OECD’s various instruments.

2.2. The central role of circumvention in tax abuse practices

Generally speaking, tax abuse (both as abuse of law and abuse of rights) is characterized by the following elements:

– the achievement of (improper) tax benefits (by means of tax savings);

– a conflict between the spirit of tax law circumvented and the availability of tax savings: it must be determined whether the legislative intent would be frustrated if the tax benefits were granted (“objective test” or “legitimacy test”); and

– the absence of valid commercial reasons: it should be determined whether transactions were justified by (commercial) motives other than tax motives (“subjective test” or “motive test”).

Although the application of these criteria varies from country to country, their occurrence essentially allows a tax administration to disregard the legal form of a transaction or series of transactions. This depiction is provided by the OECD, through the reliance on:

– the term “avoidance”, “which is generally used to describe the arrangement of a taxpayer’s affairs that is intended to reduce his tax liability and that although the arrangement could be legal [i.e. in line with “the letter of the law”] it is usually in contradiction with the intent of the law it purports to follow [i.e. against “the spirit of the law”];” (Emphasis added); and

– the expression “abuse of law”, meaning “[t]he doctrine which allows the tax authorities to disregard a civil law form used by the taxpayer which has no commercial basis.”

The term “abuse” plays an important role in the BEPS Reports, where it is used much more than the term “ATP” (apart from in the Action 12 Final Report). In the BEPS Reports, tax abuse is assimilated to tax avoidance, as sentences such as the following show:


Civil law doctrine, not restricted to tax law, which is broadly equivalent to the substance over form doctrine often referred in common law systems. No reference to “fiction” has been made.


56. Abuse is also used in a more generic way, in sentences such as “jurisdictions could consider adopting rules that, if they are satisfied that a business is following these principles, this business should expect challenges
such *avoidance* strategies may be addressed through domestic general anti-*abuse* rules. (Emphasis added).

From this perspective, according to the OECD, the most relevant anti-*abuse* rules in domestic tax systems include: general anti-*avoidance* rules or doctrines; controlled foreign company (CFC) rules; thin capitalization and other rules limiting interest deductions; and rules found in bilateral tax treaties to reduce the risk of abuse of treaties by unintended beneficiaries, e.g. through the use of conduit companies. Also included are anti-base erosion rules, which impose higher withholding taxes on, or deny the deductibility of, certain payments (e.g. those made to entities located in certain jurisdictions).

The element of “circumvention” is fundamental in the OECD’s language. It is adopted in a very extensive way, not rigorously limited to expressing the idea of a taxpayer who “*salvis legis verbis, substantiam eius circumvenit*” (i.e. although the formal respect of the legal rule, he circumvents the object and spirit of such rule), but also with reference to other objects of avoidance, such as legal definitions, recommendations, obligations, hallmarks, treatments and guidance.

only where there is *misuse or abuse of such evidence*” (Emphasis added). Action 1 Final Report, supra n. 5, at 245.


58. *Addressing BEPS*, supra n. 57, at 38.

59. E.g. Action 3 Final Report, supra n. 18, at 21: “further recommendation is to include a form of hybrid mismatch rule to prevent entities from *circumventing* CFC rules through different tax treatment in different jurisdictions” (Emphasis added); Action 3 Final Report, supra n. 18, at 25: “to prevent *circumvention* and to ensure that rules operate effectively” (Emphasis added); Action 12 Final Report, supra n. 13, at 46: “to *circumvent* salary sacrifice anti-*avoidance* provisions” (Emphasis added); Action 3 Final Report, supra n. 18, at 21: “to ensure that companies in the parent jurisdiction cannot *circumvent* CFC rules just by changing the legal form of their subsidiaries” (Emphasis added); Action 2 Final Report, supra n. 5, at 56: “[i]n order to prevent a reverse hybrid being inserted into a structure to *circumvent* the operation of the hybrid financial instrument rule, the reverse hybrid rule will also apply to the extent a direct payment would have been subject to adjustment” (Emphasis added); *Addressing BEPS*, supra n. 57, at 44: “rules such as thin capitalisation rules may be *circumvented* by channelling the financing through an independent third party, particularly when the relevant rules only apply to related parties” (Emphasis added); Hybrid Mismatch Arrangements, supra n. 5, at 23: “audit activities carried out in Italy have revealed the use of schemes that seek to *circumvent* the rules denying benefits in the case of hybrid mismatch arrangements…” (Emphasis added).

60. E.g. “[t]he Action Plan ... called for a review of that definition to prevent the use of certain common tax avoidance strategies that are currently used to *circumvent* the existing PE definition” (Emphasis added); OECD/G20, *Preventing the Artificial Avoidance of Permanent Establishment Status – Action 7: Final Report*, p. 9 (OECD/G20 2015), International Organizations’ Documentation IBFD [hereinafter Action 7 Final Report]).

61. E.g. Action 2 Final Report, supra n. 5, at 61: “[r]everse hybrids cannot be used to *circumvent* the application of Recommendation” (Emphasis added).

62. E.g. Action 12 Final Report, supra n. 13, at 38: “the filter could be used to *circumvent* the disclosure obligation” (Emphasis added).

63. E.g. *Addressing BEPS*, supra n. 5, at 44: “prevent *circumvention* of hallmarks drafted in a more objective way” (Emphasis added).

64. E.g. Action 5 Final Report, supra n. 5, at 42: “[j]urisdictions with IP regimes need to ensure that taxpayers are not able to *circumvent* this treatment of acquisition costs by acquiring entities that own IP assets” (Emphasis added).

65. E.g. OECD, *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10: Final Report*, p. 161 (OECD/G20 2015), International Organizations’ Documentation IBFD [hereinafter Actions 8-10 Final Report]: “[t]he guidance ensures that CCAs cannot be used to *circumvent* the new guidance on the application of the arm’s length principle in relation to transactions involving the assumption of risks, or on intangibles” (Emphasis added).
The central role of circumvention in characterizing tax abuse is shared by the EU Commission, in which the purpose of abusive arrangements is “avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply” 66 (Emphasis added). Even the EU Court of Justice (ECJ) employs this core element in order to identify tax abuse, 67 notwithstanding that in some cases the ECJ has confused the objective and subjective test by discussing factors related to the purpose of transactions in the context of the (frustration of the) legislative purpose. 68

For the purposes of this present research, it is important to underscore that in the European Union’s legal area, the prohibition of tax abuse has acquired the legal recognition 69 of:

- general principle (in cases of abuse of EU hard law, where the taxpayer seeks to unduly achieve tax benefits granted by directives). In this tax-harmonized area, the ECJ applies the concept under its strictest scrutiny and provides the authentic interpretation of EU law; 70 and
- general interest of the so called “rule of reasons” (in cases of abuse of EU treaty law, invoked by the taxpayer in order to circumvent domestic tax law), applied in conjunction with the principle of proportionality. 71

2.3. The “double” depiction of treaty abuse

“Treaty abuse is one of the most important sources of BEPS concerns”. 72 Because of the application of double tax treaties, “income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed” 73 undermining “tax sovereignty ... thereby depriving countries of tax revenues”. 74 Indeed, double tax treaties, which are bilateral tools that countries use to coordinate the exercise of their respective taxing rights, may create opportunities for taxpay-
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ers to obtain undue tax benefits in the form of lower or no taxation at source and/or lower or no taxation in the state of residence. 75

As noted above the double depiction of treaty abuse underlined in section 2.3. makes treaty abuse a species of the genus “abuse”. It is possible to distinguish abuse of rights (where a person seeks to benefit from a right in a manner running contrary to the spirit of the law that provides this right) from abuse of law (where “law” is a domestic rule that a person seeks to circumvent or displace). Accordingly, it is possible to identify:

- cases where the object of abuse and the circumvention is the same (the double treaty); and
- cases where the object of abuse (the double treaty) does not correspond to the object of circumvention (the domestic tax rule).

These distinctions appear to have been considered by the OECD, as the following examples show:

… [o]ther States prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law: 76

… treaty-shopping situations as well as other cases of treaty abuse, which may give rise to double non-taxation77 (Emphasis added).

Therefore, treaty abuse is different from (and more prevalent than) treaty shopping, which is (almost) abuse per se.

The OECD further provides in its Action 2 Final Report that hybrid instruments and entities (as well as dual resident entities) are not to be used unduly to obtain the benefits of treaties. 78

The OECD advocates “a hard law multilateral instrument both to prevent the tax treaty network from facilitating BEPS and to protect their tax sovereignty”. 79

However, the term “treaty abuse” is used inconsistently. The OECD uses vague expressions and adverbs to mean that “there are a number of arrangements through which a person who is not a resident of a treaty country may inappropriately obtain the tax benefits that a bilateral tax treaty is intended to provide on a reciprocal basis to appropriate claimants” 80 (Emphasis added). However, the concepts of tax abuse and ATP overlap each other, thereby defining treaty abuse as “a way of implementing tax planning”, as multinational enterprise (MNE) groups present in many countries have “greater tax planning opportunities. Indeed,

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76. Action 6 Final Report, supra n. 5, at 80.

77. BEPS Action Plan, supra n. 5, at 18. It is arguable also in sentences such as “treaty shopping and other forms of treaty abuse will be addressed” (Emphasis added). Action 8 Deliverable, supra n. 5, and OECD/G20, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2014 Deliverable, p. 4 (OECD/G20 2014).


80. Id., at 25.
MNEs have access to a broader range of (potentially mismatching) tax systems and pairs of bilateral tax treaties, creating fertile ground for ‘treaty abuse’. The two different categories of treaty abuse seem to provide for diverse solutions. Notwithstanding, the Action 6 Final Report tends to merely propose general statements that tax treaties are not intended to be used to generate double non-taxation and to identify the tax policy considerations that, in general, countries should take prior to entering into a tax treaty with another country.

The first category of cases involves situations wherein a person seeks to circumvent tax treaty rules: “it is unlikely that these cases will be addressed by specific anti-abuse rules found in domestic law”. Although domestic general anti-abuse rules could prevent the granting of treaty benefits in these cases, the OECD fosters a more direct approach, involving the drafting of anti-abuse rules to be included in treaties.

In comparison, the situation in the second category of cases is different. In this category the taxation under domestic rule is evaded. This situation cannot be addressed by treaty provisions alone and it requires domestic anti-abuse rules.

The first case of abuse is illustrated in situations of unintended non-taxation that result from tax treaties, specifically where countries eliminate double taxation through the exemption method. Non-taxation resulting from potential abuses of such an exemption method can be avoided at the treaty level by encouraging states “not to include the exemption method in their treaties”.

Another illustration is found in cases involving the use of dual resident companies that claim to be resident of a particular treaty country to achieve double non-taxation by interposing shell companies located in countries with favourable treaty networks “that contain insufficient protections against treaty abuse [and which] raise BEPS concerns”. The contracting states should “deny the application of the provisions of their treaties when transactions or arrangements are entered into in order to obtain the benefits of these provisions in inappropriate circumstances” through the use of a limitation on benefits (LOB) rule supplemented by a mechanism (such as a restricted principal purpose test (PPT) rule) that would deal specifically with conduit arrangements or through a combined approach (i.e. including both LOB and PPT rules). In this case, the OECD’s rules provide “for a minimum standard to address … arrangements through which companies are set up in a country in order to take advantage of the treaty network of that country rather than for carrying on business activities...
in that country”.

However, what constitutes “inappropriate circumstances”? The benchmark is the following: treaty benefits may be denied through the application of an anti-abuse provision “where obtaining a more favourable treatment based on the applicable treaty would be contrary to the object and purpose of the relevant treaty provisions”. In the author's opinion, where the OECD in the context of Action 6 of the BEPS Action Plan makes reference to “inappropriate circumstances”, it is referring to situations where the ratio of the relevant treaty provisions is violated.

Here, states have to protect their tax bases from such abuse on the basis of the object and purpose of the relevant treaty provisions by:
- denying treaty benefits to taxpayers who, under different circumstances, would not be entitled to them; or
- granting access to these benefits only if certain conditions (as provided by the treaty provisions) are met.

The second category of abuse is much more complicated. The OECD recognizes that the adoption of anti-abuse rules in tax treaties is insufficient to address “tax avoidance strategies that seek to circumvent provisions of domestic tax laws” because these cases include situations where the taxpayer calls for the enforcement of tax treaties to restrict a contracting state's right to tax or departure or exit taxes.

The OECD uses the expression “tax avoidance strategies” to define the same pattern recognizable in EU treaty abuse, wherein EU treaty freedoms are (ab)used to circumvent domestic tax laws. In this context, the OECD suggests adopting:
- “the combination of hybrid mismatch arrangement rules with treaty abuse rules”, that can reduce “tax planning opportunities”. These hybrid mismatch rules link rules that seek to align the tax treatment of an instrument or entity with the tax outcomes in the counterparty jurisdiction “but [which] otherwise do not disturb the tax or commercial outcomes”;
- changes to the OECD Model aimed at ensuring that “treaties do not inadvertently prevent the application of such domestic anti-abuse rules” and
- a multilateral instrument that could incorporate approaches to prevent the avoidance of domestic rules.

89. Action 1 Final Report, supra n. 5, at 87. However, “if a country is not itself concerned by the effect of treaty-shopping on its own taxation rights as a State of source, it will not be obliged to apply provisions such as the LOB or the PPT as long as it agrees to include in a treaty provisions that its treaty partner will be able to use for that purpose”. Action 6 Final Report, supra n. 5, at 20.
93. See also OECD/G20, Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2014 Deliverable, p. 18, 20, 81, 82 and 97 (OECD/G20 2014) [hereinafter Action 2 Deliverable].
94. Action 11 Final Report, supra n. 81, at 225.
95. Action 2 Deliverable, supra n. 93, at 12.
2.4. The static and dynamic pattern of aggressive tax planning

While the concept of tax abuse has a stable legal recognition at EU level (in addition to recognition – eventually – on domestic and treaty level), ATP has been used in EU soft tax law instruments97 “as a (vague) concept very much linked to a call to new policy developments and coordinated international action”.98 Aggressive tax planners are those exploiting the differences resulting from the concurrent exercise of two or more taxing jurisdictions in the international tax system to achieve:

– no single taxation (also known as “double non-taxation”) (e.g. income not taxed in the source state is exempt in the state of residence),99 or
– negative taxation (e.g. double deductions, if the same loss is deducted in both the state of source and residence100 or when the taxpayer obtains a refund higher than the amount of taxes originally paid).

