The general anti-abuse rule of the Anti-Tax Avoidance Directive: how compliant is the Dutch fraus legis?

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The European general anti-abuse rule of the Anti-Tax Avoidance Directive has not seen specific implementation in the Netherlands, because the existing general anti-abuse rule of fraus legis would be sufficiently compliant. In this article I show that Dutch courts will still have to make some adjustments to their application of fraus legis. The Anti-Tax Avoidance Directive’s artificiality test requires more individual attention in establishing abuse, and the existing Dutch substance requirements should be fine-tuned and extended. Additionally, courts may have to broaden the motive test of fraus legis, and/or adjust the burden of proof of fraus legis.

Introduction

The idiom holding that nothing is certain, except death and taxes, certainly has lost its meaning in the sphere of international corporate tax planning. A combination of intentional and unintentional distortions between national tax systems, strategically minded businesses, and a relatively unaware public, had almost made taxes something for the ethical or less resourceful. Global firms Google, Starbucks and Amazon are well-known examples of (legal) tax avoiders, bypassing billions of euros a year in corporation tax. Much has changed over the last decade or so, however, due to public outcry after scandal-raising leaks and the reality of a disappearing corporate tax revenue. In the process of countering tax avoidance, states have both sought international cooperation and become more flexible in their application of anti-abuse measures. The Anti-Tax Avoidance Directive (ATAD1, hereafter ATAD) of the European Commission, having entered into force in 2019, contains a rule that combines these two approaches. This general anti-abuse rule (GAAR) must be implemented by all 28 Member States, and provides them with an instrument that fills in the gaps in tax laws for more flexible taxation.

The government of the Netherlands has determined that the existing Dutch general anti-abuse rule, fraus legis (Latin for ‘abuse of law’), already sufficiently implements the ATAD GAAR. This article will research the validity of that statement: is fraus legis truly compliant with the ATAD GAAR, or will courts need to make changes in their judgements? Its conclusion will include recommendations for tax lawyers and judges.

Fraus legis

2.1 Development
The Netherlands is one of the 26 Member States that already had independently established a general anti-abuse rule in corporate tax law before the introduction of the ATAD. Such a rule is

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useful in situations where tax avoiders or aggressive tax planners construct abusive arrangements that are not strictly prohibited by the wording of the law, yet clearly fall outside the purpose of the law. If it was undoubtedly the intent of the legislator to exclude certain constructions from or include them in legal provisions, this should be the measure a judge applies. A tax system, most agree, should not subsidize malevolent creativity.

*Fraus legis* is an uncodified principle of law, that was developed by the *Hoge Raad* (Supreme Court of the Netherlands) in 1984. It was given both a motive and a norm test. The motive test is characterized by the taxpayer’s decisive motive for the arrangement being the obtaining of a tax advantage; the norm test requires the arrangement to defeat the object or purpose of the applicable tax law. Application may lead to elimination of the abusive arrangement or substitution with the arrangement that would otherwise have been avoided.

### 2.2 Motive test

The motive test requires that the taxpayer’s *decisive* motive is the avoidance of tax. The point of departure for this test is the permissibility of tax planning: a taxpayer may choose the path with the most advantageous tax rate when pursuing a commercial goal. It is when the tax considerations become predominant, even decisive, that tax planning may become tax avoidance. The motive test may be satisfied in different ways. If an arrangement can only be disadvantageous to the taxpayer with taxes left out of the equation, it is clear that tax considerations form the decisive motive. Another indication is whether an arrangement has no real practical value, for example when there is no change in the financial position of the defendant, he can exercise no more control than before and factual relationships between (legal) persons remain unaltered. A third approach identifies arrangements that are circuitous, unusual and artificial; the presumption is that someone with commercial goals would not quickly choose such an arrangement. The court has made it clear that without further evidence this can never be sufficient to support *fraus legis*. All of the above can be refuted by a believable defence that other commercial reasons not subordinate to tax considerations contributed to the arrangement.

