From Evasion to Avoidance: The Historical Evolution of the OECD Model in Addressing Tax Abuse

In this article, the author examines the historical evolution and significance of the anti-abuse provisions in the various OECD Models and the Commentaries on the OECD Model as these measures affect the abuse of tax treaties. The author also discusses the time before the OECD Model.

1. Introduction

This article focuses on the evolution, i.e. the historical development, of tax abuse from the perspective of the OECD Model. The purpose of this article is to present some historical perspectives on anti-abuse developments, and how these should be taken into account when interpreting tax treaties in situations of tax abuse. The objective, among others, is to answer the question of why the older OECD Models only include the term “tax evasion” but not “tax avoidance”.

The new article 29(9) in the OECD Model (2017) may – not for the first time, following the additions made to the Commentaries on the OECD Model (2003) and the ensuing debate – raise questions as to whether the OECD Model’s position on tax abuse, and in particular tax avoidance, has changed from previous versions. The

* LLD and Senior Lecturer, University of Eastern Finland. The author can be contacted at mika.nissinen@uef.fi. The author would like to thank IBFD for granting research access to issues of the Bulletin for International Taxation (prior to 2006, the Bulletin for International Fiscal Documentation) in the spring of 2021 while writing this article. The author would also like to thank Professor Johann Hattingh for his comments on the draft article. The author has written about tax abuse in Finnish in a two-part refereed-article on treaty override in the Verotus-Tax Journal (2021).

1. OECD Model Tax Convention on Income and on Capital, art. 29(9) (21 Nov. 2017), Treaties & Models IBFD.

article is intended to explore the purpose and objective of the OECD Model in the area of tax abuse, and how it has evolved. Specifically, it is asked if, in the past – although somewhat provocatively stated – it has been intended that the OECD Model should permit tax abuse, in general, and restrict countries from preventing tax abuse?

2. Abuse of the Tax System and Its Prevention

2.1. Abuse in general

The concept of tax abuse is difficult to define globally, as the concept may have been defined differently in different countries. Understanding the terminology related to the abuse of the tax system is essential to understanding the interface between tax treaties and tax abuse. Consequently, the different concepts of tax abuse may become clear when they are consistently defined and systematized.

(Legitimate) tax planning is independent of abuse. Sometimes the term “aggressive tax planning” is also used. The

The interface between the concept of tax evasion and tax avoidance has been examined throughout history. Tax evasion is the intentional and deliberate concealment of income or related information (mala fides) contrary to the law. Such action is intended to avoid taxes that are required by law to be paid. Tax evasion as an "upper" concept does not determine the procedural issue of punishment. The deliberate non-declaration of income can be addressed by either administrative or criminal provisions, and the interface between these concepts can vary in different countries. Tax evasion can satisfy the characteristics of tax fraud. In these situations, the punishment is usually carried out by way of criminal proceedings.

To what extent the concepts of abuse and avoidance overlap depends on the definition of each concept. The concept of tax abuse can sometimes – not necessarily always – be understood as a somewhat broader concept. It may include arrangements that constitute (legitimate) tax planning, despite being morally reprehensible, as well as arrangements that constitute tax avoidance. The definition of tax abuse can also be understood to relate only to tax avoidance and artificial arrangements. The concept of tax abuse can also cover different laws, measures and practices in different countries.

Some of the risk of tax abuse can be prevented, for example, by a formulaic limitation. This can be, for example, a certain percentage and time limit set for ownership. Such provisions can be easy to control administratively, as the application of the provision does not require an assessment of the potential tax interest of the arrangement. The provision is usually simple and clear, which ensures legal certainty. The challenge may be that the provision also applies, for example, in a situation that has not been made in the context of tax interest, but only for commercial reasons. Similarly, such a provision often affects the behaviour of taxpayers. While these provisions may prevent certain types of abuse, they may not necessarily be considered anti-abuse provisions.

Similarly or even synonymously with the abuse of tax, the concept of tax avoidance can be defined as a conscious attempt (successful or unsuccessful) to take advantage of a tax law or the absence of it, which is contrary to the spirit or purpose of tax law. Tax avoidance can be prevented by setting an anti-avoidance provision or an anti-avoidance judicial interpretation. The prevention of tax avoidance can be built, for example, on the fraus legis doctrine, the business purpose doctrine or the substance-over-form doctrine, which are overlapping concepts to some extent.