This “tax policy”101 concept has been expanded to encompass MNEs arranging their affairs in a tax-sensitive manner. ATP takes many forms, including: making tax-sensitive adjustments to the transfer prices used to record transactions between related parties; corporate reorganizations designed to relocate corporate residence to attractive tax jurisdictions; and the careful timing of income repatriation to reduce the cost of home-country taxation of foreign income.102 These forms are developing according to a pattern which can be static or dynamic as follows:

– the “static” form (regarding, for example, the artificial creation of permanent establishments or controlled foreign companies), consists of the exploitation of legal discrepancies among national tax systems, assumes and implies the existence of fiscal and legal
state boundaries and stands for a “border-full” economy. Accordingly, it implies a greater revisiting of the common international tax law core concepts and the “dynamic” feature (regarding, for example, the growing reliance of modern business on intangible property – which will become a unique value – and risk management as part of global value chains, requesting a careful transfer pricing analysis of individual transactions to identify where the activities creating profits take place) implies the introduction of new rules to detect and discover the degree of aggressiveness, which is particularly problematic currently since some taxpayers (MNEs in particular) are often oligopolies managing unique features and not yet fully appreciated values. These “uncatchable” values are well articulated in the OECD’s Reports with the term “synergic benefit”, signifying the quid pluris emerging from the combined relationship of international business activities and multiple localisations. This “value” (which, from the fiscal perspective, is the income subject to taxation) can be considered (and measured) only if a comprehensive approach is adopted (e.g. without limiting the consideration to the fragmentation of group entities).

In this area “previously not covered by international standards”, the challenge is complementing “existing standards that are designed to prevent double taxation with [new] instruments that prevent double non-taxation”. According to the OECD, ATP results in slipping taxable income through “loopholes, as well as gaps, frictions or mismatches in the interaction of countries’ domestic tax laws”. Therefore, ATP arises in contexts of “loopholes”, “gaps”, “mismatches” and “frictions”.

2.4.1. “Loopholes” and “gaps”

It is important to evaluate the difference between “loopholes” and normative “gaps” (in the strict sense of the word, “axiological gaps”). Since loopholes are considered to be an unintentional imperfection in the law, if a taxpayer takes advantage of a tax provision exploiting a legislative “loophole”, the taxpayer’s behaviour may be challenged by tax authorities.

This concern is shared by EU law, where the idea of closing savings taxation loopholes in the Directives to “improve the effectiveness of [these] instrument[s]” is expressed. In the


106. Compare with the domestic case law, such as FI: SAC (Korkein hallinto-oikeus), 17 Feb. 2014, Case 2014:31, Other Domestic Case Law IBFD.

107. BEPS Action Plan, supra n. 5, at 13. On such an idea of “complementing” the existing international standards, see C. Fuest et al., Profit Shifting and "Aggressive" Tax Planning by Multinational Firms: Issues and Options for Reform, 5 World Tax J. 3 (2013), Journals IBFD.


same way, this could trigger a state to amend the relevant existing legislation, thereby closing the loopholes, even through available interpretative tools,\(^{112}\) to improve the effectiveness of domestic law.

On the contrary, gaps in tax laws imply the inapplicability of a rule and the impossibility to use the integration by analogy\(^{113}\) to tax and use the ECJ’s jurisprudence as a gap filler. In other words, the borderline between loopholes and gaps is that the former can be contrasted with legal interpretation, whereas the latter cannot.

Accordingly, it may be argued that ATP concerns, firstly, taxpayers’ behaviour, looking for “gaps in the interaction of different tax systems to artificially reduce taxable income or shift profits to low-tax jurisdictions in which little or no economic activity is performed”\(^{114}\) (Emphasis added). In the author’s view, sentences such as “aggressive (or potentially abusive) tax planning which often takes advantage of loopholes in the law or uses legal provisions for purposes for which they were not intended”\(^{115}\) are to be considered inconsistent (Emphasis added).

2.4.2. “Mismatches”

Loopholes and gaps in a domestic tax system may represent a source of ATP behaviour per se. However, also in cross-border transactions, they may cause ATP situations, arising from the interaction of two or more domestic tax systems.

Indeed, ATP may also be shaped in the form of a “mismatch arrangement” (which is, in turn, sometimes due to loopholes and/or gaps in one or more tax systems).

The OECD considers to be aggressive a scheme that exploits a difference in the tax treatment of an entity (sometimes “hybrid”)\(^{116}\) or instrument under the laws of two or more tax jurisdictions and which produces a mismatch in tax outcomes, wherein that mismatch has the effect of lowering the aggregate tax burden of the parties of the arrangement.\(^{117}\)

\(^{112}\) On this topic, see B. Drummond, A purposive approach to the drafting of tax legislation, 6 British Tax Review (2006).

\(^{113}\) More in-depth on this topic, see G.S. Cooper, Taxation by Analogy (Sydney Law School – Legal Studies Research 2010).

\(^{114}\) Action 1 Final Report, supra n. 5, at 11.

\(^{115}\) Action 12 Final Report, supra n. 13, at 85.

\(^{116}\) The role played by hybrid mismatch arrangements in ATP has been discussed in a number of OECD reports. E.g. the OECD’s Report on Addressing Tax Risks Involving Bank Losses (OECD 2010) highlighted their use in the context of international banking. Similarly, the OECD Report on Corporate Loss Utilisation through Aggressive Tax Planning (OECD 2011) recommended that countries “consider introducing restrictions on the multiple use of the same loss to the extent they are concerned with these results” and finally, in the Report on Hybrid Mismatch Arrangements, supra n. 5. A “hybrid entity” is defined as “an entity that is characterised as transparent for tax purposes (e.g. as a partnership) in one jurisdiction and non-transparent (e.g. as a corporation) in another jurisdiction”, while a “hybrid financial instrument” is an “instrument with economic characteristics that are inconsistent, in whole or in part, with the classification implied by their legal form. Hybrid financial instruments normally contain elements from equity, debt and/or derivatives, the advantages of which they seek to combine in the same instrument”. Hybrid Entity and Hybrid Financial Instrument, in IBFD International Tax Glossary (J. Rogers-Glabush, ed., 6th rev. ed., IBFD 2009), Glossary IBFD. See also G.K. Fibbe, EC Law Aspects of Hybrid Entities (IBFD 2009), Online Books IBFD.

\(^{117}\) The role played by mismatch arrangements in ATP is discussed in a number of OECD reports, such as: Addressing Tax Risks Involving Bank Losses (OECD 2010) regarding schemes “where the same tax loss is relieved in more than one country as a result of differences in tax treatment between jurisdictions”; Corporate Loss Utilisation through Aggressive Tax Planning (OECD 2011), suggesting the introduction of “restrictions on the multiple use of the same loss to the extent they are concerned with these results”; Hybrid Mismatch Arrangements, supra n. 5, dealing with double non-taxation and long-term deferral of taxation
In particular, the OECD distinguishes two categories of mismatches on the basis of their underlying mechanics:118
(i) arrangements that involve the use of entities, where the same entity is treated differently under the laws of two or more jurisdictions; and
(ii) the use of instruments, where there is a conflict in the treatment of the same instrument under the laws of two or more jurisdictions (e.g. generating deductible payments with no corresponding inclusion in the payee’s country).

This legal mismatch across tax borders may be defined as a form of what has been labelled as “cross-border tax arbitrage” or “international tax arbitrage” in the literature.119 Clear evidence of this can be found in the OECD’s language where, after describing a mismatch arrangement, the OECD states that:

[c]ompanies may also use arbitrage between the residence rules of the intermediate country and the ultimate residence country to create stateless income120 (Emphasis added).

Indeed, arbitrage transactions can take advantage of mismatches “found in the domestic law of one State” or “between the domestic laws of two States.”121

2.4.3. “Frictions”

Generally, in the context of abuse, “friction” is used to indicate the deviation by the relationship between verba (i.e. the literal meaning of the legal rule) and sententia legis (i.e. the object and spirit of such rule). In the context of ATP, “friction” is a non-recurring term, often used in combination with “gap”,122 to express the general idea of unacceptable outcomes, “including potential double taxation for corporations operating in several countries”.123

From a more comprehensive perspective, both abuse and ATP create a “friction” between legal form and economic reality (concerning tax abuse) and in the consistency in tax treatment arising from the interaction of different systems (concerning ATP). Accordingly, in the author’s opinion, the existence of “friction” is not suitable to distinguish abuse from ATP, since it occurs in both situations.

2.5. Comparative remarks on tax abuse and aggressive tax planning

From a theoretical point of view, the difference between tax abuse and ATP is clearly discernible. Tax abuse is a concept related to the idea of “limit”: it is recognized that taxpayers can

120. Action 1 Final Report, supra n. 5, at 82. See also the expression “identifying and exploiting the legal arbitrage opportunities” (BEPS Action Plan, supra n. 5, at 8).
121. Action 6 Final Report, supra n. 5, at 78.
122. BEPS Action Plan, supra n. 5, at 9.
123. Id.
legitimately organize their affairs so as to minimize their tax payable within the (external) limits allowed by (the letter of) the law.124

Tax abuse is, in principle, lawful, because the tax benefit being sought is literally within the boundaries of the rules, albeit not according to the object and purpose of the rules (agere in fraudem legis). It is said that tax abuse is not a “mala in se” (i.e. illegal in itself), but is a “mala quia prohibita” (i.e. illegal because it is prohibited).125 Accordingly, tax abuse is a behaviour intra legem (within the law), but not secundum legem (according to the law): abusive schemes refer to arrangements that “push the (internal) limits” of tax minimization. In other words, the concept of abuse constitutes the threshold above and beyond which taxpayers would no longer be able to rely on the protection of the international principle of tax neutrality. When taxpayers exceed this threshold, tax evasion occurs.126 Indeed, “[b]eyond cases of illegal abuses, which are the exception rather than the rule, MNEs engaged in BEPS comply with the legal requirements of the countries involved”.127

In comparison, ATP has another rationale: tax planning is not a violation or circumvention of the law because it is not in conflict with the intention (literally and purposively) of the law. From such a perspective, the expression “identifying and exploiting … the boundaries of acceptable tax planning”128 as used by the OECD is misunderstood (Emphasis added).

Aggressive tax planners do not go beyond the limits fixed by rules, they go between rules (i.e. “inter leges”). This gives rise to “aggressive” tax planning, which consists of exploiting gaps in the architecture of the existing tax legislations, mismatches and disparities (i.e. differences resulting from the concurrent exercise of two or more taxing jurisdictions) of the international tax system.

ATP reveals its essential nature of “arranging”, “organizing”, “placing” (“planning”, precisely) for tax purposes. It consists of active purposive behaviour (as opposed to passive unintentional behaviour), as “[m]aking mistakes because of ignorance of tax rules is very different from aggressive tax planning and tax fraud”.129

According to EU law and the OECD, the outcome of this “activity” (resulting in no or negative taxation) is not per se a cause of concern. However, it becomes a concern when it implies something “artificial” which segregates taxable income from the activities that generate it. This element of “artificiality” is shared by the concept of abuse and ATP, as will be more thoroughly analysed in section 4.

124. A relevant application of this principle can be found in UK: First Tier Tribunal, 31 July 2009, Case [2009] UKFTT 192 TC, Pendragon, Other Domestic Case Law IBFD.
125. In Latin: “Nulla lex, nulla restrictio est imposita liberae voluntati contrahentium”, meaning that individuals have the freedom to arrange their affairs without limitations provided by the law.
127. Addressing BEPS, supra n. 57, at 28.
128. BEPS Action Plan, supra n. 5, at 8.
129. European Commission, supra n. 97, at 75.
Much of the evidence suggests that ATP – like tax abuse – has to be considered as non-compliance, but not as unlawful. For example, in EU soft law it is stated that “[t]ax fraud and tax evasion is a multi-faceted problem which requires a coordinated and multi-pronged response. Aggressive tax planning is also a problem which requires urgent attention” (emphasis added). Accordingly, ATP has to be considered as distinguished from tax fraud or tax evasion.

Another noteworthy difference between abuse and ATP concerns the addressees. While the tax abuse concept is based on taxpayers’ behaviour, the real subjects of the ATP concept are national legislators and governments – too passive in their approach to closing tax gaps – and tax authorities in general – who have the responsibility to revise the rules or introduce new rules in line with the international convergence approach – which will provide for comprehensive worldwide solutions, to:

- discourage non-taxation or negative taxation outcomes (as the prohibition of abuse provides for); and
- ensure that the global tax architecture will be equitable and fair.

The last issue goes beyond tax abuse concerns and emphasizes the differences between the two concepts, as the literature has clearly highlighted. This general purpose justifies the


132. In EU Law, tax fraud is “a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted or fake documents are produced. Tax evasion generally comprises illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities”. Concrete Ways to Reinforce the Fight against Tax Fraud and Tax Evasion (COM(2012) 351), supra n. 131, at 2, note 1). According to the OECD, “[t]ax fraud involves the direct violation of tax law and may feature the deliberate concealment of the true state of a taxpayer’s affairs in order to reduce tax liability. The cases of illegal tax fraud vary among countries but examples include false claims to exemption or deductions, unreported income, organised failure to withhold taxes, etc. which may result in a criminal charge” (Action 12 Final Report, supra n. 13, at 85). P. Essers, The fight against tax fraud in the European Union, in Armonización, Coordinación Fiscal y Lucha contra el Fraude p. 62 (F. Adame Martinez ed., Thomson Reuters Aranzadi 2012). On the distinction between tax avoidance and tax fraud, see RU: Constitutional Court, 1 Apr. 2004, Case 169-0. Other Domestic Case Law IBFD, and RU: Higher Arbitration Court, 1 Mar. 2008, Other Domestic Case Law IBFD.

133. Tax evasion carries an element of dishonesty, comprising intentional illegal behaviour, such as not declaring, or under-declaring, income or assets which are subject to tax, which is often sanctioned by financial or criminal penalties (see European Commission Action Plan (COM(2012) 722), supra n. 43). On this topic, M. Richardson, Fighting Tax Fraud and Tax Evasion in the EU: The 2012 Action Plan, 24 EC Tax Review 4 (2015). According to the OECD, the term “tax evasion” is “generally used to mean illegal arrangements where the liability to tax is hidden or ignored”. Tax Evasion, in OECD Glossary of Tax Terms (accessed 10 Nov. 2015), available at http://www.oecd.org/ctp/glossaryoftaxterms.htm.

134. “The lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide”. Action 12 Final Report, supra n. 13, at 9. See also the opening remark of the BEPS Action Plan, supra n. 5.

135. For an extensive analysis of this institutional purpose, see sec. 4.

136. P. Pistone, EU law, the BEPS project and the global framework for transparent tax competition, 84 Archiv für schweizerisches Abgaberecht, p. 149 ff. (2015/2016); A.P. Dourado, The Base Erosion and Profit Shifting (BEPS) Initiative under Analysis, 43 Intertax 1, p. 44 (2015), where it is openly stated that the ATP concept
comprehensive scope that should be given to the ATP concept, which does not generally match, in the terminology used internationally, cases of tax abuse, as the linguistic use of these terms reveals.\textsuperscript{137} Indeed, ATP seems to be broader than the abuse concept, because:

– taking advantage of mismatches between two or more tax systems does not per se imply circumvention (because there is no rule to circumvent);
– in some cases (where the exploitation of rate differentials is not contrived directly by shifting profits from one jurisdiction to another), it is impossible to ascertain – and quantify – the tax benefits achieved, comparing the taxpayer’s transaction to the normal feasible alternative (in this context, the comparison should concern the advantages arising from the international disparities and those emerging if the situation was connected with just one single tax jurisdiction); and
– the increasing information disclosure obligations on taxpayers regarding “disclosing”\textsuperscript{138} ATP arrangements (as provided by BEPS Action 12 Final Report)\textsuperscript{139} confirm that ATP is broader than the abuse concept, because taxpayers are legally bound to inform tax administrations of these arrangements, even if their transactions do not constitute abuse.\textsuperscript{140}

Having this broad latitude, ATP covers situations where states (do not) introduce or (do not) maintain rules in order to attract business investments, which – under some circumstances – may amount to potentially harmful tax practices.