### 2.3 Norm test

The norm test requires that the arrangement defeats the object or purpose of the applicable tax law. Only gaps in the law that the legislator must not have reasonably foreseen can be closed by *fraus legis*, for otherwise the judiciary would overstep its power. In interpreting a legal provision, judges should examine its legislative history – including parliamentary discussions – and the system of the wider tax law. A general indication that an arrangement defeats the object and purpose of the law is if it carries no to little substance relative to its form. Even in the presence of economic substance, an arrangement can (partly) be eliminated if it contains unnecessary, uncommercial

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1 HR 21 November 1984, *BNB* 1985/32  
2 Alexander van den Bosch, “De algemene anti-misbruik bepaling in de Anti-tax Avoidance Directive. Hoe GAAR proof is Nederland?” (Europese Fiscale Studies, 2016), 11  
4 HR 26 April 1989, *BNB* 1989/217  
5 HR 10 March 1993, *BNB* 1993/195  
6 Substantial economic risks may be an indication that an arrangement is not artificial, as follows from HR 21 April 2017, *BNB* 2017/162  
7 Leon Hokke, “*Fraus legis* en winstdrainage” (Diss., Universiteit van Amsterdam, 2010), 10  
8 Robert IJzerman, *Het leerstuk van de wetsontduiking in het belastingrecht* (Amsterdam: Kluwer, 2007), 131
intermediate steps. Another indication is the possibility of arbitrary repetition, as the Hoge Raad considered that it can never be the object and purpose of the law to enable taxpayers to save an unrestricted amount of taxes by repetition of a certain arrangement to their discretion. Still, no arrangement can be abusive if it is necessary in full for a commercial aim, even if it does lead to such tax advantages.

There are two important factors that limit the working of *fraus legis*, since they are indications that the arrangement in question does not fall outside of the object and purpose of the law. The first of these is the *compenserende heffing*, translated as the compensating tax levy. In the case of BNB 2002/118 a Dutch subsidiary wanted to deduct from its tax base the paid interest of a loan provided by its parent concern established in Ireland. Where originally the court had denied this deduction, the Hoge Raad considered that the interest would be taxed as revenue in Ireland with a rate of 10% and the interest deduction therefore could not defeat the object and purpose of the law: there was sufficient compensating tax levy, just as under normal circumstances. The Hoge Raad then held that a compensating tax levy abroad of 7% or more would suffice to justify interest deduction by a company established in the Netherlands. *Compenserende heffing* is an everything or nothing measure: a tax rate above what is considered reasonable at the time legitimizes the deduction, whereas any lower tax rates prohibits the deduction. The second limitation to *fraus legis* is the presence of specific anti-abuse rules. *Fraus legis* may only be employed by courts if it is reasonable to believe the legislator had not foreseen the specific tax abuse in question. When a legal provision or system becomes very detailed, the playing field for *fraus legis* decreases.

To summarize, *fraus legis* is a flexible principle developed in case law, constituting the Dutch GAAR for tax law. Its motive test, requiring the decisive motive to be the obtaining of a tax advantage, may be indicated if the arrangement has foreseeable disadvantages, no real practical value, and/or is circuitous, unusual and artificial. In every case the defendant may bring forward other reasons for the arrangements. The assessment is made on a case-by-case basis and needs to be supported by enough evidence. The norm test, requiring a defeat of the object or purpose of the applicable tax law, may be indicated by a divergence of substance and form or the possibility of arbitrary repetition, and tested by extensive interpretation of the concrete legal provision and the system of the applicable tax law. The norm test is limited by *compenserende heffing* and presence of specific anti-abuse rules.

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9 HR 6 September 1995, *BNB* 1996/4, par. 3.2.4
12 HR 8 February 2002, *BNB* 2002/118
13 The general rule is that the interest of a loan may be deducted from the tax base of the receiver of the loan, but taxed on the other end, with the provider of the loan.
14 The concept of *compenserende heffing* does have its roots in earlier cases, see HR 20 September 1995, *BNB* 1996/5; HR 10 August 2001, *BNB* 2001/399
15 Jeroen van Strien, "Dubbele heffing en overkill" FM nr. 119 2006/6.7.2.5 (2006)
16 Van den Bosch “De algemene anti-misbruik bepaling in de Anti-tax Avoidance Directive. Hoe GAAR proof is Nederland?”, 11
The ATAD GAAR

3.1 Background and wording

The Anti-Tax Avoidance Package of the European Commission of January 2016, which comprises the ATAD, is the first binding legal instrument of its sort encompassing a large number of countries; it is only due to the efforts of earlier pieces of soft law, such as the Common Consolidated Corporate Tax Base (CCCTB) of the EU and the Base Erosion and Profit Shifting (BEPS) actions of the OECD, however, that the ATAD was made possible. These put combating tax abuse on the agenda and suggested action points for States. The Anti-Tax Avoidance Directive seeks to advance efforts in the fight against tax avoidance and aggressive tax planning in the European Union through positive harmonization. Its de minimis nature creates a minimum level of protection for countering tax base erosion in the Member States.

