

## A. Introduction

### 1. Background

Taxation is at the core of the sovereignty of a country.<sup>1</sup> Money provided by taxation has been used by governments throughout history to carry out many functions. Taxes may be used to cover a state's own financial needs or they may be spent to build and maintain infrastructure, to enforce the law and public order, to protect property or to pay off the state's debt. Taxes are also an important tool for the redistribution of wealth.<sup>2</sup> As such, taxes may be passed on in the form of subsidies or they may be used to fund welfare and public services.

When a state is levying taxes, it will inevitably interfere with the rights of its taxpayers.<sup>3</sup> For this to be justifiable, a tax system has to take into account many factors. A well designed tax code should be neutral, i.e. it should avoid distortions of the market.<sup>4</sup> Additional factors that need to be considered in the design of a tax code concern matters of administrative efficiency (i.e. the cost-yield ratio for a tax) and the principle of legal certainty.<sup>5</sup> Eventually, a tax code also has to ensure that equal taxpayers are equally affected.<sup>6</sup> This is because one core aspect of taxation is related to the fact that the tax burden should be distributed among the individuals (and businesses). It is therefore also for the tax law to protect individuals (and businesses) from having to disproportionately contribute to the financial needs of a State.<sup>7</sup>

Nonetheless, for as long as there have been taxes, persons have been trying to reduce their tax bills. This is where the phenomena of “*tax evasion*”, “*tax avoidance*” and “*tax mitigation*” come into play. From a government's perspective, tax avoidance and tax evasion are matters of concern as they nibble away the edges of the tax base, thus, reducing government revenue.<sup>8</sup> Whenever this is the case, it will inevitably cause problems as a legislative decision concerning the distribution

1 *Tiley/Loutzenhiser*, Revenue Law 10; *J. Lang in Tipke/J. Lang* 1 et seq.

2 *Tiley/Loutzenhiser*, Revenue Law 8.

3 *Nevermann*, Justiz und Steuerumgehung 47.

4 *Tiley/Loutzenhiser*, Revenue Law 11 et seq adds that the UK tax system has many rules which break the principle of neutrality.

5 *Davies*, Principles of Tax Law 6; *Tiley/Loutzenhiser*, Revenue Law 12 et seq; *Cagianut in Cagianut/Vallender* 18.

6 *Tiley/Loutzenhiser*, Revenue Law 11; *J. Lang in Tipke/J. Lang* 1 et seq.

7 *Davies*, Principles of Tax Law 6; *J. Lang in Tipke/J. Lang* 3; *Nevermann*, Justiz und Steuerumgehung 47.

8 *Tiley/Loutzenhiser*, Revenue Law 96.

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of the tax burden is not put into practice. It should in this context be noted that the terms tax evasion, tax avoidance and tax mitigation are often used imprecisely or with varying meanings.<sup>9</sup> However, the precise nature of this problem depends on the precise definition of these terms.<sup>10</sup>

## 2. Terminology

### 2.1. Tax evasion

There seems to be substantial consensus about the term “*tax evasion*” (“*Steuerhinterziehung*”<sup>11</sup>).<sup>12</sup> Accordingly, both German as well as British scholars argue that tax evasion involves concealment of the facts.<sup>13</sup> Tax evasion concerns actions where taxpayers make false declarations, disguise or conceal facts with the result that tax authorities claim too little taxes from them. Accordingly, tax evasion implies criminal activity,<sup>14</sup> is illegal<sup>15</sup> and is synonymous with tax fraud:

“[T]he expression *tax evasion* should be deleted from the vocabulary as it is a euphemism which covers its true name, which is *tax fraud*. *Tax evasion* requires falsehood of some kind. Basically it requires either non-disclosure, or fabrication of a story which differs from the facts.”<sup>16</sup>

### 2.2. Tax avoidance and tax mitigation

Taxpayers also have another possibility to frustrate the legislator’s attempt of collecting the taxes. This is where the term “*tax avoidance*” comes into play. Tax avoidance is a concept that can be properly used with more than one meaning.<sup>17</sup> Accordingly, the meaning of the term must be derived from the context. In its general sense, tax avoidance refers to an activity aimed at the reduction of tax that is not criminal in nature.<sup>18</sup>

9 Thuronyi, Comparative Tax Law 154; Eidenmüller in *de la Feria/Vogenauer* 142; Vogenauer in *de la Feria/Vogenauer* 524 with numerous examples from the jurisprudence of the ECJ; Tiley/Loutzenhiser, Revenue Law 97; see also *Englisch*, Working Paper Series 11/13, 3 with further references.