Regarding the two concepts of ATP and “harmful tax practice”, it should be noted that in EU soft law instruments:

– both concepts belong to the same “related area”\textsuperscript{141};
– with respect to ATP, the work on harmful tax competition by the Code of Conduct Group (1998-2013) focuses on legislative action rather than taxpayer conduct (taxpayer conduct was correctly perceived as being primarily caused by the taxation legislation of EU Member States); and
– the two concepts are often expressed indistinguishably\textsuperscript{142} and

\begin{quote}
\textbf{does not correspond to the concept of "tax abuse" used in EU law, since BEPS worries "go beyond tax avoidance, covering legal gaps and mismatches, and corresponding to what the EC Recommendation refers to as aggressive tax planning" (Emphasis added).}
\end{quote}

\textsuperscript{137} This is clear in expressions such as "aggressive or abusive transactions, arrangements, or structures". BEPS Action Plan, supra n. 5, at 22.

\textsuperscript{138} The verb “to disclose” is used in the BEPS Action Plan (supra n. 5, at 22) and in Addressing BEPS (supra n. 57, at 31). On these reports, see P. Baker, The BEPS project: disclosure of aggressive tax planning schemes, 43 Intertax 1, pp. 85–90 (2015).

\textsuperscript{139} The “availability of timely, targeted and comprehensive information” represents a relevant tool “for the early detection of aggressive tax planning”. BEPS Action Plan, supra n. 5, at 22.

\textsuperscript{140} See Action 12 Final Report, supra n. 13, at 23, where it is stated that “the definition of a ‘reportable scheme’ for disclosure purposes will generally be broader than the definition of tax avoidance schemes covered by a GAAR and should also cover transactions that are perceived to be aggressive or high-risk from a tax planning perspective” (Emphasis added).


\textsuperscript{142} It could be interesting to note that the expression “harmful tax practice” and ATP are sometimes combined in the neologism “harmful tax planning” (e.g. “[o]n the basis of cases provided by Member States and to the extent considered necessary the Group will examine policy responses available addressing potentially harmful tax planning by multinationals through the use of special tax regimes for investment funds possibly leading to a best practices solution” (Emphasis added). Council of the European Union, Code of Conduct Group Progress Report of 13 December 2011, Doc. 17081/1/11 REV 1, p. 8.
the revenue impact of these phenomena is depicted in the same way.143

On the contrary, according to the OECD, ATP was not intended to be synonymous with “harmful tax practice”, as used in sentences such as: “governments must continue to work together to tackle harmful tax practices and aggressive tax planning”144 (Emphasis added). This macroscopic difference between EU and OECD law exemplifies the linguistic discrepancies existing on the issue and is the starting point for the discussion developed in section 3., wherein a preliminary categorization of these discrepancies will be provided.

3. Tax Abuse and Aggressive Tax Planning: Some Linguistic Features

3.1. Introduction: The language issue

Generally, it is impossible to appreciate facts from a legal point of view without taking into account their linguistic characterization. The law is in a two-sided relationship with its direct object (the language).145 This also applies in tax law, which is an intense linguistic and practical matter.146 Accordingly, an analysis of both tax language and commercial praxis must be undertaken.

It is recognized that the lack of clarity and precision in tax law, resulting in divergent interpretations of taxable events and fiscal issues, may upset the requirement of the “quality of rules” of tax systems where the importance of accessible, clear, consistent and predictable legislation is highlighted.147 This linguistic quality of rules is employed in abusive schemes. As noted in section 2. addressing the element of “circumvention”, tax abuse occurs when taxpayers arrange their affairs in such a way as to take advantage of the intrinsic ambiguities in tax law,148 i.e. playing with words.149 In particular, legal terms (better yet, their semantic extensions), if they alter tax liability, enable taxpayers to avoid taxes. Indeed, even in perfectly drafted tax rules, there is a hiatus between the literal wording of the provisions and their ratio. Such hiatus gives the measure of the quality of the rules. Certainly, tax abuse must be considered as a relative concept as it depends on the quality of the rules.150

Depending on the relevant domestic (and treaty) provisions, abusive schemes may vary and assume different forms. In the post-BEPS era, even ATP must be considered as a relative concept, depending on the quantity of the rules, because ATP assumes that there are gaps in the architecture of the international tax system.

143. E.g. “[t]he persistence of such situations can lead to artificial capital flows and movements of taxpayers within the internal market and thus harm its proper functioning as well as erode Member States’ tax bases” (Emphasis added). EC Recommendation on ATP (C(2012) 8806), supra n. 12, at point 5.
144. BEPS Action Plan, supra n. 5, at 13.
146. See F. Geny, Science et technique en droit privé positif p. 455 (1921, reedited by BiblioLife in 2009). It is impossible to imagine taxation on a “real” economic event, irrespective of the legal systems and the law.
149. The playing activity of tax abusers is suggested by the Latin etymon ludere of the Spanish “elusión fiscal”, the Portuguese “elisão fiscal” and the Italian “elusione fiscale”.
150. More in-depth on this topic, see S. Cipollina, La legge civile e la legge fiscale. Il problema dell’elusione fiscale (Cedam 1992); R.A. Tooma, Legislating Against Tax Avoidance (IBFD 2008), Online Books IBFD.
Depending on the relevant domestic systems, aggressive schemes may vary and assume different forms. The quality and quantity of the tax rules are the target of the BEPS Project and the EU reform package, which provide tools to: (i) identify cases of tax abuse and ATP; (ii) enhance enforcement of tax rules; (iii) detect abusive and aggressive schemes and their participants; and (iv) resolve disputes.

Much has been (and will continue to be) written about the instruments elaborated at international level and their effects on domestic systems. However, this article does not address how domestic and treaty provisions and systems will be or should be changed in line with the initiatives promoted by the OECD and EU law.

The following research aims to play a role at a logical prior stage, showing how the OECD and EU law are providing a unified linguistic framework in this “grey” area of abuse and ATP. In the author's view, this is a fundamental step in order to “speak the same language” on concepts involving crucial construal issues.

On the one hand, many difficulties arise due to the ambiguity and approximation inherent in defining the two concepts of abuse and ATP. On the other hand, a correct equilibrium between precision and flexibility is required to ensure simplicity, effectiveness and transparency in the application of these two concepts.

Moreover, international tax law is – by definition – a multilingual (and multicultural) context in which every lawyer tends to interpret the relevant terms according to the framework of his own legal thinking, which, in turn, is often influenced by ideas, approaches and features characteristic of their legal culture.151

This issue is emphasized within the EU legal system. While on the one hand, the relevant terms built from approximations of law and language come from different legal cultures and different legal languages, in contrast, by the European Union's very nature, it is “obliged to express itself with a single voice”.152 This need is based on the “hybrid” process of the legal reasoning adopted by the ECJ and on the fact that EU law is expressed in one language that “exists” (from a legal point of view) in different linguistic versions, even if the lexicon of each national language analyses reality differently.153

In this context, how can EU law and the OECD provide a unified linguistic framework?

The only available tool is cross-referencing, i.e. the repetition of the same ideas, using the same wording, making reference to other instruments where a consistent approach is adopted. This cross-referencing allows a “roadmap” to be established that would be useful in defining the relevant concepts with ever greater accuracy. Even referring to other international law instruments (by the OECD to EU law and vice-versa) contributes to creating a “common language” and thereby gives more legitimacy and authority to these instruments.

While linguistic descriptions of ATP and abuse may differ between EU law and the OECD's soft law on a purely linguistic level, this article aims to query whether, on a legal level, their

descriptions express the same legal concepts. To answer this question, the starting point of this research is to survey the different linguistic characterizations of ATP and abuse, as presented and applied by the OECD and EU soft law, to ascertain (i) whether their descriptions are vague and undetermined\textsuperscript{154} and (ii) if this is the case, whether it is possible to rely on these characterizations within the international tax system.

Initially, the analysis is focused on the most frequent object of the OECD’s attention, i.e. the “tax benefit”, and its role, compared to the (slightly) different concept of “advantage”\textsuperscript{155} (see section 3.2.). Secondly, since legal literature recognizes no universal approach to the constructs of tax aggressiveness, the linguistic analysis attempts to define “aggressive” tax planning (see section 3.3.). After providing a preliminary categorization of the linguistic discrepancies existing in the OECD’s and EU soft law instruments in section 3.4., it appears that, arguably, this systematic action of linguistic characterization carried out by EU law and the OECD on abuse and ATP is based on a somewhat “lawmaking process” in international tax law in such matters (see section 3.5.).

3.2. (Undue) tax benefits and advantages

Both ATP and tax abuse result in “aggressive or abusive tax benefits”,\textsuperscript{156} sub specie a reduction of tax liability (for the taxpayer) and “in massive revenue losses”\textsuperscript{157} (for sovereign states). These outcomes are fundamental in the characterization of the phenomena and represent the principal underlying reason of BEPS concern, as confirmed by the fact that that the most frequently used word by the OECD in its Reports is “benefit”.

According to the OECD, abuse and ATP share the same purpose. The OECD states in its Action Plan on Base Erosion and Profit Shifting: “[t]his Action Plan calls for fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, \textit{including} anti-abuse provisions, designed to prevent and counter base erosion and profit shifting” (Emphasis added). Moreover, “[f]undamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it”\textsuperscript{158}

Hence, pursuant to the OECD’s perspective, abuse and ATP could be considered together, insofar as both actions imply measures that “negate or reduce the tax benefit sought”.\textsuperscript{159} It is an empirical (financial-oriented) approach which considers only the effect (base erosion, from states’ point of view, and benefit, from the taxpayers’ point of view) and not the rise of the abusive/aggressive practice. From this perspective, ATP and abuse do not differ based on the \textit{habilité} (ability) of the taxpayer or the particular complexity of the arrangement.

According to the OECD, the tax benefit has an “ambiguous nature”\textsuperscript{160} and is typically generated through cross-border schemes by different parties, in different jurisdictions. Therefore,

\textsuperscript{154} “A term is vague when a lack of clarity exists about the applicability thereof”, while “undetermined” occurs “when the concept is too general for the factual context in which it is used”. B. Peeters, \textit{European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws}, 22 EC Tax Review 3, p. 112 (2013).

\textsuperscript{155} As argued below, the term “benefit” is used to indicate a tax saving or a tax refund, while the term “advantage” has a broader scope because it also encompasses economic (non-fiscal) benefits.

\textsuperscript{156} \textit{Action 12 Final Report}, supra n. 13, at 65.

\textsuperscript{157} \textit{Addressing BEPS}, supra n. 57, at 6.

\textsuperscript{158} \textit{BEPS Action Plan}, supra n. 5, at 13.

\textsuperscript{159} \textit{Addressing BEPS}, supra n. 57, at 37.

\textsuperscript{160} \textit{Action 12 Final Report}, supra n. 13, at 68.
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to detect tax benefit in “international tax schemes”, this term has to be construed broadly because “the domestic tax benefits that arise under a cross-border scheme may seem unremarkable when viewed in isolation from the rest of the arrangement as a whole”.161 In other words, the focus on the benefit is fundamental to understanding the global picture and to discovering many types of cross-border tax planning schemes. The most frequent representation of such a “benefit” is tax exemption or relief from taxation,162 derived from:

– double deduction schemes, i.e. arrangements where a deduction related to the same contractual obligation is claimed for income tax purposes in two different countries;164
– deduction/no inclusion schemes, i.e. arrangements that create a deduction in one country, typically a deduction for interest expenses,165 but avoid a corresponding inclusion in the taxable income in another country;166 and
– foreign tax credit generators, i.e. arrangements that generate foreign tax credits that arguably would not otherwise be available, at least not to the same extent or without more corresponding taxable foreign income.167

These outcomes may arise from:

– fiscal (preferential) treatment provided by domestic laws,168 EU Directives169 or treaty provisions;
– the (legitimate) result emerging from a transaction170 or situation (e.g. “benefits arising solely by virtue of group affiliation”171);

161. “One focus will be where the work will explore using a wide definition of ‘tax benefit’ in order to capture such transactions”. Action 12 Final Report, supra n. 13, at 14.
163. E.g. see the following sentences: Action 2 Final Report, supra n. 5, at 306: “without the benefit of any deduction, credit or other tax relief” (Emphasis added); Id., at 41: “[i]n those cases where the payer is transparent, the burden will be on the taxpayer claiming the benefit of the exemption or relief from taxation to establish, to the satisfaction of its own tax administration, that the payment has not given rise to a deduction under the laws of another jurisdiction” (Emphasis added); Id., at 101: “rules denying the benefit of a dividend exemption to a deductible payment” (Emphasis added).
164. E.g. id., at 17: “[a] DD mismatch arises to the extent that all or part of the payment that is deductible under the laws of another jurisdiction is set-off against non-dual inclusion income”.
165. E.g. Action 5 Final Report, supra n. 5, at 24: “expenditures and benefits are directly linked”. Accordingly, tax benefit would cover not only amounts which have not been included into the taxable base, but also expenses which would not have been deductible were the arrangement not to have been put in place.
166. E.g. Action 2 Final Report, supra n. 5, at 17: “[a] D/NI mismatch generally occurs when a payment or part of a payment that is treated as deductible under the laws of one jurisdiction is not included in ordinary income by any other jurisdiction”.
167. Accordingly, the concept encompasses capital losses incurred by the taxpayer or foreign taxes which may either be offset against other capital gains or allow for a double taxation relief when they would not have been offset, were the scheme not to have been put in place.
168. E.g. Action 5 Final Report, supra n. 5, at 28: “to benefit from the preferential regime”.
169. E.g. Action 4 Final Report, supra n. 55, at 85: “the re-qualified interest should be granted the benefits of the Parent Subsidiary Directive”.
170. E.g. Action 2 Final Report, supra n. 5, at 107: “the economic and commercial benefits of the transaction”; Action 2 Final Report, supra n. 5, at 297: “utilising the benefit of the PE loss”; Action 5 Final Report, supra n. 5, at 29: “unlimited outsourcing to unrelated parties should not provide many opportunities for taxpayers to receive benefits without themselves engaging in substantial activities”.
171. Action 8 Deliverable, supra n. 5, at 19. References are made to functional and “synergistic” benefits, plus to other benefits, qualified as “potential”; “anticipated”; “amortisation”; “future”; “projected”; “ongoing”; “financial”. See also Actions 8-10 Final Report, supra n. 65, at 35 and 58 (“synergistic”), 96 (“future”), 108 (“anticipated”) and 146 (“incidental”), and at 18: “MNE groups and the associated enterprises that comprise such groups may benefit from interactions or synergies amongst group members that would not generally be available to similarly situated independent enterprises”.