The GAAR included in the ATAD stretches to the whole of corporate tax law, and reads as follows:

*General anti-abuse rule*

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

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

The ATAD GAAR imposes three requirements before an arrangement or a series of arrangements may be ignored: it must have been put into place for the main purpose or one of the main purposes of obtaining a tax advantage, this tax advantage must defeat the object or purpose of the applicable tax law, and the arrangement or series of arrangements must be not genuine having regard to all relevant facts and circumstances. The Commission has equated ‘non-genuine’ with ‘wholly artificial’.

Therefore the three requirements above will be referred to as the main purpose test, the conflict with object and purpose test and the artificiality test. Satisfaction of these tests provide for elimination or substitution of the abusive arrangement. The fact that the ATAD preamble synonymizes ‘non-genuine’ with ‘wholly artificial’ places the GAAR in the context of an extensive collection of European case law, which will prove essential to how Member States should implement the GAAR. Therefore I will first expand on the Union concept of artificiality before I touch on the main purpose and conflict with object and purpose test.

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17Commission, “Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market” COM(2016) 26 final memorandum par. 1
18 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD) OJ L193/1 (2016), art 1
19 Ibid, art 6
3.2 Artificiality test

3.2.1 Development
The artificiality test in relation to direct taxation was developed in the 2006 Cadbury Schweppes case,\(^ {22}\) where it came into question whether the United Kingdom’s anti-abuse legislation on CFC’s was an infringement on the fundamental freedoms of the EU.\(^ {23}\) This legislation governed that the general rule that a resident company is not taxed on the profits of a subsidiary as they arise should not be applied to subsidiaries established in a country with a lower tax rate. The Treaty’s freedom of establishment ensures that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, but also prohibit the Member State from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.\(^ {24}\) The Court held that the fact that a company is established in another Member State to benefit from more favourable legislation alone is not enough to restrict the freedom of establishment with anti-abuse regulations, such as the UK legislation in question does.\(^ {25}\) Companies are to a certain extent free to do ‘tax jurisdiction shopping’, or tax planning. However, when the object of the Treaties guaranteeing fundamental freedoms is not respected, anti-abuse legislature may restrict these freedoms. This is in case of a ‘wholly artificial arrangement’, for which there must be “in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that [...] the objective pursued by freedom of establishment [...] has not been achieved”.\(^ {26}\) The Court then explained that the freedom of establishment involves the pursuit of genuine economic activity through a fixed establishment in that State for an indefinite period.\(^ {27}\) This means that the artificiality test consists of a subjective element (the intention to obtain a tax advantage) and objective circumstances showing that the objective pursued by – in this case – the freedom of establishment has not been achieved (from now on the subjective and objective element). An anti-abuse measure is therefore only valid if it targets arrangements aiming to escape taxes and lacking economic reality. The two elements will be discussed separately.

3.2.2 Objective element
In Cadbury Schweppes we saw that the objective element of artificiality tests assesses whether from objective circumstances it may be concluded that an arrangement does not reflect economic reality, thus not achieving the objective of the freedom of establishment. The ‘wholly artificial arrangement’ formula has not been restricted to potential breaches of the freedom of establishment; the Court has expanded the concept to among others the free movement of services\(^ {28}\) and of capital.\(^ {29}\) The requirements change from case to case, making it difficult to predict the right measures. In addition to these freedom-specific circumstances, the characteristics of the arrangement may also indicate artificiality. The Commission’s Aggressive Tax Planning

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\(^ {23}\) The four fundamental Treaty freedoms of the EU are the free movement of goods, capital, services and labour, which should be guaranteed by the European Single Market.
\(^ {24}\) Case 311/08 Société de Gestion Industrielle SA (SGI) v État belge [2010] ECLI:EU:C:2010:26, par. 39
\(^ {25}\) Cadbury Schweppes, par. 37
\(^ {26}\) Ibid para 64
\(^ {27}\) Ibid para 54
\(^ {28}\) See Case 318/10 Siat [2012]ECLI:EU:C:2012:415, par. 40, 50 et seq
\(^ {29}\) Case 182/08 Glaxo Wellcome GmbH & Co KG [2009] ECLI:EU:C:2009:559
Recommendation suggests within this context that national authorities consider among others whether an arrangement is circular in nature, its legal substance is inconsistent with its individual steps, and whether the expected pre-tax profit is insignificant in comparison to the expected tax benefit. These are objective factors which Member States can take into account in realizing the artificiality test. However, predetermined general criteria alone cannot constitute abuse; this is why we need the subjective element.