10 See below next section A.2.

11 J. Lang in Tipke/J. Lang 182.

12 Thuronyi, Comparative Tax Law 155; Alvarrenga, BFIT 2013, 348. Thuronyi adds that what behaviour constitutes tax evasion depends, however, on the criminal laws of each country.

13 Templeman in *Shipwright* 1; J. Lang in Tipke/J. Lang 167 argues that “*Steuerhinterziehung*” (“*tax evasion*”) only comes into question where the taxpayer disguises or conceals the facts; *Englisch*, Working Paper Series 11/13, 4.

14 Thuronyi, Comparative Tax Law 154; Templeman in *Shipwright* 1; J. Lang in Tipke/J. Lang 1151 et seq; *Englisch*, Working Paper Series 11/13, 4.

15 Tiley/Loutzenhiser, Revenue Law 96; J. Lang in Tipke/J. Lang 182.

16 Thuronyi, Comparative Tax Law 154 and Gololobov, The Yukos Case 223 refer to Dilger in *Shipwright* 12. See also Eidenmüller in *de la Feria/Vogenauer* 142.

17 Thuronyi, Comparative Tax Law 155; Tiley/Loutzenhiser, Revenue Law 96 et seq; Nevermann, Justiz und Steuerumgehung 49.

18 Thuronyi, Comparative Tax Law 155.

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“*Tax avoidance*” also needs to be distinguished from “*tax mitigation*” (which is synonymous with “*tax planning*” or “*tax minimization*”).<sup>19</sup> Scholars from both the UK and Germany emanate from such a distinction. *J. Lang* distinguishes, in the context of German tax law, between two concepts: “*Steuerumgehung*” is supposed to be legal as it involves conduct what British lawyers would probably refer to as “*tax mitigation*”, “*tax planning*” or “*tax minimization*”.<sup>20</sup> The term “*Steuervermeidung*” stands for the second concept and addresses issues what lawyers from the UK would typically refer to as “*tax avoidance*”. Lord Nolan, in *IRC v Willoughby*, summarises the distinction:

*“The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.”*<sup>21</sup>

“*Tax avoidance*” ultimately involves a concept that corresponds to the idea of what certain civil law jurisdictions would consider “*abuse of law*”.<sup>22</sup> The concept of abuse is invoked in diverse areas of civil law and in many legal systems to serve a variety of purposes.<sup>23</sup> Its origins may be traced back to Roman law.<sup>24</sup> Abuse of law is about correctly applying the law to a specific set of facts.<sup>25</sup> Abuse of law must therefore be distinguished from “*abuse of rights*”, which is concerned with the excessive exercise of an individual right that causes harm to another person without good reason.<sup>26</sup> It should be noted that courts (particularly the ECJ) have not always been consistent in distinguishing between abuse of rights and abuse of law. Sometimes, the ECJ used concepts of “*abuse of rights*” and “*abuse of law*” synonymously.<sup>27</sup>

19 Also *Thuronyi*, *Comparative Tax Law* 155 or *Tiley/Loutzenhiser*, *Revenue Law* 97 distinguish between these concepts.

20 *J. Lang* in *Tipke/J. Lang* 182; see also *Thuronyi*, *Comparative Tax Law* 155; *Tiley/Loutzenhiser*, *Revenue Law* 97.

21 *IRC v Willoughby* [1997] 1 WLR 1071, 1079. See also *Tiley/Loutzenhiser*, *Revenue Law* 97.

