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The taxation implications of the mobility guarantees of the Agreement on the Free Movement of persons between Switzerland and the EU in the experience of the German taxation system

di Filippo Luigi Giambrone

(Ricercatore a tempo determinato presso l'Universitá degli Studi del Sannio di Benevento)

Sommario

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Abstract

Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules to combat tax avoidance practices having direct effects to the functioning of the internal market — OJ L 193, 19.7.2016, p.1 (Anti-Tax Avoidance Directive/ATAD), as amended by Article 1 of Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (OJ L.144, 7.6.2017/ATAD II), requires EU Member States to adapt, in particular, their tax regimes on entrenchment and exit taxation (Article 5 ATAD); the additional taxation (Articles 7 and 8 ATAD) and the neutralisation of tax mismatches related to hybrid arrangements (Articles 9 and 9b of the ATAD) to the extent that they do not already comply with the minimum standard set by ATAD. Deviating from this, the present analysis confirms the applicability of the activity test in general vis-à-vis third countries against the background of the free movement of capital and specifically vis-à-vis Switzerland in view of the right of establishment enshrined in the Free Movement of Persons Agreement.

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1. Description of the legal issue in concern.

From the point of view of international taxation, a particularly debated topic, which is also the subject of numerous regulatory interventions, both national and international, concerns the tax treatment of controlled foreign companies. The latter are those companies, located in foreign countries, that are controlled, directly or indirectly, by persons resident in Italy.The tax treatment of controlled foreign companies has been the subject, especially in recent years, of various regulatory interventions that have considerably modified its assumptions and scope.These regulatory changes have become necessary to avoid possible tax abuses in foreign operations[1], so that the relative consideration becomes absolutely essential for those who are preparing to implement international tax planning strategies.[2]The new rules concerning the discipline of controlled foreign companies were introduced through the amendment of Article 167 of Presidential Decree No. 917/1986 (TUIR) made by Article 4, paragraph 1, Legislative Decree No. 142 of 29 November 2018 (implementing Law No. 163 of 25 October 2017).The purpose of the amendment was to transpose the EU Council Directive (EU) 2016/1164 of 12 July 2016 on rules against tax avoidance practices directly affecting the functioning of the internal market (so-called ATAD 1), also in light of the amendments made by the EU Council Directive (EU) 2017/952 of 29 May 2017 concerning the provisions on "hybrid mismatches" with third countries (so-called ATAD 2).In particular, ATAD 1 was prompted by the need to introduce rules to strengthen the level of states' defences against aggressive tax planning in the EU market and is in continuity with current international tax policy priorities, i.e. the need to ensure that tax is paid where profits and value are generated.These policy objectives are inspired by the actions taken by the international community in the framework of the Organisation for Economic Cooperation and Development (OECD)'s Base Erosion and Profit Shifting (BEPS) initiative.Thus, in order to follow up on the commitments undertaken within the BEPS Project, EU states have taken action to introduce measures to discourage tax avoidance practices and to ensure fair and effective taxation in the EU in a sufficiently consistent and coordinated manner.[3]Thus, the ATAD 1 Directive adopts a common strategic approach in order to prevent market fragmentation and put an end to existing market misalignments and distortions by laying down general provisions that leave the implementation of the measures in their particulars to the individual states.In fact, Member States are in a better position to identify the content of the rules implementing the choices made in the EU, in a manner best suited to

[1] P.PISTONE, *Diritto tributario internazionale* , 2017, p. 142 ff.

[2] P.PISTONE, *Diritto tributario internazionale* , 2017, p. 142 ff; per un approfondimento riguardo la disciplina dell´elusione internazionale cfr. G. CORASANITI, *La disciplina dell´elusione internazionale nell ordinamento federale tedesco,* in Studi in onore di Victor Uckmar, 1997.

[3] Cfr. G. CORASANITI, *Diritto tributario internazionale, Manuale*, ult. Edz.

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their respective corporate tax systems.Ultimately, ATAD 1 aims to establish a minimum level of protection for the EU market in several areas, such as: limits on interest deductibility, exit taxation, a general anti-abuse rule, rules on controlled foreign companies, and rules to tackle hybrid mismatches.The so-called new economy[4], characterised by strong globalisation and greater currency freedom, has encouraged companies, especially manufacturing and financial companies, to relocate certain assets, such as trademarks, patents, know-how and other volatile monetary resources, to foreign territories. This migration has been facilitated by the presence of developing jurisdictions with privileged tax regimes that allow their residents to benefit from an extremely low level of income taxation. Such jurisdictions have given rise to often damaging international tax competition, leading to the erosion of the tax bases of more industrialised (or advanced tax) states. The issue has aroused the interest of the world's major organisations, calling for supranational measures and the establishment of a climate of cooperation between advanced tax countries. Of particular importance was the contribution provided by the OECD (Organisation for Economic Co-operation and Development), whose studies focused on the identification of so-called tax havens and the creation of legal instruments capable of combating tax avoidance/evasion practices implemented through the transfer of highly profitable mobile assets within favourably taxed jurisdictions. The issue was not an easy one to resolve as there was an awareness that tax emigration, whether achieved through the relocation of the entire business activity, or through the removal of movable wealth, could not be prevented. The only condition that could be imposed was that the diversion of taxable matter was associated with the conduct of an actual economic activity in the foreign country and not with a mere relocation of dematerialised business fragments in fictitious corporate structures.Among the provisions of international tax law aimed at combating the diversion of income from the taxation of the State of residence by means of its location in privileged taxation territories, a primary role is attributed to the Controlled Foreign Companies (CFC) discipline.The phenomenon[5] of corporate foreign ownership is a form of tax avoidance, consisting in the creation of companies resident in a foreign country that on the one hand are controlled or administered by Italian residents and on the other hand control companies resident in Italy. In this sense such companies represent therefore a screen for personal connection to the taxation of corporate income companies in Italy. The foreign subsidiary legislation serves to establish the personal link with the taxation of the entity, overcoming the screen represented by the legal personality of a subsidiary and resident in a foreign

[4] A. DONATO, *La disciplina della Controlled Foreign Companies alla luce del recepimento della direttiva ATAD 2016/1164.*

[5] P.PISTONE, *Diritto tributario internazionale* , 2017, p. 142 ff.