3.2.3 Subjective element
Case law shows that the procedural importance of the subjective element of the artificiality test is the need for an individual examination of the whole operation at issue. Tax considerations must be proven to be the main aim of the arrangement. Tax authorities should provide at least prima facie evidence – sufficient to raise a presumption – and the taxpayer must be allowed the possibility to argue that valid commercial reasons were the main purpose of the arrangement, instead of tax considerations. The nature of the arrangement that is important for the objective element of the artificiality test, may also provide an indication of this intention. It is the purpose of the arrangement to be determined from objective factors, instead of the purpose of the taxpayer, that constitutes the subjective test.

3.2.4 The artificiality test in the ATAD GAAR
Since the development of the artificiality test in 2006, the focus has slowly shifted from the decisive importance of the fundamental freedoms to the justified purpose of combating tax abuse. Where the artificiality test was established to assess the legitimacy of Member States’ anti-abuse legislation, we are in a time where the Commission is now drafting this legislation. Still, by restricting the GAAR to non-genuine arrangements, the Commission ensures that only justified restrictions of the fundamental freedoms will occur in combating tax avoidance.

A few factors do make the article in question a rather strange codification of the artificiality test – if this is how we may treat it. The first is that the ATAD GAAR allows arrangements to be split in genuine and non-genuine parts, by its ‘to the extent’ wording. It can be expected that intermediate steps in arrangements that are partly genuine may be tackled now as well, which will benefit the combat of abuse. Secondly, where before both the subjective as the objective element of artificiality needed to be present for abuse, the wording of the ATAD GAAR seems to require that both must be absent for there to be no abuse: only when an arrangement is put into place for

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34 Eqiom and Enka, par. 32 et seq. and Case 524/04; Thin Cap Group Litigation [2007] ECLI:EU:C:2007:161, par. 82
35 Case 251/16 Cussens e.a. [2017] ECLI:EU:C:2017:881, par. 60
37 Ibid, 774
38 Commission working document accompanying the document “Communication from the Commission to the European Parliament and the Council – Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU” COM(2016) 23 final, par. 3.2.1
valid commercial reasons which reflect economic reality, it is genuine. The article thus seems to establish cumulative criteria for the taxpayer, which would not be in line with the artificiality test. A recent opinion of Advocate General Kokott, in a case that is yet to be decided, is in line with this presumption.\textsuperscript{39} She believes the distinction is expressly covered by the wording of the ATAD GAAR.\textsuperscript{40} This could change the meaning of the concept of artificiality quite drastically, although it is not ruled out that the Court will independently decide to continue interpretation as before; it might dismiss a purely grammatical interpretation, like it did in Foggia.\textsuperscript{41}

3.3 Main purpose test and conflict with object and purpose test
The main purpose test can be deduced from the wording in the ATAD GAAR of “an arrangement […] having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage”. Considering what is written above, it seems this main purpose test is very similar to the subjective element of the artificiality test. The difference is that the main purpose test requires the tax advantage to be the ‘main or one of the main’ purposes, which is a less strict test than the Court generally holds in anti-abuse case law.\textsuperscript{42} Perhaps this very low threshold for abuse will be moderated in case law, but some hold that the Court may no longer deviate from the wording in the Article due to the harmonization brought on by the Directive.\textsuperscript{43}

It is somewhat strange that the main purpose test is mentioned separately next to the ‘non-genuineness’ test, since we would expect the latter to already contain the subjective element of artificiality developed in anti-abuse case law. It is possible that this was a conscious step to expand the scope of anti-abuse provisions; Shu-Chien argues that any subjective test plays a less important part when the law becomes more harmonized.\textsuperscript{44} I think the two might reflect different burdens of proof: where tax authorities need to provide at least prima facie evidence that tax considerations were a main reason for the arrangement, taxpayers can argue their arrangements to be genuine only by establishing both valid commercial reasons and economic reality (the cumulative test). The ‘to the extent’ wording in paragraph 3 could also support the need for two different subjective tests, even if it is not about the burden of proof. The whole arrangement must have a tax advantage as one of the main purposes, but the part of the arrangement that is to be ‘ignored’ must be artificial in the classical sense of the word, which requires a stricter purpose test. The difference with the collection of anti-abuse case law would then be that arrangements that may be split in genuine parts and non-genuine parts and which have overall as one of the main purposes the obtaining of a tax advantage, can also be contested. Resolving this apparent tension between the two subjective tests will be a task for the Court.