22 See also *Englisch*, *Working Paper Series* 11/13, 4 or *Zimmer* in *Cahiers* 42 et seq.

23 *Thuronyi*, *Comparative Tax Law* 158 et seq.

24 *Tridimas* in *de la Feria/Vogenauer* 169 referring to “*Nullus videtur dolo facere, qui suo iure utitur*” *Gaius*, *Digest* 50.17.55.

25 *Eidenmüller* in *de la Feria/Vogenauer* 142.

26 *Tridimas* in *de la Feria/Vogenauer* 169; *Englisch*, *Working Paper Series* 11/13, 22 referring to ECJ 12. 5. 1998, C-367/96, *Alexandros Kefalas and Others*, para 20; ECJ 23. 3. 2000, C-373/97, *Diamantis*, para 33.

27 One example is *Kofoed* (ECJ 5. 7. 2007, C-321/05, *Kofoed*). In para 38, the Court declared for the first time that there is a general Community law principle that “*abuse of rights*” is prohibited. However, the matter was actually one of “*abuse of law*”. See also ECJ 22. 12. 2010, C-277/09, *RBS Deutschland*, para 52; ECJ 27. 10. 2011, C-504/10, *Tanoarch*, para 51; ECJ 20. 6. 2013, C-653/11, *Newey*, para 46 and *Tridimas* in *de la Feria/Vogenauer* 171; *Vogenauer* in *de la Feria/Vogenauer* 524; *Pistone*, *Intertax* 2007, 535. See also below section B.4.5.

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Abuse of law concerns the proper interpretation of a particular legal provision. Abuse of law seeks to prevent a person from deriving benefits which, although it may result from formal compliance with a measure, pursues ends which lie beyond its objectives.<sup>28</sup> Abuse of law is therefore an issue of having to ascertain the scope of a provision. Account has to be taken of the various means of interpretation. A civil law lawyer would typically interpret the respective statute within the light of its wording, its telos, its historical background and its systematic integration within the tax system and would also use the methods of analogy and teleological reduction.<sup>29</sup> Common law lawyers would typically refer to “*purposive interpretation*” of the respective statute.<sup>30</sup> Ultimately, it is about having to assess whether the facts of a case answer the questions asked by the relevant (taxing) statute. Accordingly, the expressions “*tax avoidance*” and “*tax mitigation*” are merely labels that describe the outcome of interpretation. Accordingly, it should be noted that the author uses the expression “*tax abuse*” synonymously with “*tax avoidance*”.

## 3. Scope of the study

### 3.1. Point of departure

It has already been described above that the phenomena of “*tax avoidance*” (“*Gestaltungsmisbrauch*”) and “*tax evasion*” (“*Steuerhinterziehung*”) are a cause of concern for governments.<sup>31</sup> Quite obviously, tax avoidance and tax evasion leads to less tax revenue. No legislature can allow taxpayers to arrange their affairs in such a way that the tax system becomes voluntary or that government revenue falls short of what is needed.<sup>32</sup> Accordingly, the legislator has a multitude of possibilities to fill these tax gaps:

Governments may simply fill the tax gap by way of cutting expenditure (e.g. cutting the military budget). On the other hand, governments may also want to hire additional staff, thereby hoping to better enforce the existing (tax) laws. It is also conceivable that the legislator may want to sanction tax evasion under criminal law, thus hoping to discourage taxpayers from evading taxation. Governments may also decide to accrue additional revenues by introducing new taxes or by shifting and increasing the tax burden on less mobile activities, such as labour. Another possibility to fill the tax gap consists in broadening the tax base. Accordingly, the legislator could abolish benefits or could introduce measures which

28 *Tridimas in de la Feria/Vogenauer* 171.

29 *Larenz, Methodenlehre*<sup>5</sup> 298 et seq, 365 et seq; *Bydlinski, Juristische Methodenlehre*<sup>2</sup> 472 et seq.