When applying the anti-avoidance rule, it is usually assessed whether the tax advantage to be obtained should be the sole or main reason for the arrangement and the relationship of the arrangement to non-tax benefits (for example, business and commercial reasons).

Provisions on anti-avoidance and anti-abuse are often divided into general and specific provisions. Tax abuse and tax avoidance do not require the criteria of tax fraud.
to be fulfilled.\textsuperscript{18} In order to arrive at a juridical conclusion, it is not sufficient to classify the scheme as a “certain degree of abuse” of a tax provision. For instance, the scheme may be acceptable tax planning that is not precluded by any applicable tax provision. The taxpayer is always protected by the general principles of fairness of the tax system and the legal protection of the taxpayer.\textsuperscript{19}

2.3. Abuse of a tax treaty

Tax abuse requires an assessment of whether it is an abuse of domestic law, tax treaty or possibly both. This has implications for whether, if necessary, the arrangement should be addressed by, inter alia, domestic law, a provision in a tax treaty, or possibly both. Abuse of a tax treaty focuses on the abuse of the tax treaty itself. Treaty shopping or rule shopping is one form of tax planning in respect of tax treaties that draws a line between acceptable and unacceptable tax planning.\textsuperscript{20} The term itself cannot resolve the tax nature of the arrangements, unless it is expressly defined that the term refers to arrangements that are not legally acceptable. While one contracting state may regard the arrangement as an abuse of the tax treaty in question, the other contracting state may consider that the arrangement merely supports its policy objectives of attracting foreign investment and foreign capital to the country. From the taxpayer’s perspective, the objective, for example, may be to utilize an extensive network of tax treaties.\textsuperscript{21}

The OECD Model may include principles for the prevention of abuse in both the OECD Model and the Commentaries on the OECD Model in respect of the provision in question. The substantive provisions of a tax treaty and their interpretation may involve an assessment of whether the benefits of a tax treaty should be denied. If that situation is the case, it is necessary to assess, inter alia, whether the assessment must consider, for example, elements of artificiality. The possibility of abuse has been identified, for example, in the 12-month time limit for construction activities in article 5 (Permanent establishments) and in the provisions of articles 10 (Dividends), 12 (Royalties) and 15 (Income from employment).\textsuperscript{22}

The OECD Model did not have a separate general model provision on preventing tax abuse before the OECD Model (2017). The addition of article 29(9) of the OECD Model (2017) gives rise to overlaps between the substantive provision and the general anti-abuse provision, as both may address situations of abuse.\textsuperscript{23}

For the purposes of complying with the provisions of a tax treaty, it is irrelevant whether the arrangements described above are addressed by a domestic anti-abuse provision or by judicial interpretation. What is essential for a tax treaty is that the provisions of the tax treaty are complied with, regardless of the choices made under domestic law, ultimately in the light of the object and purpose of the tax treaty.\textsuperscript{24}

3. The Evolution of Anti-Abuse

3.1. Tax treaties before the OECD Draft (1963)\textsuperscript{25}

Before the OECD Draft (1963), tax treaties were often entitled “Agreements for the Avoidance of Double Taxation and the prevention of Fiscal Evasion”, where the term avoidance was especially connected with the avoidance of double taxation.\textsuperscript{26} In the early 20th century, the challenges of tax control, both nationally and internationally, related particularly to tax evasion, in respect of which taxable income was not declared. The prevention of tax evasion was effected via the tax treaty by way of the exchange of information and cooperation between authorities.\textsuperscript{27}
Although the title of the tax treaties employed the term “evasion”, which was prevented by the exchange of information, this exchange of information was not limited to tax evasion, but could also include the prevention of tax avoidance. Prior to the OECD Draft (1963), this position was often stated in the information exchange article in the following wording:

the contracting states shall exchange such information as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or for the administration of statutory provisions against tax avoidance/legal avoidance in relation to the tax. 24

These tax treaties, which preceded the OECD Draft (1963), had an effect on the development of the first OECD Model. 29 This situation arose because countries that already had such tax treaties were involved in the preparation of the OECD Draft (1963). In addition, the wordings of the tax treaties in force at the time were taken into account when drafting the OECD Draft (1963). For instance, with regard to the drafted wording of the article on information exchange (“... shall exchange such information as is necessary for carrying out the present Convention or for the prevention of fiscal evasion” 26), the Irish delegate commented that they “would like to have mentioned in the Article also the “prevention of fraud” and to say “legal avoidance” instead of “fiscal evasion”, as the latter term has a more comprehensive meaning”. 31 The final version of article 26(1) of the OECD Draft (1963) was ultimately a modified version of these (“... shall exchange such information as is necessary for carrying out of this Convention and of the domestic laws of the Contracting States”).