The conflict with object and purpose test can be deduced from the wording in the ATAD GAAR of “a tax advantage that defeats the object or purpose of the applicable tax law”. It is very

\textsuperscript{39} Case 116/6 Skatteministeriet v T Danmark [2018] ECLI:EU:C:2018:144, conclusion 4(a)
\textsuperscript{40} Ibid para 52
\textsuperscript{41} In Foggia, the Court held that by automatically accepting that the saving in the cost structure resulting from the reduction of the administrative and management costs would constitute a valid commercial reason, as the TAAR in the Merger Directive says, the very same rule would be entirely deprived of its purpose. Thus the Court ruled that under circumstances this would not be considered a valid commercial reason (par. 49).
\textsuperscript{42} See also Halifax e.a., par. 75; Case 425/06 Part Service [2008] ECLI:EU:C:2008:108, par. 45; Case 126/10 Foggia [2011] ECLI:EU:C:2011:718, par. 35; Case 330/07 Jobra [2008] ECLI:EU:C:2008:685, par. 35
\textsuperscript{43} De Broe and Beckers “The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice’s Case Law on Abuse of EU Law”, 142
\textsuperscript{44} Shu-Chien Chen “Predicting the ‘Unpredictable’ General Anti-Avoidance Rule (GAAR) in EU Tax law”, (Diss. Erasmus University Rotterdam, 2018), 95

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similar to the wording used by the Court in its case law.\textsuperscript{45} Considering the GAAR applies in domestic situations, within the Union and vis-à-vis third countries according to the ATAD preamble, this applicable tax law can have a variety of forms in both EU and national law. Treaties, however, are excluded from its scope.\textsuperscript{46} It is up to the discretion of Member States to decide what the object and purpose of national provisions are,\textsuperscript{47} within the limits imposed by the Fundamental Freedoms.

**Compliance of fraus legis with the ATAD GAAR**

4.1 Compliance with the main purpose test

The explanatory memorandum of the Dutch bill implementing the ATAD asserts that the GAAR does not necessitate implementation, as \textit{fraus legis} covers its requirements.\textsuperscript{48} The Court of Justice has made it clear that legislative action is not necessarily required in the existence of uncodified principles of law,\textsuperscript{49} but the national courts should in that case ensure that the directive is correctly implemented.\textsuperscript{50} This is why it is important to closely compare \textit{fraus legis} and the ATAD GAAR; courts might have to make some changes to their application of \textit{fraus legis} to comply with the Directive.

Both the ATAD GAAR as \textit{fraus legis} require a motive of acquiring a tax advantage, but this must be the main or one of the main motives in the former, and the decisive motive in the latter. It is very difficult to foresee how the Court will interpret this wording in the ATAD GAAR. Considering the harmonization effects of the Directive in corporate taxation, it may not be able to stray from its exact wording. The Hoge Raad might have to extend the motive test of \textit{fraus legis} to cover situations where tax considerations are only one of the main reasons for the arrangement, unless the Court establishes that tax considerations must form the essential or predominant purpose within the part of the arrangement branded as non-genuine, when it is separated from other parts of the arrangement; \textit{fraus legis} already allows the examination of intermediate steps. Secondly, Dutch courts have also taken the motives of natural persons into account, next to the purpose of the arrangement.\textsuperscript{51} It is clear that the Hoge Raad does not solely look at the arrangement, but maintains a relatively flexible motive test that may also consider personal facts. This is not strictly in accordance with the ATAD GAAR, yet it may be justified by the \textit{de minimis} nature of the Directive when it leads to a quicker assumption of abuse.

4.2 Compliance with the conflict with object and purpose test

In the ATAD GAAR, the object and purpose test relates to the ‘applicable tax law’. If this is a provision put in place by Union law, it is up to the Court to interpret its object and purpose. When the applicable tax law is a national tax provision, it is primarily up to the discretion of Member States to determine its object and purpose. Only when the supposed object and purpose of that law are in conflict with Union law, the Court of Justice has a say in its interpretation. The methods of

\textsuperscript{45}Cadbury Schweppes, par. 65-66

\textsuperscript{46} Commission Communication “Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU” COM(2016) 23 final, par. 4