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the (disapproved) consequence of an ATP scheme;\(^{172}\) and
- the (abusive) circumvention of tax incentive provisions.\(^{173}\)

However, use of the term “benefit” is inconsistent in the OECD’s language, sometimes overlapping with the term “advantage”,\(^{174}\) and more often used in EU soft law\(^{175}\) and ECJ case law.\(^{176}\)

In BEPS Reports, the term “advantage” is used in a more theoretical way to indicate non-fiscal benefits\(^{177}\) – derived by the exploitation of rules\(^{178}\) or as a consequence of artificial behaviours\(^{179}\) (especially by MNEs)\(^{180}\) – including “competitive benefits”\(^{181}\) or “tax-advantaged

\(^{172}\) E.g. Action 2 Final Report, supra n. 5, at 111: “the taxpayer has benefited from the mismatch”; Action 4 Final Report, supra n. 55, at 16: “a multinational group can generate a benefit based on the location of its debt, in both outbound and inbound investment scenarios”.

\(^{173}\) A clear example is provided in the context of Action 5, where the use of tax incentives for R&D, in principle legitimate, should not lead to abusive shifting of mobile capital.

\(^{174}\) E.g. Action 12 Final Report, supra n. 13, at 37: “[u]nder such a threshold the arrangement must satisfy the condition that the tax advantage is, or might be expected to be the main benefit or one of the main benefits of entering into the arrangement” (Emphasis added); Action 12 Final Report, supra n. 13, at 36: “whether a main benefit of the scheme was obtaining a tax advantage” (Emphasis added); Action 6 Final Report, supra n. 5, at 20 and 24: “strategies aimed at using a permanent establishment located in a low-tax jurisdiction in order to take advantage of the exemption method applicable by a Contracting State” (Emphasis added); Action 12 Final Report, supra n. 13, at 29: “a transaction is disclosable if it enables a person to obtain a tax advantage which is the main benefit” (Emphasis added).

\(^{175}\) See EC Recommendation on Good Governance in Tax Matters (C(2012) 8805), supra n. 50, and European Commission Action Plan (COM(2012) 722), supra n. 43, at 6, where it states that “taxpayers take advantage of mismatches in national laws to ensure that certain items of income remain untaxed anywhere or to exploit differences in tax rates” (Emphasis added).

\(^{176}\) In Cadbury Schweppes and subsequent cases, the ECJ has stated that CFC rules and other tax provisions that apply to cross-border transactions and that are justified by the prevention of tax avoidance must specifically target wholly artificial arrangements which do not reflect economic reality and whose subjective element would be “to obtain a tax advantage” (Emphasis added). UK: ECJ, 12 Sept. 2006, Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, para. 64, ECJ Case Law IBFD. See N. Vinther & E. Werlauff, Tax Motives Are Legal Motives – The Borderline between the Use and Abuse of the Freedom of Establishment with Reference to the Cadbury Schweppes Case, 46 Eur. Taxn. 8, pp. 383-383 (2006), Journal IBFD.

\(^{177}\) It is arguable in statements such as: “[a] key advantage of this approach is that it avoids the need for cross-border refunds of VAT to businesses that have acquired services abroad, which often involve considerable administrative and compliance burden and costs for tax administrations and businesses” (Emphasis added). Action 1 Final Report, supra n. 5, at 46; or “taking advantage of advances in communications and data processing capacity” (Id., at 7 and 33); “market advantages” (Action 8 Deliverable, supra n. 5, at 13 and 15; Action 1 Final Report, supra n. 5, at 22); “commercial advantage” (Action 8 Deliverable, supra n. 5, at 33); “proprietary advantage” (Action 1 Final Report, supra n. 5, at 52 and 36).

\(^{178}\) E.g. Action 6 Final Report, supra n. 5, at 71: “for the purpose of taking advantage of this provision”; Action 11 Final Report, supra n. 81, at 156: “take greater advantage of tax incentives for R&D”.

\(^{179}\) E.g. Action 11 Final Report, supra n. 81, at 121: “MNEs can take advantage of BEPS behaviours to artificially segregate taxable income from the activity creating that income to reduce the MNE group’s overall effective tax rate” (Emphasis added); Action 1 Final Report, supra n. 5, at 81: “[w]hen functions are often located in a particular jurisdiction for non-tax reasons such as access to skilled labour or necessary resources, as business functions grow increasingly mobile, taxpayers may increasingly be able to locate functions in a way that takes advantage of favourable tax regimes” (Emphasis added); Action 2 Final Report, supra n. 5, at 318-319: “prevent the PE from taking advantage of any structuring opportunities that would allow the deduction for the payment to be set-off against income that is not dual inclusion income” (Emphasis added).

\(^{180}\) MNE affiliates are able to take advantage of differences in international tax systems or take greater advantage of domestic tax preferences, then MNE affiliates in a country would have lower reported ETRs (tax expense/assets) than comparable domestic-only firms”. Action 11 Final Report, supra n. 81, at 58.

\(^{181}\) E.g. Addressing BEPS, supra n. 57, at 8 and 39; Action 1 Final Report, supra n. 5, at 22, 33, 71, 78, 84, 92, 100, 122 and 251; Hybrid Mismatch Arrangements, supra n. 5, at 11; Action 8 Deliverable, supra n. 5, at 66 and 74; Action 3 Final Report, supra n. 18, at 15 and 63; Action 11 Final Report, supra n. 81, at 80, 111, 161 and 169.

\(^{172}\) \(^{173}\) \(^{174}\) \(^{175}\) \(^{176}\) \(^{177}\) \(^{178}\) \(^{179}\) \(^{180}\) \(^{181}\)
locations”. “Advantage” means the outcome retrievable from elements related to the nature or the status of the taxpayer (“advantage of this special tax status”, advantage emerging from “structures, technically legal”) or from an object characteristic (arrangement marketed as a tax-advantaged product), rather than defined as the result of something “arranged”, “planned”, “organized” to achieve a favourable position. In other words, even if both benefit and advantage are the result of an option or election by the taxpayer, in the author’s view it seems that the term “benefit” has been used in order to better emphasize that the favourable outcome is the specific goal of the purposive choice of the taxpayer, while the “advantage” represents just a consequence of his behaviour.

The attention given to the OECD and EU soft law to provide guidelines to ascertain the existence of this tax benefit is notable. Indeed, in determining whether an arrangement or series of arrangements leads to a tax benefit, “national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s)” (Emphasis added). In sum, a test must be applied to compare what actually resulted based on the scheme and what would have resulted had the scheme not existed.

In cross-border situations, “[t]he extent of a mismatch is determined by comparing the tax treatment of the payment under the laws of each jurisdiction where the mismatch arises” (Emphasis added). A more general approach addresses an analysis of BEPS requiring a comparison between an observed world (i.e. the current situation) and one that is “counterfactual.”

In the author’s view, temporary tax savings and tax deferral planning (i.e. the deferral of income recognition for tax purposes, while there is income for accounting purposes) may be regarded as abusive or ATP practices, bearing in mind that a temporary tax saving scenario used indefinitely results in a permanent tax saving scenario. On this issue, the OECD does not provide any guidance. Only in the EU context is this alluded to and only with reference to tax abuse: the “free choice of the least taxed route” implies that the mere spreading of the tax burden, which results in a financing advantage, does not in itself constitute an abusive practice.


183. Action 2 Final Report, supra n. 5, at 340: “[i]f a dual resident entity with excess deductions under the dual resident payer rule abandons its dual resident status, the residence jurisdiction may release those excess losses and allow them to be set-off against non-dual inclusion income if the residence jurisdiction is satisfied that the taxpayer can no longer take advantage of any carry-forward losses in the other jurisdiction” (Emphasis added).

184. Addressing BEPS, supra n. 57, at 7.

185. E.g. Action 2 Final Report, supra n. 5, at 87: “taxpayer in the group has derived a tax advantage under a hybrid mismatch arrangement” (Emphasis added).

186. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 5.


188. That is also the approach adopted by the OECD in order to estimate the scale of BEPS, which “involves comparing current reported profits, taxes, and economic activity in a world with BEPS with a hypothetical world without BEPS”. Action 11 Final Report, supra n. 81, at 83.

189. Action 3 strengthens CFC legislation with a view to effectively countering tax deferrals that can be obtained by setting up a subsidiary in a low(er) tax jurisdiction.

190. Weald Leasing Ltd (C-103/09), para. 34.
3.3. The depiction of (offensive) tax planning as “aggressive”

The legal literature knows no universal approach to the constructs of ATP and a range of qualifiers is used to indicate the diversity of planning in this grey zone. Arguably, the current legal debate on “aggressive” and “not aggressive” tax planning appears to be based on the same arguments, which, in the 1970s, animated the discussion on the blurred distinction between “legitimate” and “unlawful” tax evasion.\(^{191}\)

Even the OECD was aware of “the difficulties in precisely identifying the dividing line between what it is aggressive and what is not”.\(^{192}\) Moreover, it should be noted that the OECD’s language is inconsistent in identifying what is “aggressive”, since this adjective has been used in combination with the following dissimilar nouns: “arrangements”\(^{193}\), “techniques”\(^{194}\), “strategies”\(^{195}\), “positions”\(^{196}\), “structures”\(^{197}\), “practices”\(^{198}\), “schemes”\(^{199}\), “transactions”\(^{200}\), “behaviour”\(^{201}\), “multinational enterprises”\(^{202}\) or “merger and acquisition policy”.\(^{203}\)

Pursuant to the OECD’s perspective, these terms should connote different meanings. Otherwise, expressions such as “aggressive or abusive transactions, arrangements, or structures”\(^{204}\) would be meaningless.

Apart from the difficulties involved in transposing these categories of term into EU law,\(^ {205}\) which adopts other definitions,\(^ {206}\) it remains unclear what “aggressive” tax planning would amount to. In the author’s view, there is no guideline in the BEPS Reports on how to identify the degree of the offence because “aggressiveness” is unconnected with the particular quality of the taxpayer’s behaviour (which is irrelevant even to distinguish ATP from tax abuse, as noted in section 3.3.).

\(^{191}\) This distinction was based on the idea according to which not filing and/or not paying taxes amounts to evasion insofar as such behaviours are regarded by the law as violations, sanctioned with penalties. If no penalty has been provided, the evasion is considered “legitimate” by the tax system. On this perspective, *ex multis*, A.R. Ileric & A. Seldon, *Tax avoision: The economic, legal and moral inter-relationships between avoidance and evasion* vol. 22 (Institute of Economic Affairs 1979); G. Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, Columbia Law Review 80, p. 1553 (1980); B.I. Bittker, *Taxing income from unlawful activities* p. 130, 25 Case W. Res. L. Rev. (1974); A. Gunn, *Tax Avoidance*, Michigan Law Review 76, p. 733 (1978); C. Jacobsen, *Permissiveness and norm evasions: Definitions, relationships and implications*, 13 Sociology 2, p. 219 (1979).

\(^{192}\) *Addressing BEPS*, supra n. 57, at 43.


\(^{194}\) *BEPS Action Plan*, supra n. 5, at 22.

\(^{195}\) Id., at 14; *Addressing BEPS*, supra n. 57, at 21, 23 and 31; *Action 11 Final Report*, supra n. 81, at 238.

\(^{196}\) *BEPS Action Plan*, supra n. 5, at 8; *Addressing BEPS*, supra n. 57, at 30; *Action 1 Deliverable, supra n. 45, at 108; Action 1 Final Report*, supra n. 5, at 84; *Action 11 Final Report*, supra n. 81, at 238.

\(^{197}\) *EC Recommendation on ATP (C(2012) 8806)*, supra n. 12, at 3.

\(^{198}\) *Addressing BEPS*, supra n. 57, at 6 and 49; *European Commission*, supra n. 97, at 11.

\(^{199}\) *Addressing BEPS*, supra n. 57, at 6 and 49; *Action 12 Final Report*, supra n. 13, at 26.

\(^{200}\) *Action 12 Final Report*, supra n. 13, at 14 and 45.

\(^{201}\) Id., at 23.

\(^{202}\) *Action 11 Final Report*, supra n. 81, at 15, 29, 110, 111 and 121 (even if at 121 it is stated that “r[e]venue losses from BEPS arise from both aggressive tax planning by some MNEs and tax competition between some governments”).

\(^{203}\) *Action 6 Final Report*, supra n. 5, at 61.

\(^{204}\) *BEPS Action Plan*, supra n. 5, at 22.


\(^{206}\) For instance, in EU law, “arrangement means any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event” (*EC Recommendation on ATP (C(2012) 8806)*, supra n. 12, at 4). Even the depiction of tax abuse includes a wide range of agreements, undertakings, understandings and promises, whether expressed or implied and whether or not plans, proposals, actions, courses of action or courses of conduct are enforceable.
Tax planning becomes “aggressive” due to its specific target, i.e. not a (limited) domestic tax rule, but the international tax system as a whole. While tax abuse always implies a scheme involving circumvention (i.e. arrangements in line with the letter of the law but not with its object and purpose), aggressive tax planners achieve results that rely upon uncertain tax positions, unanticipated by the same legislative intent underlying the law. This gives rise to “aggressive” tax planning, consisting of structures that take advantage of the technicalities or mismatches between two or more tax systems, with the goal of reducing the overall tax liability.

While both ATP and tax abuse connote the idea of obtaining undue tax benefits, ATP implies a reaction that cannot be found in interpretative tools on the intent of the specific relevant rules avoided. However, something more is required as the entire tax system is involved. From this perspective, ATP is an “abuse of tax system”: an avoidance behaviour but not contrary to legislative intent.

Hence, in the author’s view, the EU Commission’s statement that “[a] key characteristic” of ATP schemes “is that they reduce tax liability through strictly legal arrangements which however contradict the intent of the law”207 is inconsistent. Expressions such as “domestic taxing rights … circumvented through artificial arrangements”,208 “circumvent the threshold for exercising taxing rights”209 and “in an attempt to circumvent the effect of the hybrid mismatch rules”210 are properly related to tax abuse schemes.

In the ATP context, legislative intent is also relevant from another point of view (apart from that assumed by the EU Commission): it is important to ascertain whether under the relevant tax system the MNE is playing with axiological gaps (which BEPS Reports and EU law aim to close through multilateral action) or with loopholes (which can be closed unilaterally through the interpretative tools of the single tax jurisdiction involved).

3.4. A preliminary categorization of linguistic discrepancies

In order to detect BEPS results, the OECD and EU soft law instruments present the same three-prong test:
(i) identification of undue tax benefits (or advantages);
(ii) description of the illegitimate behaviour (abuse or ATP); and
(iii) prevision of a reaction to the relevant phenomenon (anti-abuse or anti-ATP measure).

However, these three elements are not always uniform in the language used by the OECD and EU law, arguably adopting the perspective of the linguist. In particular, by means of the following trichotomy of signifier, signified and referent, it is possible to categorize the linguistic discrepancies present in the soft law instruments:
(i) “signifier” is the literal representation of the concept (i.e. the wording adopted to represent on paper the idea of “abuse” and “ATP”);
(ii) “signified” is the core concept expressed (i.e. what does it mean?), since legal terms in the legal-positivistic sense are words implying content; and

207. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 2.
208. Action 1 Deliverable, supra n. 45, at 113.
(iii) “referent” is the real phenomenon considered, for which a coherent reaction should be provided.