30 *Barak, Purposive Interpretation* 85 with further references. When analysing various cases decided by UK courts, this study will also show that the term “*purposive interpretation*” is not used synonymously with the civil law concept of “*teleological interpretation*”. There are cases where courts from the UK applied, under the guise of “*purposive interpretation*” methods that a lawyer coming from a civil law country would probably refer to as historical or contextual means of interpretation.

31 See above section A.1.

32 *Tiley/Loutzenhiser, Revenue Law* 99.

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prohibit the deduction of certain expenses. Furthermore, the legislator could also introduce rules particularly aimed at dealing with the phenomenon tax avoidance. Accordingly, the legislator could introduce SAARs, TAARs or GAARs (special, targeted or general anti-avoidance rules):

SAARs thereby follow a ‘sniper approach’.<sup>33</sup> They are provisions which are aimed at identifying, with precision, the type of transaction to be dealt with and prescribe, with precision, the tax consequences of such a transaction. A typical feature of UK legislation is that it also includes TAARs. These rules are wider than SAARs as they are formulated in terms of countering ‘avoidance’ within the framework of a whole set of (newly introduced) provisions.<sup>34</sup> Last but not least, legislators may also want to introduce GAARs.<sup>35</sup>

#### 3.2. Bringing GAARs into play

There is a wide spectrum of definitions of a GAAR.<sup>36</sup> In most countries, a GAAR takes the form of a statutory rule, albeit with an extremely large range of constructions.<sup>37</sup> For a rough orientation, it can be pointed out that authors seem to agree that a GAAR is a broad and typically principle-based rule designed in way to empower courts and tax authorities to challenge transactions which are aimed at tax avoidance and which violate the statutory requirements of the applicable tax law.<sup>38</sup>

It should be noted that this study is going to deal with the GAARs as implemented in Germany, the UK and as suggested by the EU.<sup>39</sup> As GAARs try to establish the borderline between “*abuse*” and “*use*” of a law, this study therefore deals with issues involving tax avoidance (tax abuse) and tax mitigation (tax planning or tax minimization).<sup>40</sup> This study does therefore not deal with tax evasion.<sup>41</sup> Last but not least, it should also be noted that the abbreviation “GAAR” stands for “*General Anti-Avoidance Rule*” or “*General Anti-Abuse Rule*”, whatever the reader prefers.<sup>42</sup>

<sup>33</sup> *Tiley/Loutzenhiser*, Revenue Law 99.

<sup>34</sup> *Tiley/Loutzenhiser*, Revenue Law 99 argues that Sec 16A of the TCGA 1992 is a TAAR.

<sup>35</sup> See below section A.3.2.

<sup>36</sup> *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 1.

<sup>37</sup> *Zimmer* in *Cahiers* 37 et seq; *van Weeghel* in *Cahiers* 22 et seq. *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 2 adds that in some countries lacking a statutory rule, a doctrinal approach based only on judicial interpretation might also be considered a GAAR.

<sup>38</sup> *van Weeghel* in *Cahiers* 22; *Zimmer* in *Cahiers* 45 et seq; *Krever* in *Lang/Rust/Schuch/Staringer/Owens/Pistone* 4 et seq.

<sup>39</sup> Regarding the reasons for this ‘selection’, see below section A.4. Also note that main section C is entirely devoted to an analysis of the various requirements inherent in the respective GAARs.

<sup>40</sup> Regarding the concept of tax avoidance (tax abuse), see above section A.2.2.

<sup>41</sup> Regarding the concept of tax evasion, see above section A.2.1.

<sup>42</sup> The reader should also be reminded at this point that the UK GAAR is referred to as “*General Anti-Abuse Rule*”. However, this is nothing but a political message. It does not come with any substantial changes when compared with a “*General Anti-Avoidance Rule*”. See also below in more detail section C.2.2.2.3.