\textsuperscript{47} See Cussens e.a., par. 59

\textsuperscript{48} Tweede Kamer 35 030 “Wijziging van de Wet op de vennootschapsbelasting 1969 en de Invorderingswet 1990” Nr. 3 Memorie van toelichting (2018), par. 2.3

\textsuperscript{49} Case 321/05 Koefoed [2007] ECLI:EU:C:2007:408, par. 41-45, and Case 456/01 Commission v Italy [2004] ECLI:EU:C:2004:258, par. 51

\textsuperscript{50} Case 29/84 Commission v Germany [1985] ECLI:EU:C:1985:229, par. 28

\textsuperscript{51} HR 23 January 2004, BNB 2004/142, par. 4.1.2
proof and indication for the norm test in *fraus legis* should therefore remain largely untouched by the arrival of the ATAD GAAR. However, there is one exception relevant to the current application of this principle that needs to be discussed, because it appears to be in conflict with Union law: the *compenserende heffing* (compensating tax levy).

Already in 1999, the Court reasoned in the *Eurowings* case: “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. […] As the Commission rightly observed, such compensatory tax arrangements prejudice the very foundations of the single market”.

The rule of *compenserende heffing* may be characterized as follows: if a company has a tax rate lower than a fixed ‘reasonable’ rate on the interest earned on a loan, the related recipient of that loan, established in the Netherlands, will not be able to deduct this interest from their tax base as an exception to the general rule, given that the decisive motive of this company was a tax advantage. If the first company is established in another Member State, this rule seems to form a clear breach of Treaty freedoms as determined in the judgement in *Eurowings*. We know from *Cadbury Schweppes* that such a restriction on the fundamental freedoms is only possible in the absence of economic reality.

The Hoge Raad has already been confronted with the above reasoning in *BNB* 2004/142, where a company argued that denying interest deduction based on *compenserende heffing* was a prohibited restriction of the free movement of capital (art 56 TEC). The Hoge Raad held that abuse this evident would deny access to the fundamental freedoms according to Union case law, and the only movement of capital affected by a denied deduction was the movement directly connected with the abusive arrangement. Therefore article 56 TEC would not be applicable to this situation. It is questionable that the Hoge Raad denies access to fundamental freedoms upfront instead of restricting fundamental freedoms in cases of abuse. It is generally held that the Hoge Raad should have referred preliminary questions to Court, rather than presuming its incompetence. This case might demonstrate problems of compliance of *fraus legis* with the artificiality test, which I expanded upon in the following section.

### 4.3 Compliance with the artificiality test

**4.3.1 Artificiality in relation to the motive and norm test**

Whereas both the ATAD GAAR and *fraus legis* clearly have a motive test and a norm test, the presence of the concept of artificiality in *fraus legis* would be more hidden, if existent at all. Although the ATAD is a *de minimis* Directive that allows Member States to offer a higher level of protection for national corporate tax systems, it also speaks of a “minimum level of protection

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52 Case 294/97 *Eurowings Luftverkehr* [1999] ECLI:EU:C:1999:542, par. 44-45
55 HR 23 January 2004, *BNB* 2004/142, par. 3.3
56 Ibid annotation para 3
57 Ibid annotation para 1
59 ATAD, recital 3

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for the internal market”. If the Dutch courts would not recognize non-artificiality as an escape clause the consequence might be a higher level of protection for its corporate tax system; yet the essence of the artificiality test is the protection of the internal market. It is therefore essential that this third GAAR test is properly incorporated in the Dutch jurisdiction. It should be noted that the anti-abuse rule must be applied equally in international and national cases, which would preclude a more restrictive approach in the latter cases.

A potentially worrisome stance of the Hoge Raad is that the very identification of abuse can deny the taxpayer the right to fundamental freedoms, as in BNB 2004/142. This stance has been affirmed in later cases, especially on interest deduction, including the recent Credit Suisse case. Reference is made to cases such as Kefalas, where it is said that Community law cannot be relied on for abusive or fraudulent ends. We have seen that the presence of abuse can only be determined with the Union concept of artificiality — which assesses the objectives of the fundamental freedoms — rather than before the freedoms come into question. Literature generally supports this perspective, and the Hoge Raad has been encouraged to incorporate justification grounds limiting the freedoms in its reasoning rather than keeping the freedoms outside of the equation altogether.

Throughout the development of artificiality in Union case law, Dutch courts have incorporated its elements in the existing motive and norm tests of fraus legis, instead of creating a separate test. We have seen that a lack of economic reality can indicate fulfilment of the motive test, and that an unsound relation between substance and form can indicate fulfilment of the norm test. These elements are, however, not necessary for establishing fraus legis. Thus the danger lies in using fraus legis where its norm and motive test have been fulfilled, yet the arrangement is genuine in the sense of the ATAD GAAR.