3.4.1. Vague signifiers

The literal representation of the concepts in question is sometimes surrounded by vagueness, since EU law and the OECD provide inconsistent descriptions through the abundant use of adjectives and adverbs. For instance, one may question why the concept of “tax avoidance” requires the qualification of “artificial”, in expressions like “artificial avoidance of permanent establishment”.

Another example can be the (ab)use of adverbs such as “inappropriately” and “improperly” to describe the vague nature of tax abuse or ATP.

The same problem occurs when defining ATP and presents a problem concerning its signifier. In BEPS Reports, the term “ATP” is infrequently used, apart from in Actions 1, 2, 11, 12 and 15. However, occasionally the undesirable effects produced by exploiting the differences resulting from the concurrent exercise by two or more taxing jurisdictions in the international tax system are described without the adjective “aggressive”. For example, in the following sentences: “another benefit of an earnings-based approach is that it makes a general interest limitation rule more robust against planning”, “… but this is likely to create opportunities for tax planning”, “this could lead to inaccurate attribution and could create opportunities for tax planning”.

211. Action 11 Final Report, supra n. 81, at 100, 236 and 237. See also Action 7 Final Report, supra n. 60, at 11, and BEPS Action Plan, supra n. 5, at 19 and 25. See also Action 1 Deliverable, supra n. 45, at 14, and Action 1 Final Report, supra n. 5, at 86, on the so-called “artificial avoidance” of PE status.

212. Action 6 Final Report, supra n. 5, at 74. See the Commentary section on “Improper Use of the Convention” currently found in the Commentary on Article 1 (its revised version can be found in Action 6 Final Report, supra n. 5, at 80 ff.). Action 2 Final Report, supra n. 5, at 139: “[t]his will ensure not only that the benefits of tax treaties are granted in appropriate cases” (Emphasis added).

213. E.g. Action 3 Final Report, supra n. 18, at 62: “there are other anti-abuse rules to prevent inappropriate under-attribution of profits” (Emphasis added); Action 1 Final Report, supra n. 5, at 87: “[t]he denial of treaty benefits in cases that could otherwise inappropriately result in double non-taxation will ensure that the market country will be able to apply its domestic law unconstrained by treaty rules aimed at preventing double taxation” (Emphasis added).

The Report on Action 2 proposes to include in OECD Model (2010) a new provision and detailed commentary that will ensure that benefits of tax treaties “are granted in appropriate cases to the income of these entities but also that these benefits are not granted where neither State treats, under its domestic law, the income of such an entity as the income of one of its residents” (Action 2 Final Report, supra n. 5, at 12); Action 3 Final Report, supra n. 18, at 40: “to ensure that the tax rates of the PE and CFC cannot be blended to inappropriately exempt income of a CFC” (Emphasis added); Action 12 Final Report, supra n. 13, at 37: “the main benefit test sets a relatively high threshold for disclosure and the experience of at least one country suggests that it can be used inappropriately as a justification for not disclosing tax avoidance schemes that would be of interest to a tax administration” (Emphasis added). See also Action 6 Final Report, supra n. 5.

214. E.g. Action 7 Final Report, supra n. 60, at 38: “any concern about the inappropriate use of these exceptions” (Emphasis added); Action 1 Final Report, supra n. 5, at 78: “in the case of value added tax (VAT), situations in which no or an inappropriately low amount of tax is collected on remote digital supplies to exempt businesses or multi-location enterprises (MLEs) that are engaged in exempt activities” (Emphasis added); Actions 8-10 Final Report, supra n. 65, at 60: “[a]n appropriate method using inexact comparables is likely to be more reliable in such cases than an inappropriate use of the transactional profit split method” (Emphasis added); Action 13 Final Report, supra n. 5, at 10: “[t]he specific content of the various documents reflects an effort to balance tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on business” (Emphasis added).


216. Action 3 Final Report, supra n. 18, at 57.

217. Id., at 62.
These sentences probably imply defensive tax planning, meaning situations where the taxpayer tries to avoid tax traps in genuine commercial transactions. In contrast, offensive tax planning, meaning unacceptable minimization of a tax burden, should properly be labelled as “aggressive” tax planning. Notwithstanding, arguably more specificity should be required regarding expressions (such as, for example, “abuse” and “aggressive tax planning”) whose scope is unclear.

3.4.2. Overlapping of the signifieds of “tax abuse” and “aggressive tax planning”

In some cases (and often in the same sentence), the two concepts are used interchangeably and indistinguishably, thereby creating an overlap between their two different signifieds. For instance, with reference to abuse of law, scholars recognize that “there are a variety of anti-avoidance strategies that countries use to ensure the fairness and effectiveness of their corporate tax system. These strategies often focus on deterring, detecting and responding to aggressive tax planning.”218 (Emphasis added).

Another example could be represented by the anti-hybrid rules,219 linking the domestic tax treatment with the tax treatment in that foreign country thereby eliminating the possibility for mismatches, which, according to the OECD, are “specific anti-abuse” rules220 instead of anti-ATP measures.

Moreover, it is difficult to understand the proper meaning of expressions such as the following:

- the OECD: “potentially aggressive or abusive tax avoidance schemes”,221 “[g]eneral or other specific anti-avoidance rules prohibit “aggressive” tax avoidance”;222 “potentially aggressive or abusive international tax planning strategies”223 (Emphasis added); and
- the EU Commission: “Member States can use these possibilities to avoid abusive tax planning”224 (Emphasis added).

In these phrases, “aggressive” qualifies “tax abuse” and “abusive” qualifies (undesirable) “tax planning”. In the author’s view, these misqualifications are particularly problematic in the context of BEPS Action 12 Final Report, released in October 2015, and the Report on Tackling Aggressive Tax Planning through Improved Transparency and Disclosure Rules, dated February 2011.

In these soft law instruments, the OECD lists the strategies the states adopt to deter, detect and respond to ATP. These strategies include, for example, influencing taxpayers through the issuance of public rulings, applying promoter penalties, imposing additional reporting obligations, as well as implementing effective mass communication strategies. Unfortunately, apart from the fact that the OECD’s proposals provide “very little real guidance on the arrangements that are the target of the disclosure rules”,225 in the author’s view, since tax

218. Addressing BEPS, supra n. 57, at 37.
219. See sec. 2.4.2.
220. Action 2 Final Report, supra n. 5, at 96; “Just as the hybrid mismatch rules require co-ordination with hybrid mismatch rules in other jurisdictions they also must be co-ordinated as between themselves and with other specific anti-abuse and re-characterisation rules”.
222. Action 11 Final Report, supra n. 81, at 158.
223. Id., at 238.
abusers and aggressive tax planners act openly, only in tax evasion and tax fraud schemes does the problem of a lack of information exist. Only for this situation should “timely, targeted and comprehensive information, which traditional audits alone can no longer deliver” be required.226

ATP and abuse are not hidden phenomena: tax administrations have the instruments to ascertain if they occur. They do not imply a problem of information, but of evaluation. In other words, it may be doubtful whether “disclosure is likely to be targeted on the areas of avoidance and aggressive tax planning”,227 notwithstanding that these are perceived to give rise to the greatest risks. This example demonstrates that the signifieds of tax abuse and ATP are not completely construed and explained yet.228

3.4.3. Indeterminate referents and inconsistent reactions

Linguistic theory demonstrates that every language and every word with a semantic function analyses and “covers” different aspects of reality, since the “semantic application and extension of tax terms are in constant dispute”.229 However, in the present matter, the two-sided correspondence between the concepts adopted and the real phenomenon considered should be stringent in order to ensure full understanding amongst states on the proposed reactions (anti-abuse or anti-ATP measures) in relation to the relevant situation (abuse or ATP, respectively).

Nevertheless, in cases of abuse by dual-residence companies, the OECD has proposed ATP measures to address these situations: “[g]iven the risk of abuse arising from the use of these [dual-residence] structures, countries may conclude that it is better to address dual-residence situations on a case-by-case basis in order to deter aggressive tax planning that facilitates BEPS”230 (Emphasis added). A relevant inconsistency between the signified and the referent can also be appreciated in the EU Commission Recommendation, which states in the relevant part that: “novel aggressive tax planning structures... can be harmful to national tax revenues and to the functioning of the internal market. Therefore, it is appropriate to recommend the adoption by Member States of a common general anti-abuse rule”231 (Emphasis added).

In the author’s view, anti-abuse provisions can only be used indirectly to prevent ATP, since GAARs may not always provide a comprehensive response to cases of unintended double

226. Addressing BEPS, supra n. 57, at 37.
228. This situation cannot be problematic from the perspective of A. D’Amato, Can Legislatures Constrain Judicial Interpretation of Statutes?, 75 Va. L. Rev., p. 584 (1989), according to whom “tax avoidance... is not readily available in law books, because the better the tax-avoidance lawyer, the less likely the scheme will be contested by the government”.
229. M. Pasternak & C. Rico, Tax Interpretation, Planning, and Avoidance: Some Linguistic Analysis, 23 Akron Tax J., p. 36 (2008). The following Latin motto can be reminded of here: “Neque leges neque senatus consultus ita scribi possunt ut omnes casus, qui quandoque inciderint, comprehenderetur”. The meaning of this Latin sentence can be found in the following: “Nothing short of omniscience would suffice to enable the draftsmen to conceive and provide for every possible contingency, and if he attempted to do so the resulting legislation will be of inordinate length and elaboration. It is not practicable to pursue any given topic to its last details”. UK Tax Codification Committee, Report of the Income Tax Codification Committee, vol. I, para. 24 (1936).
231. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 3. The same idea is expressed at point 4.1., where it is stated that: “[t]o counteract aggressive tax planning practices which fall outside the scope of their specific anti-avoidance rules, Member States should adopt a general anti-abuse rule, adapted to domestic and cross-border situations confined to the Union and situations involving third countries” (Emphasis added). See also European Commission Action Plan (COM(2012) 722), supra n. 43, at 6.
non-taxation through hybrid mismatch arrangements. In particular, GAARs can be an effective tool in addressing (only) hybrid mismatch arrangements with circular flows, contrivance or other artificial features. However, according to the OECD, “the terms of general anti-avoidance rules and the frequent need to show a direct link between the transactions and the avoidance of that particular jurisdiction’s tax tend to make the application of general anti-avoidance rules difficult in many cases involving hybrid mismatch arrangements”.

Accordingly, such a recommendation, apart from being inconsistent from a linguistic point of view because the signed (ATP) is inconsistent with the referent (“abuse” as used in the term “GAAR”), represents a “delayed” and “short-term” proposal because it works within the limited scope of anti-abuse policies, which are used to shift from over-coverage to under-coverage, from inclusiveness to exclusiveness, from generality to selectiveness. Even if a common GAAR “would help to ensure coherence and effectiveness in an area where Member State practice varies considerably”, it seems to be a “rear guard” response. Currently, Member States are under no obligation to combat abuse unless they have assigned their jurisdiction in a certain area (for example, in the VAT area) to the European Union.

Moreover, the idea of preventing “a specifically identified type of double non-taxation” can be only part of the solution, recommending to “include an appropriate clause in their double taxation conventions” concluded with other EU Member States and with third countries. As noted in section 3.2., although this solution addresses the issue of double deduction, it does not deal with the problem of deduction/non-inclusion because it is ambiguous as to whether it provides for an obligation or a mere possibility to tax.

Furthermore, tax abuse works “effectively” from the (limited) perspective of the relevant domestic (or treaty) law involved, since it implies a direct link between the transaction and the avoidance of that particular jurisdiction’s tax (legal provision). In other words, this tool, albeit provided by the EU tax directives (Interest and Royalties Directive, Merger Directive and Parent-Subsidiary Directive), tends to be inapplicable in many cases.

3.5. A lawmaking process in action

EU institutions and the OECD operate in a disjointed context, where different languages coexist. Different languages imply different interpretations based on different legal signifieds and different linguistic signifiers. In this complex polysystem, which gives rise to polysemy.

234. Id.
235. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 4: "Where this Convention provides that an item of income shall be taxable only in one of the contracting States or that it may be taxed in one of the contracting States, the other contracting State shall be precluded from taxing such item only if this item is subject to tax in the first contracting State".
236. L. De Broe, At Last, Some Output on the Fight against Double Non-Taxation, EC Tax Rev. 6 (2014).
237. Action 6 Final Report, supra n. 5, at 19, where it is stated that "some countries may have domestic anti-abuse rules, or the courts of some countries may have developed various interpretative tools (e.g. economic substance or substance-over-form), that effectively address various forms of domestic law and treaty abuses".
239. Under art. 20 Treaty on the European Union, Member States may adopt all acts permitted by EU law. However, directives adopted within the context of an enhanced cooperation are binding only on the participating Member States.
240. One shall “speak of polysemy rather than ambiguity when relatively general laws allow passage from one meaning to another and allow us to foresee the variation”. O. Ducrot & T. Todorov, Encyclopedic Dictionary.
the systematic action of “characterization” carried out by EU law and the OECD on abuse and ATP referents presents some linguistic discrepancies.

However, despite the reported inconsistencies, it can be argued that the work done in the last few years by the EU institutions and the OECD represents a type of lawmaking process in international tax law,241 which seems to be:

– functional, creating a more efficient and coherent tax system. In particular, such a process can reduce complexity in the current international system and signifies a sort of response to the “orgy of statute making”,242 which was the first way in which states addressed the phenomena of abuse and ATP;
– self-referential and constant, bringing stability of meaning to tax law;243 and
– creative, meaning that impact on different national systems is possible, even if previously the legal basis of this process was not explicit.

This last concept implies linguistic consequences. Soft law, for it to be intelligible and applicable worldwide, has to not only be specific, but also simultaneously flexible and adjustable in all linguistic jurisdictions.244

In some cases, EU institutions and the OECD, acting as interpreters of legal language between the government and the taxpayer, arguably have a fundamental role in the shaping of legal signifieds. For instance, linguistic analysis reveals a preference by the OECD and EU law for factual and empirical taxable events (put simply) through the same basic concepts. Transactions, schemes and arrangements have major considerations from an international law perspective because in abusive and ATP contexts, they have become a dynamic tool of creation (as well as management) of resources.

Since wealth, in the present digital era, consists largely of intangibles and unquantifiable (and individualized) values, the abusive or aggressive cross-border transactions addressed by the OECD and EU institutions are not perceived as instruments of income circulation; rather, they are considered as instruments of income production. In this context, the friction is between the tax characterization of the transaction and its relevant economic substance, as will be analysed in section 4. According to this substantive approach, tax abuse and ATP


can be seen not as legal concepts, but rather as logic categories, i.e. summary formulas in describing tax fading strategies that have a technical content, without moral implications.


4.1. Introduction

The analysis proposed in section 3. confirms that, apart from some linguistic discrepancies, the different features characterizing the two signifieds imply their coexistence in international tax law.245 Is it possible, however, to recognize a common ground shared by both tax abuse and ATP?