3.2. The original purpose in the OECD Model: Cooperation between tax authorities

The term “tax evasion” has been identified in the OECD Model from the beginning, and relates to cooperation. 32 The purpose of cooperation between tax authorities is to prevent tax evasion, especially in international situations. These forms of cooperation are: (i) the exchange of information; and (ii) the collection of taxes.

Without the exchange of information, the tax control of taxable income from another country would have been challenging. 33 This was particularly the case in international situations where the taxpayer fails to declare income and related information, i.e. in tax evasion situations. 34 However, from the beginning of the OECD Model, the exchange of information was not limited to the prevention of tax evasion or fraud, but could be used in any situation to secure the correct application of the articles of the tax treaty in question and also of the internal laws of the contracting states concerning taxes covered by the tax treaty. 35 The tax treaty can also be used to secure the collection of taxes in cross-border situations. 36 Here, it should be noted that the exchange of information and the collection of taxes are part of the OECD Model (2017). 37

Both the exchange of information and the collection of taxes require that these must be expressly agreed between countries, as these always require action by another country. The application of a domestic anti-abuse provision, on the other hand, does not require immediate action by another country. Accordingly, the anti-abuse provision did not initially have to be the focus of the treaty provisions. Indeed, the drive against international tax evasion and avoidance was built in the early 20th century on mutual assistance between countries through
the exchange of information and the collection of taxes, which required an agreement with another state. It is logical that the exchange of information relates in particular to tax evasion. Without the exchange of information, the tax authorities cannot obtain information, for example, on income that has been intentionally omitted. Instead, to assess whether there is a case of tax avoidance, the information should be available, in principle, to the tax authorities without the exchange of information. However, the exchange of information can also provide information that is essential for the assessment of tax avoidance, in respect of which, therefore, the exchange of information can be used as well.

The relationship between tax treaties and the prevention of tax avoidance and evasion is reflected in subsequent OECD publications. For instance, in the 1980s, the OECD recommendations on the prevention of tax avoidance and tax evasion related to the development of varying degrees of information exchange between countries. With regard to domestic law, the recommendations primarily related to strengthening the powers to detect and prevent these arrangements. One area of cooperation in the field of tax avoidance and evasion was (and still is) the exchange of experience on ways to counter tax avoidance and evasion at domestic level.

The treaty concepts of tax evasion and tax avoidance have been clear in principle. However, their meanings became somewhat blurred at a relatively early stage. For instance, the UN Report (1972) defined international tax evasion on the basis of responses from countries. This situation was considered to cover wilful, deliberate violation of law (illegality), intended to avoid the payment of tax on international income, which is unquestionably imposed on that income in the taxing jurisdiction. This position includes, first, the non-disclosure of income, and second, the misleading disclosure of income, deductions or credits. This may also have entailed certain inconsistent characterizations of income. The situations covered by the concept of tax avoidance would be various arrangements for tax interest, which can lack the characteristic of illegality. The concepts may have also been used together, having the same meaning at least to some degree. For instance, very inventive industries, valuable and easily portable products, group organizations and permanent loss-makers may have historically been considered indicators of international tax evasion.

Despite the ambiguity of the concepts, the term “tax evasion” does not define the interface between criminal and administrative process in treaty law. This position is understandable, as the boundaries of administrative and criminal process can differ significantly between countries. For instance, when a taxpayer fails to declare undisputable taxable income, it is a question of tax evasion, regardless of whether the sanctions arise in administrative or criminal proceedings.