4.3.2 Substance requirements

A relevant development in Dutch law is the creation and tightening of substance requirements. Used in assessing actual establishment in the Netherlands, these criteria require a measure of economic substance before granting a certain tax advantage: the Dutch board members of a company must have sufficient professional skills and the power to make decisions, and important board decisions should be made in the Netherlands, for instance. The State Secretary of Finance believes that the substance requirements are the Dutch realization of the artificiality test. Fulfilment of the requirements would ensure economic reality of an establishment, classifying it as genuine. Anti-abuse case law of the Court has indeed influenced the Dutch substance requirements.

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60 Ibid; also see Case 47/90 Delhaize [1992] ECLI:EU:C:1992:250, par. 26
62 See HR 1 June 2012, BNB 2012/213
63 HR 21 April 2017, FED 2017/120, par.3.3.3
64 Kefalas, par. 20
65 HR 1 June 2012, V-N 2012/31.18, annotation; Gerard Blokland, “Compenserende heffingstoets EU-proof?” WFR 2005/1125 (2005), par. 3.1 et seq
66 Ministry Decision of 3 June 2014 on “Dienstverleningslichamen en zekerheid vooraf” DGB 2014/3101
68 Jaap Bellingwout and others, Substance en de Nederlandse houdstervenootschap (Deventer: Kluwer, 2014), 65-66
With regard to the concept of artificiality developed by the Court, this development should be applauded. Substance requirements aim to embody the objective of the freedom of establishment in predetermined objective factors – the objective element of artificiality – and the rebuttal arrangement ensures a case-by-case examination of the purposes for the arrangement – the subjective element of artificiality. It is then up to the State to keep the substance requirements high enough to satisfy Union law: taxpayers fulfilling all requirements find themselves in a ‘safe harbour’, as the State Secretary calls it.\(^6\) There are of course many situations of potential abuse where the substance requirements are not useful, for instance when other fundamental freedoms than the freedom of establishment are in question. Besides, there may be discrepancies in certain situations between the substance requirements and what the Court classifies as ‘genuine’. It is therefore important that the Dutch courts always keep the Treaty freedoms in mind in their judgements employing fraus legis, and do not dismiss their application altogether after identifying abuse under fraus legis.

As we have seen, however, the meaning of the artificiality test in the ATAD GAAR might be somewhat different from the concept developed in case law. Even in the most recent discussions, Dutch politicians have accepted the fact that if either the subjective or the objective requirement of artificiality is not fulfilled, anti-abuse measures cannot be possible.\(^7\) If the Court instead confirms that the fulfilment of either of these criteria constitutes abuse, there could also be abuse when there is economic reality but there are no underlying commercial reasons. The implications would be that fulfilment of the substance requirements might not always be enough – Dutch courts must then still apply fraus legis in the absence of valid commercial reasons, if the object and purpose of the law is defeated. A ‘safe harbour’ might therefore not be the right term.

**Conclusion and Suggestions**

As the Court of Justice has not as consistently reasoned on anti-abuse matters as it professes, and there has been little indication to what the new wordings in the article mean, the ATAD GAAR is not always easy to interpret. It is possible that the case law of the Court will not change due to the Directive on anti-abuse matters. But the scope of abuse may also become broader, including arrangements that are only partly artificial or contain economic reality within their non-genuine parts, and/or arrangements where tax considerations only constitute one of the main reasons. While the Dutch legislator and courts cannot prepare for all possibilities, there are certainly some areas in which adjustment and prudence is advised.

The Dutch legislator was right to refrain from codifying the ATAD GAAR in favour of fraus legis: the latter is in many ways already compliant with the ATAD GAAR, having a well-developed motive and norm test, and as an uncodified principle of law it is flexible and can be adaptive of Union case law. Some differences between the two are of little or no harm, such as the broader range of facts that may be used to constitute the motive test in fraus legis, including personal circumstances of the taxpayer or its representatives, as only more instances of identified abuse should result. This does not mean that the current state of fraus legis suffices in all its applications. The artificiality test is not taken into consideration either separately or in its realization in Dutch law in every fraus legis case. Lack of economic reality is currently only one of the multiple indicators that fraus legis may be applied. As such, situations may arise where there is an illegitimate restriction of fundamental freedoms. The Hoge Raad is not correct in denying