This question is particularly important when taking into consideration the general issue of the compatibility of the BEPS Project with EU law. To answer this question and to have a comprehensive view of the issue, it is important to scrutinize the specific function both EU law and the OECD ascribe to the aforementioned concepts.

4.2. The functions ascribed to the signifieds of “tax abuse” and “aggressive tax planning”

In EU law, the approach to tax abuse was initially elaborated in a context of fundamental freedom.246 It was then applied in (almost) every field of law – it was not only reserved to EU competence – according to a progressively extensive interpretation of treaty and directive dispositions. Theoretically, the EU approach can be defined as “substantive” in the sense that abusive operations can be challenged by the economic substance test, ascertaining a correspondence between economic reality and tax saving, on a case-by-case basis.247

In order to convey this concept, the ECJ usually employs the expression “normal commercial operations”,248 meaning activities “for which there is objectively no other explanation than the creation of the right claimed”249 (i.e. the right to deduct input VAT). Also according to the OECD’s soft law, abuse represents situations where transactions lack economic substance or falsify a non-tax purpose.250

EU law and the OECD share the same rationale: unusual behaviour on its own is not per se illegitimate if such behaviour responds to a specific (extra-fiscal) interest of the taxpayer. Accordingly, it is not the occurrence of a tax benefit that makes a transaction abusive, but the lack of economic substance.

245. Indeed, a signified is defined negatively by its differences from other signifieds.
247. AG Opinion in Halifax (C-255/02), at para. 91.
248. E.g. Addressing BEPS, supra n. 57, at 38.
In contrast, the characterizations provided by EU law and the OECD concerning the function of the ATP concept are slightly different. Indeed, EU law stresses the idea of guaranteeing the proper functioning of the internal market and preventing the erosion of states’ tax bases, stating that “there is a need to ensure that the burden of taxation is shared fairly in line with the choices made by individual governments”. More explicitly, “[o]ver and above specific issues linked to tax havens”, the aim of EU law “is to contribute to a fair and sound tax environment in the EU (for Member States, taxpayers, and investors) where erosion of tax bases is efficiently tackled (within the EU and in relation to third countries)”.253

From an EU law perspective, protecting EU Member States’ revenues is not a general interest to be guaranteed per se, but to the extent to which this undermines society’s tax cohesion, States’ revenues must be protected.254 Indeed, “[a]ggressive tax planning could... be considered contrary to the principles of Corporate Social Responsibility”, since “[b]y paying taxes businesses can have an important positive impact on the rest of society.” 256

This social concern is also shared by the OECD. As the label “BEPS” indicates, anti-ATP measures, which have to be construed in line with the fundamental aim of this ambitious project, will “restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created”.257 This goal of “restoring confidence” clearly expresses that ATP could destabilize voluntary compliance by all taxpayers, giving the impression that this phenomenon is pervasive. It can be argued that “base erosion” is not an issue directly linked to states’ revenues, but to taxpayers’ compliance.258 Indeed, when certain taxpayers are able to shift taxable income away from the jurisdiction in which income producing activities are conducted, other taxpayers may ultimately bear a greater share of the burden “as corporations operating only in domestic markets or refraining from BEPS activities may face a competitive disadvantage relative to multinational enterprises (MNEs) that are able to avoid or reduce tax by shifting their profits across borders.”259

254. On the fact that some measures “might be justified by the objective of combating tax havens”, see UK: ECJ, 1 Apr. 2014, Felixstowe Dock & Railway Co Ltd v. HMRC, Case C-80/12, para. 32, [2014] ECR I-0000, ECJ Case Law IBFD.
257. Action 3 Final Report, supra n. 18, at 3. See also BEPS Action Plan, supra n. 5, at 13, where it stated that “[a] realignment of taxation and relevant substance is needed to restore the intended effects and benefits of international standards”.
258. According to OECD Secretary-General A. Gurría, “[t]he G20 has recognised that BEPS is also eroding the trust of citizens in the fairness of tax systems worldwide, which is why we were called on to prepare the most fundamental changes to international tax rules in almost a century. Our challenge going forward is to implement the measures in this plan, rendering BEPS-inspired tax planning structures ineffective and creating a better environment for businesses and citizens alike” (Emphasis added). Declaration made during a meeting on 8 Oct. 2015, in Lima, Peru, chaired by Turkish Deputy Prime Minister C. Yilmaz, where the G20 finance ministers expressed strong support for the BEPS Project.
259. Action 1 Final Report, supra n. 5, at 78.
Accordingly, the main goal of BEPS Actions is forcing economic operators (MNEs in particular) to compete with other taxpayers on an equal footing, without preferential benefits arising from ATP schemes. From this perspective, ATP seems to be conceived by the OECD as an “umbrella” concept, preordained to a more general purpose than the protection of states’ revenues. Indeed, the OECD stands for a realignment of taxation and relevant substance, with consideration to the increased disconnection between the location where the actual business activities and investments take place and the location where profits are reported for tax purposes.

In this context, the need to prevent ATP schemes can be construed as a composite of the need to preserve tax base integrity (as EU law characterization implies), connected with the need to ensure the cohesion of the international tax system, the need to safeguard the balanced allocation of taxing powers and the need to ensure effective fiscal supervision. It does not mean that the current international tax standards, allocating taxing rights between source and residence states, are no longer efficient or no longer adaptable to the current international business environment. In line with the BEPS Action Plan, the OECD’s actions “are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income”.

In providing countries with domestic and international instruments that will better align taxation rights “with the economic activity that generates that income”, the OECD’s work is still based on principles of:

- residence-based taxation of corporate income (considered as a substitute for personal income), requiring direct apportionment of profits to the owners of companies; and
- source-based taxation, implying that resident companies are not liable for taxation on their worldwide income, but only on their domestic income.

In completing (or better still, “complementing”, according to the OECD’s wording) the existing international standards (designed to prevent double taxation), the OECD’s goal suggests and supports the introduction of instruments that effectively prevent: (i) double non-taxation and (ii) cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it. From this perspective, it is commendable that BEPS is the leading force “that moves the substantive side of international tax law, namely the one that concerns the boundaries of connecting factors to a taxing jurisdiction and the way in which it is exercised, towards convergence but without depriving states of..."
the essence of their tax sovereignty" (Emphasis added). Despite the fact that defining the basic goals of tax abuse and ATP is rather easy, developing a common approach, applicable beyond the EU area (where EU hard law ensures uniformity), that will successfully address these issues is far from straightforward (especially to reconcile common law with the civil law perspectives).

4.3. The artificiality criterion

Based on the premise that tax abuse is unfavourable to states' revenues and ATP is contrary to the collective, in the author's view it is possible to subsume both concepts under the criterion of artificiality. This conclusion has been drawn due to the striking semantic similarity of their descriptions by the OECD and in EU soft tax law.

Indeed, it is interesting to note that the word "artificiality" is used in various contexts by the OECD related to both tax abuse and ATP in an indistinguishable way, as follows:

- “artificially avoid taxation”;269
- “the taxpayer being able to demonstrate that it did not artificially fragment the distance selling activities in order to manipulate the revenue threshold”;270
- “the artificial splitting of ownership of assets between legal entities within a group”;271
- “MNEs may artificially fragment their operations among multiple group entities to qualify for the exceptions to PE status for preparatory and ancillary activities”;272
- creation of “artificial losses”;273
- “artificial interest deduction techniques”;274
- “artificial shifting of income through transfer pricing arrangements”;275
- “prevent the artificial avoidance of PE status in relation to BEPS”;276
- “it is very often possible to use artificial structures to ensure that this physical presence either does not create a taxable presence or does not attract significant profits so that the bulk of the profits can then be shifted to a no or low tax jurisdiction”;277
- “artificial allocation of legal ownership of intangible assets and manipulation of debt levels”;278

267. P. Pistone, Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law, 6 World Tax J. 1 (2014), Journals IBFD.

268. On this topic, a conference entitled "Duets on International Taxation: Substance and Form in Civil and Common Law Jurisdictions" took place at IBFD on 8 Sept. 2015.

269. Action 1 Deliverable, supra n. 45, at 150.

270. Action 1 Final Report, supra n. 5, at 108.

271. Addressing BEPS, supra n. 57, at 6 and 48.

272. BEPS Action Plan, supra n. 5, at 19; Action 1 Final Report, supra n. 5, at 79; Action 11 Final Report, supra n. 81, at 235.

273. Id., at 85.

274. BEPS Action Plan, supra n. 5, at 18.

275. Id., at 19 and 25. See also Action 1 Deliverable, supra n. 45, at 102: “tax in a market jurisdiction can be artificially avoided by fragmenting operations among multiple group entities in order to qualify for the exceptions to PE status for preparatory and auxiliary activities, or by otherwise ensuring that each location through which business is conducted falls below the PE threshold” (Emphasis added); and at 14: “artificial arrangements relating to sales of goods and services cannot be used to avoid PE status” (Emphasis added); Action 1 Final Report, supra n. 5, at 12: “[i]t was also agreed to modify the definition of PE to address circumstances in which artificial arrangements relating to the sales of goods or services of one company in a multinational group effectively result in the conclusion of contracts, such that the sales should be treated as if they had been made by that company” (Emphasis added).


277. Action 11 Final Report, supra n. 81, at 156.
In each of these examples, the artificiality element is considered to produce somewhat of a détournement, a deviation.

From a theoretical point of view, this “deviation” has been remarkably expressed by the “ectopia” notion, introduced by Prebble, used to indicate the “gap” or “dislocation” “between tax law on one hand and, on the other hand, the business income and investment structures to which tax law applies”\(^\text{282}\). In greater detail, according to the OECD, “[n]o or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it”\(^\text{283}\) (Emphasis added).

Since “artificial cross-border arrangements to exploit legislated differences in tax structures, including statutory tax rate differences, are considered BEPS” (Emphasis added)\(^\text{284}\), analysis requires the identification of MNEs’ behaviours or arrangements that achieve no or low taxation by shifting profits, “artificially shifting substantial amounts of income” (Emphasis added) “away from jurisdictions where the activities creating those profits take place”\(^\text{285}\) into tax-advantaged environments. This situation is also clearly recognized in the EU area, where “some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base to other jurisdictions within or outside the Union”\(^\text{286}\) (Emphasis added).

The persistence of ATP effects, according to the EU Commission, “can lead to artificial capital flows and movements of taxpayers within the internal market”\(^\text{287}\) (Emphasis added). In this context, BEPS behaviours are also considered national domestic incentives “designed to encourage artificial schemes without economic substance”\(^\text{288}\) (Emphasis added). Certainly


281. Action 5 Final Report, supra n. 5, at 37. See also pp. 38 and 69.

282. Prebble, supra n. 119, at 8 ff.

283. BEPS Action Plan, supra n. 5, at 10 and 13; Action 1 Final Report, supra n. 5, at 78; Action 4 Final Report, supra n. 55, at 43; Action 11 Final Report, supra n. 81, at 26. Related to the issue of correctly identifying where the activities that generate profits are geographically located is the issue of measuring BEPS, which is well described in the Action 11 Final Report, supra n. 81, at 84-85, where it is stated that “[o]ur problem is magnified because we not only need to know what to recognise and when to recognise it, but we need to know where to recognise it, i.e. which jurisdiction”.

284. Action 11 Final Report, supra n. 81, at 45.


286. Action 11 Final Report, supra n. 81, at 26. See also Action 1 Final Report, supra n. 5, at 86, where it is stated that: “[s]tructures aimed at artificially shifting profits to locations where they are taxed at more favourable rates, or not taxed at all, will be addressed by the work carried out in the context of the BEPS Project” (Emphasis added).


288. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at point 5.

289. Action 11 Final Report, supra n. 81, at 83. See also Action 4 Final Report, supra n. 55, at 12, where it is stated that “[t]he report also recommends that the approach be supported by targeted rules to prevent its circumvention, for example by artificially reducing the level of net interest expense” (Emphasis added). On this topic, A.C. Dos Santos, What Is Substantial Economic Activity for Tax Purposes in the Context of the European
“[c]urrent concerns are primarily about preferential regimes that risk being used for artificial profit shifting and about a lack of transparency in connection with certain rulings” (Emphasis added). Therefore, providing tax benefits associated with a type of income or behaviour without any requirement that a real or substantial activity occurs is likely to achieve a country’s policy goal of generating significantly more of the economic activity in their country, “but is likely to result in MNEs engaging in BEPS.”

Pursuant to these guidelines, it is possible, for instance, to identify situations in which taxpayers or tax administrations may seek to artificially separate intangibles that, as a matter of substance, independent parties would not separate in comparable circumstances. For example, attempts to artificially separate trademarks or trade names from the goodwill or reputational value that is factually associated with the trademark or trade name should be identified and critically analysed. Moreover, the occurrence of the word “artificiality” is strictly connected to the word “substance”. In particular, “substance” is used by the OECD:

(i) rarely, with a strict sense, as opposed to “form”, in sentences such as “[i]n deciding whether a payment is economically equivalent to interest, the focus should be on its economic substance rather than its legal form”;

(ii) more often, in a broad sense, in expressions such as: “substantial activity”, “substantial BEPS opportunities” and “factual substance”, and in sentences such as: “companies that have little or no substance in terms of office space, tangible assets and employees”.

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290. Action 5 Final Report, supra n. 5, at 9. See also Action 11 Final Report, supra n. 81, at 86: “[a]s long as those tax preferences are not artificial schemes without economic substance” (Emphasis added).

291. Indeed, the “substantial economic activity criterion” – as defined in the Code of Conduct for Business Taxation, in the OECD Report Harmful Tax Competition – An Emerging Global Issue (OECD 1998), and in the BEPS Action Plan, supra n. 5 (namely, its application to patent box tax regimes) – is a factor, such as transparency, to be taken into account to counter harmful regimes more effectively (see Addressing BEPS, supra n. 57, at 10). Indeed, in the 1998 OECD Report addressing harmful tax practices, the Committee on Fiscal Affairs foresaw the criterion of “absence of any economic activity” as an important element identifying preferential regimes. There “it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax-driven”. In the same way, it was agreed in the BEPS Project that the preferential treatment of intellectual property should be coupled with “substantial activity” requirements to prevent harmful tax competition (Action 11 Final Report, supra n. 81, at 190). See also Action 5 Final Report, supra n. 5, at 23 ff. On the revenue effects of Action 5, see Action 11 Final Report, supra n. 81, at 230.


293. Compare with PL: NSA (Supreme Administrative Court), 18 Sept. 2012, Case I FSK 617/12, Other Domestic Case Law IBFD.

294. Action 4 Final Report, supra n. 55, at 29. Another example could be the following, Action 2 Final Report, supra n. 5, at 38-39:

[the transferor’s jurisdiction taxes the arrangement in accordance with its substance, disregarding the transfer and treating the transferor as if it continued to hold the underlying securities, while the transferee’s jurisdiction treats the transfer in accordance with its form and taxes the arrangement as the purchase and sale of securities.