In defining the concept of tax abuse, it is worth paying attention to content and not terms. This situation arises partly because the terms relating to tax abuse date back to a time before the Second World War, when the distinction between these concepts was not made so carefully. Despite some instability in the concept, the prevention of tax evasion and tax avoidance requires cooperation between tax authorities in international situations. However, the application of a domestic anti-abuse provision does not require immediate action by another country. Regulating tax abuse was originally left at a national level. The purpose of tax treaties is not to harmonize all tax provisions, but rather to regulate cross-border
taxation in relation to certain income streams. This did not originally include (general) anti-abuse provisions. 48

3.3. The treaty difference between tax evasion, tax avoidance and abuse of a tax treaty

Under treaty law, abuse of a tax provision has been identified from the very beginning of the existence of tax treaties. The prevention of tax abuse is reflected, for example, in the Swiss reservation to the exchange of information in the Commentary on Article 26 of the OECD Draft (1963). This situation is in line with the view at that time that the prevention of tax abuse was very much based on domestic law. This was supported by the cooperation provisions in tax treaties, i.e. exchange of information and the mutual agreement procedure. 49

The Commentary on Article 1 of the OECD Model (1977) refers to two areas of abuse. These areas must be identified, as otherwise the OECD Commentary on Article 1 (1977) 50 could appear to be inconsistent and even contradictory.

According to paragraph 7 of the Commentary on Article 1 of the OECD Model (1977), the purpose of a tax treaty is not to help tax avoidance or tax evasion. Rather, the OECD Commentary on Article 1 (1977) emphasizes the obligation of countries to regulate this at a domestic level, and countries wish to preserve the application of such provisions in their tax treaties. This has been a general approach to the prevention of tax avoidance and evasion, which is countered at a national level and without the provisions of the OECD Model. 51 A possible interpretation of the paragraph 7 of OECD Commentary on Article 1 (1977) would relate primarily to the question of how the application of domestic anti-tax avoidance or evasion provisions should be agreed with another country.

Moreover, paragraph 10 of the OECD Commentary on Article 1 (1977) 52 addresses situations in which both the tax benefit under domestic law and the tax relief provided for in a tax treaty are abused. Such situations are above all

the treatment of abuses of the provisions of the tax treaty, some of which are dealt with in the provisions of the OECD Model (1977). 53 It is appropriate to agree on these in bilateral negotiations, or to agree (in some way) that the application of the provisions of domestic laws against tax abuse should not be affected by the tax treaty. 55

Paragraphs 7 and 10 of the Commentary on Article 1 (1977) deals with separate abuse situations. Paragraph 7 of the OECD Commentary on Article 1 (1977) contains the general premise that tax treaties do not prevent the application of a domestic anti-tax avoidance or anti-tax evasion provision. Paragraph 10 of the OECD Commentary on Article 1 (1977) deals with specific situations of abuse - some of which are taken into account in the provisions of the OECD Model (1977) and some in the interpretation of the OECD Commentaries on the OECD Model (1977) - which, in addition to domestic law, specifically abuse the benefits of a tax treaty (i.e. tax exemptions). 56

The role of a tax treaty in preventing tax abuse has been presented consistently in the legal literature during the period in question. The following three aspects of a tax treaty can be used to prevent the abuse: (i) the beneficial owner test relating to the misuse of withholding tax; (ii) the prohibition of a reduced withholding tax rate if income is paid to a low-tax country; and (iii) the exchange of information. In addition to tax treaties, the right given to the country that is seeking to impose the tax to interpret unilaterally undefined terms by reference to its own domestic tax laws can reduce tax avoidance planning. National legislation, such as the Swiss unilateral anti-treaty abuse legislation of 1962, 57 has been referred to as such. 58

3.4. The development of anti-abuse provisions by the OECD

On the basis of the OECD Conduit Companies Report (1986), some may conclude that, at least at some point, there was a consensus that the text of a tax treaty should be revised to prevent its abuse. 59 However, the OECD Conduit Companies Report (1986) only relates to conduit companies and does not take a general view of the tax abuse. 60

48. See, for example, L. De Broe, Role of the Preambles for the Interpretation of Old and New Tax Treaties and on the Policy of the Prevention of Treaty Abuse, 74 Bull Int'l Taxn. 4/5, sec. 2 (2020), Journal Articles & Opinion Pieces IBFD; Zari Malacrida, supra n. 4, at pp. 5 and 9; Arnold & Van Weeghel, supra n. 21, at sec. 5.4.1, Bolotisky Jr., supra n. 4, at pp. 62-64, OECD, Work on Tax Avoidance and Evasion, supra n. 4, at pp. 10-11; and Trelles, supra n. 38, at pp. 363-369.