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### 4. The comparative approach and the research question

*“[N]o other feature of a tax law provides a better insight into a nation’s tax psyche than its anti-avoidance rules. The intersection of general anti-avoidance rules (GAARs) [...] with operative provisions of tax laws reveal so much about all aspects of a country’s tax system: citizens’ tax morale, judicial perspectives on taxation and legal interpretation, drafters’ inclinations for technical or principled drafting, legislators’ willingness to confront politically sensitive issues or their inclination to delegate the tough decisions to administrators and courts. A comparative analysis of the role of GAARs in tax systems (or the lack of any GAAR) can thus offer unique perspectives on tax law across jurisdictions.”<sup>43</sup>*

A reason for conducting comparative studies in tax law is the “*eye-opening*” effect that leads to a better understanding of one’s own legal (and tax) system in disclosing structures that are conceded if looking from the traditional point of view of the national doctrine.<sup>44</sup> In this sense, comparison leads to a better understanding of one’s own tax law. Comparative studies are also highly relevant from a scientific and practical point of view.<sup>45</sup> Not only will there be more and more tax practitioners confronted with rules of foreign tax law but also will legislators have to acknowledge that other countries are often facing the same or at least similar problems they are dealing with.<sup>46</sup> Comparing different answers to the same questions or problem may therefore not only bring about to a better understanding of the effects of each solution but may also help to improve the own system by adopting the foreign solution.<sup>47</sup>

This study aims at comparing the GAARs of Germany, the UK and the EU<sup>48</sup>. This selection is inspired by the general framework as set out by comparative law scholars, who divided countries into several legal families to indicate broad similarities in legal traditions.<sup>49</sup> *Thuronyi* thereby distinguishes between (i) common law families, (ii) civil law families and (iii) the EU.<sup>50</sup> Choosing to compare the GAARs of Germany, the UK and the EU already takes into account that each GAAR falls within one legal family (i.e. common law for the UK, civil law for Germany and the EU as a separate legal family).

Dealing with tax avoidance from both the perspective of common law and civil law takes the two dominant legal traditions of the Western World into account.<sup>51</sup>

43 *Krever in Lang/Rust/Schuch/Staringer/Owens/Pistone* 1.

44 *Glendon, Washington and Lee Law Review* 1996, 973.

45 *Mössner in Sacchetto/Barassi* 14.

46 *Mössner in Sacchetto/Barassi* 20.

47 *Zitelmann, Deutsche Juristen-Zeitung* 1900, 329; *Mössner in Sacchetto/Barassi* 14.

48 Point of departure will be the GAAR as recommended to the Member States in the Commission Recommendation on Aggressive Tax Planning, C (2012) 8806 final, 6 December 2012 (which the author refers to as “EU GAAR”).

49 *Thuronyi, Comparative Tax Law* 7, 23 et seq; *Zweigert/Kötz, Introduction to Comparative Law* 73 et seq.

50 *Thuronyi, Comparative Tax Law* 43 et seq.

51 *von Mehren, The U.S. Legal System: Between the Common Law and Civil Law* 1 et seq.

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Much has been said about the difference between common law and civil law in general.<sup>52</sup> Lord *Cooper*, who is as a high Scottish judge familiar with both common law and civil law put forward:

*“The civilian naturally reasons from the principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, ‘What should we do this time?’ and the second asking aloud in the same situation ‘What did we do last time?’. [...] The instinct of the civilian is to systematize. The working rule of the common lawyer is solvitur ambulando.”*<sup>53</sup>

However, something more must be said when it comes to tax law: There is a fundamental similarity between the UK and the German tax law and that is that both tax systems are codified.<sup>54</sup> Other differences, such as the drafting style of the taxing statutes,<sup>55</sup> the autonomy of tax law from other branches of law,<sup>56</sup> the rules on the burden of proof<sup>57</sup> or the proceedings before a court<sup>58</sup> are therefore still important, but they may not hide the fact that judges from both jurisdictions will decide tax cases in light of a codified taxing statute.