On “the prevalence of economic or social reality over the literal wording of legal provisions”, see also the OECD Committee on Fiscal Affairs, Issues in International Taxation No. 1, International Tax Avoidance and Evasion – Four Related Studies, p. 30 (OECD 1987). Application of the substance-over-form approach invariably requires an examination of the business purpose (i.e. a commercial justification other than tax savings) that underlies the transactions at issue.

295. E.g. Action 1 Final Report, supra n. 5, at 12, 86, 90 and 144.

296. E.g. id.; at 86 and 144.

297. E.g. Action 8 Deliverable, supra n. 5, at 19 and 38.

298. BEPS Action Plan, supra n. 5, at 13. See also Action 1 Final Report, supra n. 5, at 86: the ability to centralise infrastructure at a distance from a market jurisdiction and conduct substantial sales of goods and services into that market from a remote location, combined with increasing ability to
or through “conduit arrangements that have non-tax related economic substance (e.g. in
cases where regional holding companies are established in third countries to minimise
transaction costs arising from language or time-zone differences)”.

The examples mentioned in point (ii) are somewhat similar to those provided by the EU Commission
and by the ECJ in an abuse of law context. In particular, an artificiality criteri-
on has been increasingly endorsed by the EU Commission, since “Member States are encour-
gaged to introduce the following clause in their national legislation: ‘An artificial arrangement
or an artificial series of arrangements which has been put into place for the essential purpose
of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall
treat these arrangements for tax purposes by reference to their economic substance’.”
In determining whether the arrangement or series of arrangements is “artificial”, according to
EU soft law the following elements are to be considered:
– the legal characterization of the individual steps that an arrangement as a whole consists
of;
– the arrangement or series of arrangements is carried out in a manner that would not
ordinarily be employed in what is expected to be a reasonable business conduct;
– the arrangement or series of arrangements includes elements that have the effect of off-
setting one another or cancelling each other out;
– the transactions concluded are circular in nature (“circular flows” and “contrivance” are
to be considered as “artificial features”);
– the arrangement or series of arrangements results in a significant tax benefit but this is
not reflected in the business risks undertaken by the taxpayer or its cash flows; and
– the expected pre-tax profit is insignificant in comparison to the amount of the expected
tax benefit.

As is known, an artificiality criterion is also applied in ECJ case law in the specific context
of abuse of law, where the object of abuse is a norma agendi (i.e. a legal rule) belonging to a
domestic fiscal system, which the taxpayer circumvents through the mistreatment of treaty
dispositions. In this unharmonized area, the specific objective of a restrictive national meas-
ure on the exercise of a treaty freedom “must be to prevent conduct involving the creation of
wholly artificial arrangements which do not reflect economic reality with a view to escaping
the tax normally due on the profits generated by activities carried out on national territory”.
Accordingly, making reference, for instance, to CFC cases, national anti-abuse measures

conduct substantial activity with minimal use of personnel, generates potential opportunities to achieve
BEPS by fragmenting physical operations to avoid taxation (Emphasis added).
300. EC Recommendation on Good Governance in Tax Matters (C(2012) 8805), supra n. 50, at 5, where it is stated
that “account should be taken of inter alia … whether advantages are granted even without any real eco-
nomic activity and substantial economic presence within the third country offering such tax advantages”
(Emphasis added).
301. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 4.
302. Id., at 4-5.
303. Cadbury Schweppes (C-196/04), at paras. 54-55. See S. Cipollina, CFC legislation e abuso della libertà di sta-
Case C-112/14, Commission v. UK, para. 25, [2014] ECR I-0000, ECJ Case Law IBFD; PT: ECJ, 3 Oct. 2013,
Itelcar, Case C-282/12, para. 34 [2013] ECR I-0000, ECJ Case Law IBFD.
304. See M. Heidenreich, Limits to Tax Planning: CFC Rules as an Instrument to Counter Abuse (Linde 2013).
“must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality” \(^{305}\) (Emphasis added).

Therefore, the tax benefit has to be interpreted in connection with (eventually present) valid commercial reasons which reflect the economic reality.\(^{306}\) The ECJ referred to the concept of establishment as presupposing “actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there”\(^{307}\) (Emphasis added). The finding of an actual establishment carrying on valid economic activities in the host Member State must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which “the CFC physically exists in terms of premises, staff and equipment”.\(^{308}\)

Also in the recent WebMindLicenses case, about the freedom of establishment, it is stated that a “genuine … economic activity” is considered to be carried out provided that the relevant company may “possess an appropriate structure in terms of premises and human and technical resources” and “engage in that economic activity in its own name and on its own behalf, under its own responsibility and at its own risk”.\(^{309}\)

The ECJ’s characterization of the genuine business activity performed by the non-artificial entities suggests the idea of “nothing-to-hide” by the taxpayer and, therefore, business transparency. Accordingly, for the purposes of the present research, it is arguable that the artificiality criterion implied both by the OECD and EU law reflects a move in international tax law from a “normative” approach to a “factual” one, i.e. from the primacy of legal categories over concrete issues (revenue loss) to the primacy of substantive analysis of (shared worldwide)


\(^{306}\). This requirement is part of existing EU legislation and ECJ case law. See 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 (Codified Version), art. 15, OJ L310 (2009), EU Law IBFD [hereinafter Merger Directive (2009/133)]: “the fact that the operation is not carried out for valid commercial reasons […] may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives” (Emphasis added). See DK: ECJ, 5 July 2007, Case C-321/05, Hans Markus Kofoed v. Skatteministeriet, para. 37, ECJ Case Law IBFD; NL: ECJ, 17 July 1997, Case C-28/95, A. Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, paras. 38-39, ECJ Case Law IBFD; and PT: ECJ, 10 Nov. 2011, Case C-126/10, Sociedade Gestora de Participações Sociais SA v. Secretário de Estado dos Assuntos Fiscais (Foggia), paras. 33-36, ECJ Case Law IBFD.


\(^{309}\). HU: ECJ, 17 Dec. 2015, Case C-419/14, WebMindLicences Kft. v. Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság, ECJ Case Law IBFD. The case regards a Hungarian software company, WebMindLicences Kft (WML), that licensed software to an independent Portuguese company (Lalib), which exploited the software to run an adult website. Under the terms of the licence agreement, WML remained responsible for ongoing maintenance and development of the software. Following an audit, WML was assessed to Hungarian VAT in respect of Lalib’s supplies. The Hungarian fiscal authorities were of the view that the licence agreement had not effectively transferred the rights in the software to Lalib. This meant that the operation of the website was, in fact, in Hungary. The authorities considered that WML had committed an abuse of rights by giving the impression of being based in Portugal in order to circumvent Hungarian tax law and qualify for lower tax in Portugal. The Hungarian tax authorities based their decision on evidence that had been obtained covertly by other state authorities. In particular, parallel to the tax proceedings, a criminal investigation was commenced and the investigating authority recorded telephone conversations of senior personnel at WML and Lalib.
concerns. This approach, whose main strength is flexibility in its application, paves the way for the development of new tools and solutions for closing the gaps in existing international rules that allow corporate profits to “disappear” or to be artificially shifted to low or no tax countries, where little or no economic activity takes place. Since the current system effectively allows for lower tax burdens for internationally active firms than for domestically focused firms, this criterion should be welcomed as an opportunity to revive corporate income tax as a well-designed policy instrument that can locate income appropriately in the jurisdictions where value is added and should be taxed.

4.4. An open issue: The “degree of artificiality”

Generally, the compatibility of BEPS with EU law is highly problematic. On the one hand, taxing powers by Member States are subject to the supremacy of EU law; on the other hand, however, EU institutions cannot provide any ex ante guarantee of compatibility.

This issue has been addressed by the OECD, according to which “where there are options, EU Member States will need to ensure that they make choices that are consistent with EU law”. Indeed, the OECD has, on the one hand, expressly recognized that EU law can be an obstacle to the full implementation of its proposals in BEPS matters, while on the other hand, “it restricts the field within which the solution to a given problem of international taxation may be found... in order to make its solutions enforceable also in EU Member States”. Since depictions of both tax abuse and ATP by the OECD and in EU law always imply “something artificial”, the existence of a common ground between these concepts can be useful to verify the consistency of BEPS measures within the EU area to where the profits have often been shifted. Indeed, in Europe, where tax competition seems strong, the treaty freedoms associated with a lack of harmonization or coordination of tax policies provide for a very attractive tax environment.

As a very preliminary consideration, arguably the reaction to BEPS behaviours might be in line with EU law (namely, the respect for the effective exercise of the fundamental freedoms), to the extent that this reaction satisfies the above-mentioned “artificiality” criterion.


311. Moreover, Member States have a duty to comply with their obligations under EU law when exercising their competence to conclude international agreements, as held in the Open Skies cases (ECJ, 5 Nov. 2002, Commission v. United Kingdom, Denmark, Sweden, Finland, Denmark, Finland (open skies), Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98, E.C.R. 2002, p. 9427).

312. Action 3 Final Report, supra n. 18, at 17.

313. See for example, Action 6 Final Report, supra n. 5, at 14: “Some countries may have constitutional restrictions or concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report” (Emphasis added).

314. Pistone, supra n. 267.

315. It should be noted that, in the digital era, EU Member States have become “source countries” and, conversely, the United States is a “residence country”.
However, in applying this criterion, the ECJ deliberately uses the adverb “wholly” to describe the artificial arrangements carried out by the taxpayer. Consequently, it is still open the question whether the degree of “artificiality” of an abusive transaction (as conceived in the ECJ case law) is different from the degree of “artificiality” implied in ATP structures (as intended by the OECD).

For the purposes of the current research, it should be noted that this inevitable imprecision of applying categories is considered by the OECD, where, for instance, it states that a CFC rule in a EU Member State that targets income earned by a CFC that is not itself wholly artificial may be justified so long as the transaction giving rise to the income is at least partly artificial (Emphasis added). Moreover, with reference to the applicability of the proposed interest limitation rule in the EU area, according to the OECD, “consideration should also be given to the circumstances in which EU Member States could justify a restriction of EU treaty freedoms, for example... the need to prevent tax avoidance and to combat artificial arrangements.”

The same EU Commission, in recommending the adoption by Member States of a common general anti-abuse rule, in order to discourage “novel aggressive tax planning structures”, underlines that “[i]n this context, it is necessary to take account of the limits imposed by Union law with regard to anti-abuse rules”. For instance, it should be recalled that in the context of free movement of workers, in the Eurowings and Danner cases the ECJ held that “any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State”.

316. The ECJ uses also the expression “purely artificial arrangement”: if the contractual terms constitute a purely artificial arrangement that does not correspond with the economic and commercial reality of the transactions, those terms can be redefined according to their economic reality. See UK: ECJ, 20 June 2013, Case C-653/11, Her Majesty’s Commissioners of Revenue and Customs v. Paul Newey, [2013] ECR I-0000, paras. 43-51, ECJ Case Law IBFD; Weald Leasing Ltd (C-103/09, para. 39; RBS Deutschland Holdings GmbH (C-277/09), para. 52.
In Thin Cap Group Litigation, the ECJ stated that in determining whether thin cap legislation was justified by the need to prevent abusive practices, the relevant domestic court should determine “whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State” (Emphasis added). UK: ECJ, 13 Mar. 2007, Case C-524/04, Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, para. 81, ECJ Case Law IBFD. According to the ECJ, national legislation providing that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if ”and in so far as” it exceeds what would have been agreed upon on an arms-length basis, is compatible with EU law provided that the assessment of whether or not a transaction represents “in whole or in part” a purely artificial arrangement is based on objective and verifiable elements. See also BE: ECJ, 17 Jan. 2008, Case C-105/07, NV Lammers & Van Cleeve v. Belgische Staat, paras. 29-30, ECJ Case Law IBFD and UK: ECJ, 23 Apr. 2008, Case C-201/05, Test Claimants in the CFC and Dividend Group Litigation, para. 84, ECJ Case Law IBFD; Paul Newey (C-653/11).

317. CFC rules provide for the taxation of profits derived by non-resident companies in the hands of their resident shareholders. “They can be thought of as a category of anti-avoidance rules”. Action 1 Deliverable, supra n. 45, at 35.


321. EC Recommendation on ATP (C(2012) 8806), supra n. 12, at 3.

Moreover, according to the ECJ, having recourse to a general principle, which in terms of content is much broader in its scope than that emerging in EU law,\textsuperscript{323} is not permitted.

Conversely, as expressed in the WebMindLicenses case,\textsuperscript{324} in a situation of artificiality (e.g. an abusive practice resulting in the place of supply of services being fixed in a Member State other than the Member State where it would have been fixed), “the fact that value added tax has been paid in that other Member State in accordance with its legislation does not preclude an adjustment of that tax in the Member State in which the place where those services have actually been supplied is located”.

In other words, on the one hand, tax benefits achieved in another Member State are irrelevant and cannot offset any fiscal hindrances in the Member State concerned: carrying on a business from a Member State with a lower tax rate is not abusive, provided there are genuine commercial reasons for doing so. On the other hand, the application of the artificiality test is not excluded in the case of taxation in another Member State. Accordingly, no taxation is not sufficient evidence to ascertain an artificial arrangement, which could convey situations of double taxation.

Because a common “degree of artificiality” is not yet shared by the OECD and EU law, at this stage it is only possible to list the proposed reactions against artificiality. From a theoretical point of view, they can be distinguished as belonging to two categories:

(i) measures with an anti-artificiality content; and

(ii) measures with an anti-artificiality ratio.

As far as the first group is concerned, it should be noted that the attention paid to substantial elements acquires a specific relevance in transfer pricing matters, where there is a prerequisite to identify “the substance of the commercial or financial relations between the parties”,\textsuperscript{325} by analysing the economically relevant characteristics of the actual transaction. Where there are material differences between contractual terms and the conduct of the associated enterprises in their relations with one another, the functions they actually perform, the assets they actually use and the risks they actually assume, considered in the context of the contractual terms, “should ultimately determine the factual substance and accurately delineate the actual transaction”.\textsuperscript{326}

A second context where this criterion plays a fundamental role, and has an anti-artificiality function, is the matter of the digital economy where “substance analysis” is required with the aim at verifying “whether the CFC is engaged in substantial activities in order to accurately identify and quantify shifted income”.\textsuperscript{327} With respect to intergroup operations which can “artificially separate taxable income from the underlying activities that drive value creation”, one of the aims of the best practice approach set out in the BEPS Action 4 Final Report “is

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\textsuperscript{323} AG Opinion in Kofoed (C-321/05), at para. 67.
\textsuperscript{324} WebMindLicenses (C-419/14).
\textsuperscript{325} Actions 8-10 Final Report, supra n. 65, at 38. On this topic, Y. Brauner, Transfer Pricing in BEPS: First Round – Business Interests Win (But, Not in Knock-Out), 43 Intertax 1, p. 72 (2015).
\textsuperscript{326} Actions 8-10 Final Report, supra n. 65, at 19. See also Action 4 Final Report, supra n. 55, at 12-13.
\textsuperscript{327} Action 1 Final Report, supra n. 5, at 93.
to link the amount of interest deductions in an entity to the level of its taxable economic activity”).