49. Para. 14 OECD Draft: Commentary on Article 26 (1963). This reservation can also be found in para. 14 of the OECD Estate and Inheritance Draft Model Convention: Commentary on Article 13 (1966). Switzerland adopted a national anti-abuse doctrine against the abuse of tax conventions at an early stage. See, for example, Martin Jiménez, supra n. 38, at sec. 2.1 and D. Ward, Abuse of Tax Treaties, 23 Intertax 4, p. 180 (1993).

50. OECD Model Tax Convention on Income and on Capital: Commentary on Article 1, paras. 7 and 10 (11 Apr. 1977), Treaties & Models IBFD.

51. See para. 7 OECD Model: Commentary on Article 1. As late as the end of the 20th century, a common anti-abuse provision was considered difficult to define and anti-abuse was very much based on national law. See Martin Jiménez, supra n. 38, at secs. 3.3.2 and Ward, supra n. 49, at pp. 181 and 184. For background of the change to the OECD Model: Commentary on Article 1 (1977), see Irawan, supra n. 3, at pp. 24-27 and 31; Arnold, supra n. 3, at secs. 2., 3., 4. and 5.; and Trelles, supra n. 38, at pp. 376-377. See also OECD Model Tax Convention on Income and on Capital: Commentary on Article 1 para. 23 (1 Sept. 1992), Treaties & Models IBFD.

52. See wording in para. 8 OECD Model: Commentary on Article 1 (1977).

53. Id., at para. 10.
With regard to conduit companies, the report includes ways in which to address, through specific provisions in a tax treaty, arrangements that may abuse the tax treaty. The report also states that the general premise is that, in accordance with the principle of *pacta sunt servanda*, conduit companies should also be granted tax benefits, even if granting such benefits is considered to be improper. In addition, the report explicitly states that countries may be willing to address abuses involving conduit companies through domestic law, in respect of which the relationship of domestic law to the provisions of the tax treaty must be assessed. Moreover, the report notes that it may be better to deal with complex arrangements through the principle of substance over form, rather than creating complicated rules that are very burdensome to administer, and which could affect *bona fide* economic activities.

The OECD Conduit Companies Report (1986) emphasizes that the scope of the domestic anti-abuse provision is not unlimited. The provisions of a tax treaty and, ultimately, the object and purpose of the tax treaty must be met. The fact that another country considers it to be inappropriate to grant the benefits of a tax treaty is not considered to be a sufficient ground for limiting those benefits. However, this does not categorically preclude the prevention of tax avoidance that is based on domestic anti-avoidance or a similar judicial interpretation.

The OECD Tax Treaty Override Report (1989) considers that the primary purpose of tax treaties is not only to avoid double taxation and address fiscal evasion, but also to allocate tax revenues equitably between the two contracting states. Any interpretation to achieve these objectives would be preferable to one resulting in double taxation or to an inappropriate double exemption.

In addition to the conduit companies, aspects relating to substance over form and base companies were added to the Commentary on Article 1 of the OECD Model (1992). The OECD Commentary on Article 1 (1992) reinforces the prevailing view that domestic anti-abuse provisions play an important role in treaty situations.

The OECD Commentary on Article 1 (1992) also contain differing views and have been considered to be somewhat confusing. After the following updates, the application of the substance-over-form principle in treaty situations is also noted in the application of article 11 of the OECD Model (1996) and the OECD Transfer Pricing Guidelines (1995).

The OECD Harmful Tax Competition Report (1998) is in line with the prevailing view that domestic provisions to counter tax avoidance and evasion are compatible, in principle, with tax treaties. In order to confirm this, the report recommends clarifying the issue and removing ambiguity from the Commentaries on the OECD Model. The report also identifies the need to clarify further the limitation of treaty benefits. On the basis of this report and the Restricting the Entitlement to the Treaty Benefits Report (2002), updates were made to the Commentary on Article 1 of the OECD Model (2003) (for the latter, see section 3.5).

3.5. The Commentary on the OECD Model (2003)

The Commentary on Article 1 of the OECD Model (2003) emphasizes that, inter alia, it is also a purpose of tax treaties to prevent tax avoidance and evasion. However, the OECD Commentary on Article 1 (2003) also notes that it should not be lightly assumed that a taxpayer is entering into abusive transactions. In this context, a guiding principle was added to the OECD Commentary on Article 1 (2003) to the effect that:

> the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.