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\(^6\)Minister van Financiën, Letter of 9 November 2018 “betreft aanvullende schriftelijke beantwoording WGO I – Wet implementatie eerste EU-richtlijn antibelastingontwijking” (2018), 3

\(^7\) See Minister van Financiën, Letter of 12 November 2018 nr. 38 (2018), 6

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access to the Treaty freedoms before abuse has been established in full, which should include an assessment of the economic reality of the arrangement, at the minimum when raised in rebuttal. Substance requirements may properly incorporate the objective factors constituting fulfilment of the object of the freedom of establishment; as such, arrangements with sufficient economic reality are excluded from abuse in the same way they would under case law on the artificiality test.

Attention must be given to assure that these requirements are not too low — excusing non-genuine arrangements — and that if they are higher than what ‘minimum’ economic reality would require, there is a proper rebuttal arrangement. Yet it is possible that the Court will establish that economic reality is not sufficient to escape abuse rules, but that valid commercial reasons are also necessary. In that case substance requirements may not provide a ‘safe harbor’, as a proper motive must also be established. Perhaps substance requirements relating to other fundamental freedoms could also soon be developed. Lastly, it is possible that *fraus legis* must be extended to arrangements where tax motives are not decisive, but one of the main reasons. There would be no reason to make this assumption just yet, as the main purpose test may also refer to the arrangement in whole instead of its abusive part.

General anti-abuse rules may have always been jurisdiction-specific in essence, their application an embodiment of the spirit of national law, but since the ATAD, the GAARs of 28 Member States have become a partly European concept. As all GAARs have broad scopes, their limitations will soon need to be defined by the Court of Justice of the European Union. For this purpose it is important that the Hoge Raad refers preliminary questions whenever interpretation of the ATAD GAAR is unclear. In any case, both taxes and tax avoidance — unlike death — are today uncertain. Let us hope the effect of this uncertainty is prevention of further abuse.

**References**

**Primary sources**

**EU documents**

Commission Communication “Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU” COM(2016) 23 final


**Dutch government documents**


Ministry Decision of 3 June 2014 on “Dienstverleningslichamen en zekerheid vooraf” DGB 2014/3101

Minister van Financiën, Letter of 9 November 2018 “betreft aanvullende schriftelijke beantwoording WGO I – Wet implementatie eerste EU-richtlijn antibelastingontwiking” (2018)

Minister van Financiën, Letter of 12 November 2018 nr. 38 (2018)

**European case law**


Case 116/6 *Skatteministeriet v T Danmark* [2018] ECLI:EU:C:2018:144

Case 126/10 *Foggia* [2011] ECLI:EU:C:2011:718

Case 182/08 *Glaxo Wellcome GmbH & Co KG* [2009] ECLI:EU:C:2009:559
Case 196/04 Cadbury Schweppes [2006] ECLI:EU:C:2006:544,
Case 251/16 Cussens e.a. [2017] ECLI:EU:C:2017:881
Case 29/84 Commission v Germany [1985] ECLI:EU:C:1985:229
Case 311/08 Société de Gestion Industrielle SA (SGI) v État belge [2010] ECLI:EU:C:2010:26
Case 321/05 Koeboe [2007] ECLI:EU:C:2007:408,
Case 456/01 Commission v Italy [2004] ECLI:EU:C:2004:258
Case 504/16 Deister Holding [2017] ECLI:EU:C:2017:1009
Case 524/04; Thin Cap Group Litigation [2007] ECLI:EU:C:2007:161

Dutch case law
HR 22 July 1982, BNB 1982/243
HR 21 November 1984, BNB 1985/32
HR 26 April 1989, BNB 1989/217
HR 10 March 1993, BNB 1993/195
HR 6 September 1995, BNB 1996/4
IHR 20 September 1995, BNB 1996/5
HR 10 August 2001, BNB 2001/399
HR 8 February 2002, BNB 2002/118
HR 23 January 2004, BNB 2004/142
HR 6 September 1995, BNB 1996/4
HR 1 June 2012, BNB 2012/213
HR 21 April 2017, BNB 2017/162

Secondary sources
Bosch, Alexander van den, “De algemene anti-misbruik bepalingen in de Anti-tax Avoidance Directive. Hoe GAAR proof is Nederland?” (Europese Fiscale Studies, 2016)
Hokje, Leon “Fraus legis en winstafdraining” Dissertation, Universiteit van Amsterdam (2010)

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