The author’s selection of the three legal families also finds support in *Thuronyi*’s further recommendation, whereas a comparative study should focus on Germany and the UK.<sup>59</sup> Apparently, the German and the UK tax system are “archetypes for the basic concepts [of tax law] and have been leaders in influencing the tax laws of other countries in numerous aspects”.<sup>60</sup> Hence, a comparison of the German and UK legal system “will reveal most of the basic contrasts that would arise from including other countries in the study”<sup>61</sup> and will also be beneficial for other jurisdictions. Additionally, it also needs to be considered that both Germany and the UK are Members of the EU. In this context, it must be noted that *Gassner* already in

52 *Zweigert/Kötz*, Einführung in die Rechtsvergleichung 250 et seq; *Merryman/Pérez-Perdomo*, The Civil Law Tradition 3 et seq, 27 et seq, 150 et seq; *von Mehren*, The U.S. Legal System: Between the Common Law and Civil Law 1 et seq; *Jones in Maisto* 31 et seq; *Riesenhuber*, Utrecht Law Review 2011, 117 et seq.

53 *Cooper*, Harvard Law Review 1950, 470 et seq.

54 See also *Krever in Achatz* 355 et seq who elaborates on the taxation laws of civil code and common law jurisdictions.

55 *Diplock*, The Courts as Legislators 10 et seq; *Nevermann*, Justiz und Steuerumgehung 307 et seq; *Popkin*, BTR 1991, 285; *Hoffmann*, BTR 2005, 205; *McCarthy*, BTR 2011, 286; *Gammie*, BTR 2013, 589.

56 *Thuronyi* in *Thuronyi* xxviii; *Jones in Maisto* 31.

57 *Jones in Maisto* 32.

58 *Jones in Maisto* 32.

59 *Thuronyi*, Comparative Tax Law 9. *Thuronyi* also adds the US as a third country. However, it should be noted that the US does not employ a GAAR. See therefore *Menuchin/Brauner in Lang/Rust/Schuch/Staringer/Owens/Pistone* 763 with further references; *Avi-Yonah/Pichhadze*, SSRN, 4. However, it should at least be noted that on March 30, 2010 President Obama signed the Health Care and Education Reconciliation Act which includes a provision (Sec 1409) that codified the so called economic substance doctrine in Sec 7701(o) Internal Revenue Code.

60 *Thuronyi*, Comparative Tax Law 9.

61 *Thuronyi*, Comparative Tax Law 9.

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1995 ‘invited’ future generations of lawyers to carry out comparative research in the field of tax avoidance.<sup>62</sup> The author gladly accepts this invitation.

A comparison of the German, UK and EU GAAR is also interesting if one considers the fact that Germany has a long-lasting history with its GAAR (its roots can be traced back to the year 1919). The UK and the EU GAAR, on the other hand, were only introduced or recommended quite recently in a ‘BEPS-world’. However, the topic of tax-avoidance is not entirely new in the UK or the EU. On the contrary, the UK has a long-lasting history of judicially developed anti-avoidance concepts. Similarly, the ECJ has also been alluding to abuse and abusive practices in its rulings for more than thirty years. Nonetheless, there are yet no cases which are decided on grounds of the UK GAAR. With respect to the EU GAAR, its practical importance should not be underestimated. Although it merely has the status of a recommendation, several Member States already adopted a GAAR into their tax code which is similar to the EU GAAR.<sup>63</sup> The EU GAAR, in turn, can be found in similar terms in legislative amendments made to secondary union law (e.g. the amendment made to the Parent-Subsidiary Directive).<sup>64</sup> Furthermore, it will be highly interesting from a comparative point of view to examine the similarities and differences between the various legal families and to analyse what one jurisdiction might learn from the experiences made in another jurisdiction.

It can safely be said that there is barely a topic in tax law that has been more controversially discussed than that of tax avoidance. The developments in a BEPS-world show that these discussions will very likely continue. This study aims at contributing to these discussions by entering new lands and by comparing the fundamental issues underlying the phenomenon of tax avoidance in Germany, the UK and the EU. Comparing statutory GAARs as well as the judicial approaches towards tax avoidance is not only important for scholars or practitioners but also for the legal culture. Eventually, this study aims at answering the following research question:

What is the value of the GAARs as implemented in the German and UK tax system and as suggested by the European Commission in terms of their effectiveness to counteract tax avoidance when compared with the judicially developed approaches against tax avoidance and their compatibility with the principles of a sophisticated legal culture?