The amendments to the Commentaries on the OECD Model (2003) did not change any general anti-abuse OECD Model provision, which did not exist at that time. The basic interpretation remained unchanged, as the purpose of tax treaties is not, in principle, to limit interference with tax avoidance and evasion. Nor did the additions to the Commentaries on the OECD Model (2003) reduce awareness regarding the prevention of abuse when tax treaties are negotiated, which was also partly the purpose of the additions. In the past, countries had to ensure the application of domestic anti-abuse provisions, as appropriate.

---

63. See also, for example, De Broe, supra n. 48, at sec. 2.; De Broe, supra n. 48, at sec. 2.; Danon, supra n. 22, at sec. 2.; and Arnold, supra n. 3, at sec. 2.64. Id., at para. 23.26. See also Arnold, supra n. 3, at sec. 3., and Martin Jiménez, supra n. 38, at sec. 3.
65. Id., at paras. 23-26. See also Arnold, supra n. 3, at sec. 3., and Martin Jiménez, supra n. 38, at sec. 3.
66. See also Arnold, supra n. 3, at sec. 3.11. See, for example, De Broe, supra n. 48, at sec. 2.; Danon, supra n. 22, at sec. 2.; and Arnold, supra n. 3, at sec. 2., and. Arnold, supra n. 3, at sec. 2. and Martin Jiménez, supra n. 38, at sec. 3.2.67. See also, for example, De Broe, supra n. 48, at sec. 2.; Danon, supra n. 22, at sec. 2.; and Arnold, supra n. 3, at sec. 2. and. Arnold, supra n. 3, at sec. 2. and Martin Jiménez, supra n. 38, at sec. 3.
68. See also, for example, De Broe, supra n. 48, at sec. 2.; Danon, supra n. 22, at sec. 2.; and Arnold, supra n. 3, at sec. 2. and. Arnold, supra n. 3, at sec. 2.
The Commentary on the OECD Model (2003) transferred the responsibility to countries wishing to limit the prevailing interpretation of the OECD Model in respect of tax abuse situations.  

In the update to the Commentaries on the OECD Model (2003), some of the OECD member countries, i.e. Belgium, Ireland, Luxembourg, the Netherlands, Portugal and Switzerland, added observations on the application of the anti-abuse doctrine in tax treaty situations. The contents of the observations differ. None of these countries suggested that tax treaties should categorically restrict the use of any anti-abuse provision. The observations were mainly related to the intervention threshold. In this context, it should be noted that a unilateral observation made by one country is not binding on other countries. The observation may only bind the country that made it, depending on the national judicial interpretation of that country. It may also require the country making the observation, if it so wishes, to negotiate this divergent view when concluding tax treaties.

Prior to the OECD Model (2017), the provisions of the OECD Model were not intended to determine the content of the general anti-abuse doctrine. The Commentaries on the OECD Model merely referred to the domestic law of the countries in this regard. However, the OECD Model and the OECD Commentaries also have an evolutionary path, and, in particular, certain aspects of treaty abuse are addressed by specific anti-abuse model provisions or interpretations.

The OECD Model (2017) entered a new era by adding a general anti-abuse model provision – article 29(9) – as part of the harmonized provisions of the OECD Model. Additions were also made to the Preamble and Commentary, which confirm the prevailing interpretation that tax treaties are not intended, in principle, to prevent interference in tax evasion or tax avoidance.

4. Conclusions

4.1. From evasion to avoidance

Initially, in order to counter tax evasion and avoidance, there was a need in tax treaties to agree primarily on cooperation between tax authorities, i.e. exchange of information and collection of taxes. The prevention of tax evasion and avoidance was originally based primarily on domestic legislation, the application of which is not, in principle, prevented by tax treaties.

The addition of the general anti-abuse model provision to the OECD Model (2017) is part of the development of the treaty law and its evolution. This addition is a response to the legitimate questioning of why tax treaties, based on the principle of legality, should not provide a uniformly defined general anti-abuse provision, the absence of which has been considered problematic in some countries. Article 29(9) of the OECD Model (2017) is one way of improving the uniform interpretation between countries of the question in respect of the abuse of a tax treaty. In addition, uniform interpretation should improve predictability and legal certainty.