Finally, the general anti-abuse rule in financial transaction tax (FTT) matters, as provided for in Article 13 of the FTT Proposal, with an explicit anti-artificiality context, states that:

[a]n artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. Participating Member States shall treat these arrangements for tax purposes by reference to their economic substance.

On the other hand, measures with an anti-artificiality ratio can be acknowledged in initiatives aiming at reducing the undue benefit of the illegitimate practice, for example:

[i]n order to prevent duplication of tax credits under a hybrid transfer, any jurisdiction that grants relief for tax withheld at source on a payment made under a hybrid transfer should restrict the benefit of such relief in proportion to the net taxable income of the taxpayer under the arrangement (Emphasis added).

At times, the suggestion appears less of a guideline:

[i]n determining whether to treat an item of income, which benefits from such double-taxation relief, as dual-inclusion income, countries should seek to strike a balance between rules that minimize compliance costs, preserve the intended effect of such double taxation relief and prevent taxpayers from entering into structures that undermine the integrity of the rules.

Other times, the OECD encourages “tax administrations to examine the substance of such arrangements and determine whether the results of such arrangements, viewed in their totality, are consistent with policy norms (i.e. avoidance of inappropriate base erosion)”.

Under EU law and OECD guidance, there is a strong nexus between the “artificial nature” of abusive and aggressive practices and the lack of substance/genuine economic activity.

Indeed, the “artificiality” criterion (or its “dated” version as the “substantial economic activity criterion” as defined in the Code of Conduct for Business taxation) has been integrated in both:

– the context of “tax abuse”, in order to assess the purpose of taxpayers in an objective manner, discovering the practices lacking of economic substance (i.e. “to fill the gap” between the legal description of a set of transactions and the underlying economic reality); and

328. Action 4 Final Report, supra n. 55, at 37. For example, an entity makes a payment of interest on an “artificial loan”, where no new funding is raised by the entity or its group. See E. Cencerrado Millan & M.T. Soler Roch, Limit Base Erosion via Interest Deduction and Others, 43 Intertax 1, p. 58 (2015). The new rules on artificial loans could affect the domestic case law. See e.g., UK: First Tier Tribunal, 23 Apr. 2010, Case [2010] UKFTT 183 (TC), Paul Newey, trading as Ocean Finance v. Revenue and Customs, Other Domestic Case Law IBFD.


330. Action 2 Final Report, supra n. 5, at 45. In the author’s view, this statement suggests that all the measures that tackle hybrids by eliminating the tax benefit derived therefrom, as provided by Action 2, are measures with an anti-artificiality ratio. In particular, Action 2 sets out general and specific recommendations for domestic hybrid mismatch rules and model treaty provisions which will put an end to multiple deductions for a single expense, deductions in one country without corresponding taxation in another or the generation of multiple foreign tax credits for one amount of foreign tax paid. Once translated into domestic law and tax treaties, the recommended rules will neutralize the mismatch in tax outcomes and prevent these arrangements from being used as a tool for BEPS.


332. Addressing BEPS, supra n. 57, at 42.
the context of ATP, in order to restore the full meaning and the proper application of residence and source criteria in international tax law and to fill the gaps among domestic systems.

Indeed, both of the above contexts indicate “friction” between legal form and economic reality (concerning tax abuse) and in the consistency in tax treatment arising from the interaction of different systems (concerning ATP).

5. A Converging Approach: Concluding Remarks

In the previous sections, “tax abuse” and “ATP” have been depicted in order to ascertain whether these concepts must be, in the wake of the BEPS initiative, considered as terms of art or as imprecise terms.

The theoretical starting point of this analysis was that these two concepts should have their own precise meaning and their own field of applicability. In particular, it has been argued that, while tax abuse is focused on the idea of circumvention of a tax rule (or a tax treaty), ATP has another rationale and it arises in contexts of “loopholes”, “gaps”, “mismatches” and “frictions”. The general purpose of introducing this latter concept justifies the comprehensive scope that should be given to ATP, which also covers non-abusive situations. Such differences should be reflected in the linguistic characterization of these concepts.

However, the language analysis of EU law and of the OECD’s legal instruments has revealed that there are many discrepancies in the application of these terms, because the words have so many shades of meaning. In particular, the preliminary categorization of these discrepancies has shown that there are cases of overlap between the two concepts, which may undermine their proper understanding.

On the basis of such a linguistic analysis, according to the author, “tax abuse” and “ATP” are not to be considered as terms of art with a precise legal meaning; rather, they must be interpreted in context (if not on a case-by-case basis).

Even if it is not possible to draw a fixed dividing line between the two concepts (especially on the basis of the policy documents considered), the analysis proposed in section 3. reveals that it is possible to recognize a common ground shared by both concepts. On the basis of their functions, it is argued that an “artificiality criterion” is implied by both tax abuse and ATP, as the linguistic analysis confirms. Such a criterion could be used as a tool to solve the problem of the compatibility of BEPS and EU law.

Indeed, it should be remembered that the BEPS initiative, which constitutes one of the “most significant developments in international tax coordination”,333 and the various EU soft and hard law instruments, have for the first time investigated convergence and multilateral action334 within the international tax system. The need for this converging approach is particularly emphasized in tax abuse and ATP matters and evidence of this may be found:

333. Y. Brauner & P. Pistone, BRICS and the Emergence of International Tax Coordination ch. 18 (IBFD 2014).
334. Action 15 Final Report, supra n. 5, at 16: “A multilateral instrument … responds to the political imperatives driving the BEPS Project: it allows BEPS abuses to be curtailed and governments to swiftly achieve their international tax policy goals without creating the risk of violating existing bilateral treaties that would derive from the use of unilateral and uncoordinated measures".
Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, despite Linguistic Discrepancies

- in EU law, providing that “the same general approach towards aggressive tax planning ... would help diminishing existing distortions” and that tackling aggressive tax planning “and other aspects, including tax-related crimes”, are global challenges which no single Member State can face alone” (Emphasis added); and
- in the OECD's instruments, advocating “a hard law multilateral instrument”, to prevent artificiality from facilitating BEPS and to protect states’ tax sovereignty.

In particular, the EU reaction stands for a reasonable use of the existing instruments to:
- revise anti-abuse provisions in EU legislation (in particular, the anti-abuse provisions of the Interest and Royalties Directive, Merger Directive and Parent-Subsidiary Directive);
- enact general anti-abuse rules in all Member States;
- promote bilateral measures between Member States, including a clause in the tax treaties of Member States to prevent double non-taxation; and
- enforce two soft law instruments, namely an EU Taxpayer’s Code and a Platform for Tax Good Governance.

The OECD's approach seems more ambitious than the EU approach because it includes issues related not only to the allocation of taxing rights among countries, but also “to the tax policy considerations that should be taken into account when weighing the relative costs and benefits of the various tax solutions”. In particular, the BEPS Project, the aim of which is to achieve consensus on a global stage:
(i) does not permit countries to precisely define the meaning and scope of ATP, but forces legislatures to reduce the opportunities of legitimate tax planning;
(ii) impacts the effective allocation of taxing powers (much more directly than the rules on administrative cooperation), achieving a fair balance between taxing rights in source and residence countries;
(iii) fosters global fairness in international tax matters; and
(iv) achieves a clear and consistent regulatory framework for international tax competition.

In greater detail, as far as point (i) above is concerned, the BEPS reports provide for:
- developing model treaty provisions and recommendations regarding the design of domestic rules to neutralize the impact (e.g. double non-taxation, double deduction, long-term deferral) of hybrid instruments and entities (Action 2);
- developing recommendations regarding the design of CFC rules (Action 3);

335. In the author’s view, the European Commission seems to favour convergence rather than EU-wide harmonization of the corporate tax systems of Member States.
341. Due to the absence of consensus, several Member States have already started introducing unilateral measures in their domestic tax laws to counteract “tax fraud, tax evasion and tax avoidance”. See European Commission, supra n. 97, at 20-21.
developing recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense and other financial payments (Action 4);

revamping of the work on harmful tax practices with a priority to improve transparency, including the compulsory spontaneous exchange of rulings related to preferential regimes, and on requiring substantial activity for any preferential regime (see Action 5, the final version of which provides more references to “abuse”, “advantage”, “circumvention” than previous versions);

developing model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits “in inappropriate circumstances” (Action 6);

developing changes to the definition of permanent establishment to prevent the “artificial avoidance of PE status” in reaction to BEPS, including through the use of commissioner arrangements and the specific activity exemptions (Action 7); and

developing recommendations regarding the drafting of mandatory disclosure rules for aggressive or abusive transactions, arrangements or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have these rules (Action 12).

These initiatives should improve the integrity and effectiveness (and, hopefully, the simplicity) of the international tax system, without implying a rejection of the legal heritage provided by core concepts, such as “tax residence” and “permanent establishment”. Accordingly, compared to the world before the BEPS agenda and the ECJ’s case law (anchored to the issue of the balanced allocation of taxing powers), the current public debate seems to be much more focused on tax efficiency, “realigning the tax burden on income with the level how taxpayers generate the corresponding income within a given national community”.

Thanks to the fact that the international tax community perceives the OECD as the maker of best practices on international taxation, the above-mentioned proposals may have particularly significant economic outcomes in terms of the overall tax revenue collected on capital income, the distribution of tax revenue across jurisdictions and the design of taxes. However, what should the BEPS countries themselves do?

This is a key – perhaps even the key – query in the contemporary study of the international tax regime, the limits of which domestic systems must comply with. Thanks to the application of the aforementioned artificiality criterion, it is, relatively speaking, easier to provide a guideline for states to implement the BEPS package. If domestic provisions “are designed to encourage artificial schemes without economic substance, then those schemes would be considered BEPS behaviours”.

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343. Pistone, supra n. 136, at 148, note 25 (2015/2016), according to whom, “double deductions could ultimately be seen as the single expression of a broader justification aimed at safeguarding the balanced allocation of taxing powers”.

344. Pistone, supra n. 267.

345. The reasons of this statement are explained by Y. Brauner & P. Pistone, The BRICS and the Future of International Taxation, in BRICS and the Emergence of International Tax Coordination (Y. Brauner & P. Pistone eds., IBFD 2015), Online Books IBFD.

346. “Estimation of the scale of each of the BEPS channels would be closely related to what individual governments would estimate for the fiscal and economic impacts of their country’s implementation of specific BEPS Actions” (Action 11 Final Report, supra n. 81, at 82-83).

347. Id., at 83.
In particular, in order to discourage “artificiality” resulting in abusive or aggressive arrangements, states should give priority to determining the taxable bases of substantial factors, less capable of being manipulated (than, for example, the prices used in transactions between related parties), such as employment, sales and capital in place.

To illustrate this point, it is possible to refer to the CFC issue. In designing CFC rules, states could consider including “a substance analysis that would only subject taxpayers to CFC rules if the CFCs did not engage in genuine economic activities.” From the OECD’s perspective, this implementation at the domestic level, as far as EU Member States are concerned, is consistent with the ECJ’s “wholly artificial arrangements” limitation.449

It must be noted that, in the context of the EU legal area, an artificial practice should be defined narrowly, i.e. in such a way as to not affect legitimate competition.350 Indeed, taking advantage of differences between Member States is based on the idea of the EU internal market.351 Hence, a proper application of the “artificiality test” requires that anti-abuse and anti-ATP measures do not go beyond what is strictly necessary, considering the need to preserve tax competition.

According to the OECD, the issue at hand is “finding the balance between the need for appropriate revenue protection and avoidance of distortions of competition”.352 Indeed, aggressive competition among states (becoming tax shelter promoters)353 represents the parallel of ATP (among taxpayers) and can potentially create distortions and unfair disadvantages.354

Generally, national measures increasing tax competition unavoidably create revenue losses for the other tax jurisdictions. In the EU legal area, the fact that tax competition is very strong is acknowledged by EU soft law.355 In the author’s view, discrepancies in the international tax

349. Id. For a deeper analysis, see A.P. Dourado, The Role of CFC Rules in the BEPS Initiative and in the EU, 3 British Tax Review, p. 340 (2015).
350. AG Opinion in Halifax (C-255/02), at para. 86.
353. Many countries have specific legislated domestic tax rules which provide tax credits, tax deductions or tax exemptions for selected activities, such as research and development, investments in alternative energy and contributions to charitable activities, among many others. Some governments, such as the UK government, are introducing specific national tax incentives, using their national legislations in conjunction with their treaty networks to promote themselves as an “investments hub”. These domestic incentives, which reduce corporations' average tax rates and which encourage greater activity, are not classed as BEPS. However, if domestic incentives are designed to encourage artificial schemes without economic substance, then those schemes would be considered BEPS behaviours.
354. For instance, jurisdictions with CFC rules that apply broadly may find themselves at a competitive disadvantage relative to jurisdictions without CFC rules (or with narrower CFC rules) because foreign subsidiaries owned by resident companies will be taxed more heavily than locally owned companies in the foreign jurisdiction. This competitive disadvantage “may in turn lead to distortions ... it may impact on where groups choose to locate their head office or increase the risk of inversions, and it may also impact on ownership or capital structures where groups attempt to avoid the impact of CFC rules”. Action 3 Final Report, supra n. 18, at 15-16.
system (and measures that would enhance the potential for using cross-border disparities) are not in and of themselves the cause of base eroding effects.

If in competition among taxpayers no or low taxation is not per se a cause of concern, but it becomes so when it is linked to something “artificial”, in competition among states, no or low taxation is not per se a cause for concern, but it becomes so when it is linked to lack of transparency. Indeed, according to the EU Commission, “[i]n an international context, the existence of differing tax legislation is generally accepted as a consequence of fiscal sovereignty... policies which entail a low level of income tax or none at all often go along with a lack of transparency or exchange of information with other states”356 (Emphasis added). Transparency is seen as an essential criterion for fighting not only tax evasion, but also “tax avoidance and harmful tax practices, which often rely on an environment characterized by complexity and non-cooperation”.357

Moreover, the BEPS Project does not stand for the protection of the integrity of taxing jurisdictions against base erosion in itself, but for the full respect (and the proper application) of the international principles of source and residence taxation, i.e. the transparent respect of the nexus criteria. Accordingly, it can be argued that the aspirations of some states to become the most competitive tax jurisdictions are compliant with BEPS concerns only as far as these states are transparent. Indeed, “countries are not free to adopt any international tax rules they please”, because “a coherent international tax regime exists, embodied both in the tax treaty network and in domestic laws, and... it forms a significant part of international law (both treaty-based and customary)”358. In this respect, the two-fold expression “abuse and ATP” has to be related to the notion of “exchange of information and transparency”, extensively used in international tax law.

The key importance of a systemic and consistent legal framework, within which each state can exercise its taxing sovereignty in preventing BEPS effects, is emphasized in assuring convincing, acceptable and transparent legal understanding, especially in the context of a multilingual EU area. In preventing a number of artificial opportunities for MNEs and – at the same time – enforcing transparent tax competition among states, convergence represents the feasible solution for these “divergence costs”.

This convergence could (and should) be guaranteed through the combined action of the OECD and EU law, which can play the most important role in providing a comprehensive solution to the “costs of divergence”.

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