62 Gassner in Cagianut/Vallender 89 writes: “[D]ie europäische Integration eröffnet eine weitere Dimension meines Themas, nämlich die wirtschaftliche Betrachtungsweise und den Gestaltungsmissbrauch im Gemeinschaftsrecht, die über den deutschen Steuerrechtskreis hinaus eine rechtsvergleichende Betrachtung der diversen europäischen Steuerrechtsordnungen notwendig macht: eine Aufgabe für viele Juristengenerationen mehr als jene, die sich bisher in der Schweiz, in der BRD und in Österreich diesem Thema aus der Sicht ihrer jeweiligen Rechtsordnung gewidmet haben”.

63 Greece and Italy. Poland is currently considering implementing a GAAR patterned after the EU GAAR. See also below section C.2.3.2.3.

64 Regarding the Member States’ approach in implementing the Parent-Subsidiary-Directive, see also below section C.2.3.2.4.

## 5. Structure of the study

This study is divided into three main sections: Section B lays the ground for the further analysis. It will deal with the approaches against tax avoidance as developed by German, UK and European courts. This is crucial, as a GAAR can only be properly understood and valued if one also understands the judicially developed anti-avoidance concepts.

Accordingly, section C will comprehensively deal with the statutory GAARs. In doing so, the GAARs will be compared on the basis of their conditions for application. Irrespective of their different drafting style and their distinct historical background, it is nonetheless observable that the respective GAARs pursue similar ideas and have a similar core understanding. Accordingly, the comparison will be structured along the various elements of the GAARs. Each GAAR asks whether an “*arrangement*” triggers a “*tax*” that is covered by the GAAR. Additionally, each GAAR employs objective and subjective tests, requires the finding of a tax advantage and provides for measures to counteract the abusive results.

Eventually, section D is aimed at thinking this topic through to the end. After all, the value of a statutory anti-avoidance rule (i.e. the GAAR) can only be carved out when it is compared with the already existing judicial approaches against avoidance. Accordingly, the section will first of all compare the judicially developed anti-avoidance doctrines. A proper comparison will thereby emanate from the idea that the judicially developed approaches against tax avoidance in Germany and the UK had a common starting point. Analysing and putting together the jurisprudence of approximately 100 years on issues involving tax avoidance, this section aims at identifying and explaining similarities, differences as well as the consequences of the courts’ approach against tax avoidance. This analysis will thereby also bring the EU law developments into play. Eventually, section D aims at putting the judicially developed approaches in relation with the statutory GAARs. In doing so, the reasons for introducing (or suggesting) GAARs become visible. As a result, this will enable the author to draw a conclusion concerning the value of the GAARs as implemented by Germany and the UK and as suggested by the Commission.

## B. Judicial anti-avoidance

### 1. Introduction

This first main section is devoted to an analysis of the judicial anti-avoidance approaches as pursued by German, UK and European courts. This section will thereby lay the ground for the remaining two main sections. Key aspect of this first main section thereby lies in the task of analysing how courts dealt (and deal) with issues involving tax avoidance. This is because an understanding of the judicially developed approaches in matters concerning tax avoidance is crucial: A GAAR can only be properly understood if one also understands the judicially developed anti-avoidance concepts. Furthermore, an understanding of the judicially developed approaches to counteract abuse will also shed a light on the value of GAARs.

As a preliminary remark, it needs to be asked where the case law in matters of tax avoidance begins and where it ends. Bearing in mind that “*tax avoidance*” and “*tax mitigation*” are merely labels for a problem that involves having to ascertain the scope of a provision, there will be an endless amount of cases that could be potentially examined. After all, whenever a court denies the deduction of expenses or deems a flow of income to be taxable or interprets a provision included in a Directive, it will typically do so without even mentioning the expressions “*tax avoidance*” or “*tax mitigation*”. These cases are then ‘merely’ ones where courts establish the scope of the respective (tax) provision. However, there will also be ‘borderline cases’, i.e. cases that involve arrangements that courts believe to show some specific characteristics which can be used to distinguish them from ‘genuine’ transactions. This is where tax avoidance comes into play.