The general anti-abuse provision added to the OECD Model (2017) does not retroactively change the content or purpose of tax treaties that are based on a version of the OECD Model that does not contain a general anti-abuse model provision. Nor must the argumentum e contrario be accepted in such a way that, as a result of the newer version, tax avoidance is permitted or cannot be addressed in tax treaties based on the earlier version of the OECD Model.

The question is whether the tax treaty allows the application of domestic anti-abuse provisions. Rather, the limit is whether and to what extent a tax treaty may limit the application of a domestic provision.

There is no evidence in the OECD Model, the Commentaries on the OECD Model or in the general law of treaties that taxpayers have an absolute right to abuse or fraudulently use the provisions of tax treaties. The purpose of tax treaties has never been to permit a categorical abuse of tax law. It is also important to consider whether the anti-abuse provision, or the equivalent judicial interpretation, was valid when the tax treaty was concluded, and whether the country knew or should have known the contracting state's position on the prevention of tax abuse. Ultimately, it is for a domestic court to decide how, and to what extent, the provisions of the tax treaty are com-

73. See para. 67 OECD Model: Commentary on Article 1 (2017). See also, for example, Govind, supra n. 3, at pp. 540-542. Arnold, supra n. 3, at secs. 6. and 10. De Broe, supra n. 55, at secs. 3.2. and 3.3.1.2.3.; Vogel & Rust, supra n. 12, at pp. 126-128; Martín Jiménez, supra n. 3, at secs. 5.1. and 5.12.; Loukota, supra n. 17, at pp. 357-358; and Vogel, supra n. 22, at pp. 79-83. Compare Koroncziová & Kačaljak, supra n. 62, at pp. 148 and 152 and Vleggeert, supra n. 3, at p. 4.

80. See, for example, P. Rosenblatt & M.E. Tron, Tax Treaty and the EU Law Aspects of the LOB and PPT Provision Proposed by BEPS Action 6, in Base Erosion and Profit Shifting (BEPS): Impact for European and International Tax Policy p. 201 (R.J. Danon ed., Schulthess 2016); Michel, supra n. 5, at sect. 5.; Han, supra n. 21, at p. 50; Martín Jiménez, supra n. 3, at sec. 4. Ward, supra n. 49, at p. 184; and Uğur, supra n. 9, at sec. IV.2.; Treaty provisions.


82. See, for example, De Broe, supra n. 55, at secs. 3.3.1.2.3.

83. The domestic general anti-abuse rule can already be found in section 29 of New Zealand Property Assessment Act 1879 (43 Victoria 1879 No. 17), and many countries enacted similar provisions in the 20th century. Currently, there are only few countries that do not have a general anti-abuse concept based on the provision or judicial interpretation. See, for example, Zari Malacrida, supra n. 4, at pp. 9 and 13. Van Weeghel, supra n. 20, at sec. 2.2; and Zimmer, supra n. 17, at secs. 8.1. and 11.2. See also P. Rosenstein & M.E. Tron, General Report, in Anti-avoidance measures of general nature and scope – GAAR and other rules, sec. 3.3.1. (IFA Cahiers vol. 103a, 2018).
plied with in the application of domestic anti-abuse provisions.84

4.2. Limits of the anti-abuse provision

The application of a domestic anti-abuse provision does not automatically mean that any kind of national anti-abuse provision is in accordance with a tax treaty. Countries cannot base their decision on the unspecified conclusion that tax treaties are intended to counter tax evasion and avoidance.85 For instance, in a situation where a treaty benefit is commonly known in a tax treaty, the limitation in respect of which requires a special model provision according to the version of the OECD Model on which the tax treaty is based, the benefit should not normally be limited retroactively by unilateral domestic legislation alone.86 The application of the domestic anti-abuse provisions must take into account the version of the OECD Model and the Commentaries on the OECD Model on which the tax treaty in question is based.87

Countering tax evasion or a purely artificial tax avoidance scheme is unlikely to be contrary to the tax treaty. A more interpretative situation exists where the arrangement additionally has non-taxation-based reasons, or where a
domestic provision prevents situations of tax abuse other than purely artificial tax avoidance schemes.88 With regard to the benefits of a tax treaty, account must also be taken of the specific provisions of the tax treaty which, for example, may limit benefits in certain situations. Depending on the substance in the provisions, these may limit the benefits of a tax treaty in a broader or more general way, regardless of the business reasons of the arrangement or its possible artificiality.

4.3. Final remarks

The interpretation of tax treaties based on previous versions of the OECD Model must be taken into account – in particular, the juridical and institutional context existing at the time the tax treaty was concluded. The countering of tax evasion and avoidance by domestic law is not, in principle, prohibited, even if the tax treaty is based on an older version of the OECD Model that does not contain a general anti-abuse provision. However, it is also clear that it is not possible to categorically disregard the provisions of the tax treaty simply by relying solely on some kind of anti-abuse provision under domestic law. Ultimately, it is necessary to assess the object and purpose of the income tax treaty in addition to the provisions of the tax treaty, as well as a related OECD Model and the Commentaries on the OECD Model.

A significant aspect of treaty law interpretation relating to tax abuse has arisen solely from the lack of international standardization of tax abuse concepts, for example, tax abuse, avoidance, evasion and fraud. The historical challenges of interpreting these concepts could have been avoided to some extent if these concepts had been defined uniformly. However, the development of universal standards is not easy due to different national approaches to abuse, as well as different types of national legal systems. Nor does the universal standard solve the problem if countries do not comply with these and, for example, override the standardized anti-abuse concept through national law. Despite the challenges, steps have been taken to harmonize the anti-abuse provision with the new general anti-abuse provision in the OECD Model (2017). However, its rapid addition will raise many questions in relation to its interpretation in the future.

84. Several IFA Cahiers de droit international (for example, vol. 103a of 2018, supra n. 87; vol. 95a of 2018, supra p. 20; vol. 87a of 2002, supra p. 17; and vol. 68a of 1983, supra n. 9) deal with the relationship between national anti-abuse provision and the tax treaty in different countries. See, in particular, the general reports of these publications, being Rosenblatt & Tron, supra n. 87, at secs. 3.2.2. and 3.2.3; Van Weeghel, supra n. 20, at sec. 2.5; Zimmer, supra n. 17, at secs. 10. and 11.; and Uckmar, supra n. 9, at secs. IV.2 and V. See also Danon, supra n. 22, at sec. 3.2; Chand & Elliffe, supra n. 4, at sec. 2.3; Zimmer, supra n. 5; and Jung, supra n. 21, at sec. 5.

85. See, for example, De Broe, supra n. 48, at secs. 3-6.; Chand & Elliffe, supra n. 4, at sec. 4.; Zimmer, supra n. 5, at sec. 10-12.; Peng & Schuch, supra n. 10, at sec. 1.4.; Kolosov, supra n. 4, at sec. 4.3.; R.E. Krever, General Report: GAARs, in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World secs. 1.6-1.8. (M. Lang et al. eds., IBFD 2016), Books IBFD, J. Freedman, The UK GAAR, in Lang et al. eds., supra, at sec. 37.5.; Gerezova & Popa, supra n. 13, at sec. 3.; Michel, supra n. 3, at sec. 2.; Arnold & Van Weeghel, supra n. 23, at sec. 5.4.3.; Arnold, supra n. 3, at sec. 7.1; Martin Jiménez, supra n. 38, at sec. 3.3.1.; OECD Tax Treaty Override, supra n. 66, at case 2, paras. 31-33; and Vogel, supra n. 22, at pp. 83-84.

86. See, for example, OECD Tax Treaty Override, supra n. 66, at case 2, paras. 31-33 and Vogel & Rust, supra n. 12, at pp. 124-128.

87. J.F. Avery Jones, The Relationship between Domestic Tax Systems and Tax Treaties, 56 Bull. Int'l Taxn. 6, sec. 3 (2002), Journal Articles & Opinion Pieces IBFD notes that the best argument is that an anti-abuse principle is included in the treaty interpretation principle of good faith in the UN Vienna Convention on the Law of Treaties, art. 31 (23 May 1969), Treaties & Models IBFD [hereinafter the Vienna Convention (1969)]. For the perspective in relation to the article of the Vienna Convention (1969), see para. 16.2 OECD Model: Introduction of the Commentaries (2017); Danon, supra n. 22, at sec. 3.2.3; De Broe, supra n. 55, at sec. 3.1.2.; and Martin Jiménez, supra n. 3, at sec. 2.1.