The cases dealt with in the following subsections tend to be such ‘borderline cases’. They have been selected because they openly discuss the issue of tax avoidance. As far as this is possible, the author decided to only deal with decisions issued by the highest courts of each legal family, i.e. the BFH (which will in the further course be referred to as “Federal Fiscal Court”), the House of Lords (from September 2009 the UKSC, i.e. the United Kingdom Supreme Court) and the ECJ.

In order to better understand the rationale behind the cases dealt with in this study, it should also be mentioned that the style of the judgments given by judges sitting in courts in Germany, the UK and the EU deviates quite substantially. Roughly speaking, decisions issued by courts in the UK tend to be very lengthy in terms of the amount of words used. This is partly owed to the fact that the Law

## 2. Judicial anti-avoidance in Germany

Lords (from September 2009 UKSC Justices) often gave (or give) separate speeches as they decide cases by a simple majority. This is different from the decisions passed by the Federal Fiscal Court or the ECJ, which pass one uniform decision. Accordingly, the decisions passed by the House of Lords (UKSC) are somehow comparable with the Opinions delivered by the Advocate Generals at the ECJ or with (partly) dissenting opinions given by judges sitting in the ECHR. Another factor that needs to be borne in mind is that judges in the UK have to operate within a very complex tax system. This is owed to the fact that a ‘typical’ UK tax statute is very detailed in nature, being rule based rather than building on principles.<sup>65</sup> A ‘typical’ German tax statute, in turn, tends to build on principles and tends to be drafted in an open-ended way.<sup>66</sup> Also the ECJ typically works in a legal environment with principle-based statutes (above all, the fundamental freedoms).

## 2. Judicial anti-avoidance in Germany

### 2.1. Introduction

The origins of the German GAAR can be traced back to the early 20<sup>th</sup> century. Section B.2.2. illustrates that the traditional view in those days was that civil law prevails over tax law and that tax law is naturally connected with criminal law. Consequently, taxing statutes were interpreted literally and formally. Section B.2.3. then explains that this condition needed to change drastically. In order to overcome the aftermaths of the First World War, the legislator had to enact a major tax reform to raise more revenue. In the end, nothing was as it was before. Law-making bodies were replaced, new courts were established and a new tax system was introduced. In this context, the legislator also introduced a GAAR and the concept of the so called “*economic perspective*” (“*wirtschaftliche Betrachtungsweise*”).<sup>67</sup> Eventually, the tax reform was successful. Abuse was typically dealt with using methods of interpretation. The GAAR did not play an important role in the early years of its existence.

<sup>65</sup> Freedman in Lang/Rust/Schuch/Staringer/Owens/Pistone 745.

<sup>66</sup> Thuronyi, Comparative Tax Law 18.

<sup>67</sup> The author admits that it is difficult to translate the expression “*wirtschaftliche Betrachtungsweise*” into the English language without losing content. Thuronyi, Comparative Tax Law 147 tried to translate the expression with “*economic construction*”. However, this translation might suggest to a common law (tax) lawyer that the concept of the “*wirtschaftliche Betrachtungsweise*” is a *separate* method of statutory *construction*. However, this is what it is not. Rather, it is merely a form of teleological interpretation (which could be again confused with the expression “*purposive interpretation*”, as typically used by a common law lawyer). The “*wirtschaftliche Betrachtungsweise*” being a form of teleological interpretation, it can also not be translated with “*substance-over-form approach*” (see in this respect Gassner in Cahiers 120, 147 and below section D.2.3.4.2). Eventually, the author seeks to strike a balance between a concept that has been given its own meaning over decades of discussions and the language barrier by translating the expression into the English language but by adding the German expression in brackets.