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country.This measure represents an important completion of the policy of capital export neutrality, as it avoids possible deferral of taxation at the rate of the parent company's State of residence in relation to the activities carried out abroad, neutralising the tax advantages that could be achieved by establishing the company in a country with low tax pressure through which to manage these foreign activities. For this reason, this type of measure - also known in international parlance as controlled foreign company legislation or, more simply, CFC legislation - was the subject of a special action (Action 3) within the framework of the BEPS project, which made recommendations regarding its adoption by all the countries participating in that project. Before analysing the scope of application of this measure in the Italian law, however, it must be mentioned that, within the European Union, the application of this measure is potentially capable of affecting with compensatory effects of the lower taxation of foreign companies, causing an obstacle to the exercise of the freedom of secondary establishment. For this reason the Court of Justice [CJEU, 12.9.2006, case C-196/04, Cadbury Schweppes] admits its its application only in pursuit of the purpose of combating abusive practices, i.e. when the company lacks personnel, equipment and premises equipment and premises to ensure its functioning, and in so far as this is permitted by respect of the principle of proportionality.As a result of the primacy of European Union law over national law, the limits to the exercise of taxing power established by this interpretation significantly affect the scope within which the Italian legislation on foreign subsidiaries, contained in Article 167 T.U.I.R., may be applied.This jurisprudential orientation of the European Court of Justice conditionsalso conditions the interpretation and application of the rules contained on the sameissue in the anti-avoidance directive 2016/1164, approved on 12 July 2016, which entered in force as of 1 January 2019.In particular, the rules of the directive recognise the exclusively anti-avoidance purpose of this legislation, requiring its introduction in all EU Member States (which is potentially in dissonance with the capital import neutrality policy of some of them). Among the relevant provisions of Articles 7 and 8, which regulate the foreign subsidiary, there is a clause authorising its application to subsidiaries resident in non-EU states that are not contracting parties to the Agreement on the European Economic Area, introducing an element of discrimination, potentially incompatible with the external dimension of the free movement of capital, in the event that this were to be declared relevant in relation to the application of this measure.In other words, thanks to the CFC legislation, industrialised countries have the opportunity to 'repatriate' wealth removed from their territory and to tax those who have taken advantage of the globalisation process and the fall in national barriers to channel their mobile income into jurisdictions offering a particularly advantageous tax regime. This seeks to eliminate the 'avoidance effect' and ensure

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that foreign profits are appropriately taxed in the jurisdiction where the majority shareholder resides.[6]As anticipated[7], the purpose of the institution is to prevent taxpayers with foreign subsidiaries located in countries with particularly low or no taxation levels from transferring taxable income to the latter. In particular, under the CFC regimes, the income of the foreign subsidiary is taxed in the hands of the resident parent company, regardless of the tax regime applicable to the subsequent distribution of such income. It should be noted, in this regard, how the CFC regimes, initially characterised by an 'anti deferral' purpose, have now taken on a more marked anti-abuse connotation, falling within the general interest of States in intercepting and countering base erosion and profit shifting phenomena, including through aggressive tax planning schemes implemented on a transnational scale and aimed at minimising the overall tax burden of the group. Morover for the benefit of the Italian reader, it might then be useful to introduce some reference to the contributions made, in relation to the issue at hand, by Italian doctrine. As a mere example **chapter 2 deals** with the relevance of abuse of rights for EU law in the view of the dominant italian doctrine, which analyses the relevance of Court of Justice rulings, the concept of abuse of rights in direct taxation, by means of the comparison regarding the principles laid down by the Court of Justice and the Court of Cassation.[8] The technique of controlling the exercise of individual prerogatives, based on the notion of abuse of of the right, constitutes an expression of a principle immanent to the judicial function which, as such, is part of the Community legal order, as well as of national legal orders. It figures as one of the principles representing the common legal substratum in the integrated legal order. Last but not least the anti-abuse clause in the ATAD will be briefly analyzed from the Italian experience. The prohibition of abuse of law constitutes a normative principle of case-law formation which is consistently applied in tax matters on the basis of an evolutionary path articulated through a series of rulings by the Court of Justice and the Court of Cassation.In order to provide the reader with a clear overview into the topic **chapter 3 deals** with the Cadbury Schweppes case. Indeed, the judgment allows us to reason about the 'horizontal' and pervasive value of the fundamental freedoms

[6] M. BEGHIN, *La sentenza Cadbury – Schweppes e il Malleabile principio della libertá di stabilimento,* Rass. Tributaria, 2007, 3, 983; cfr G. MAISTO, *Progetto Costituzione europea. Appunti di lavoro*, in "Riv. dir. trib.", 2003, IV, pagg. 124 e seguenti; A. MIRANDA PEREZ, Non discriminacion fiscal en los

[7] Agenzia delle Entrate, Circolare ATAD n. 1 – Chiarimenti in tema di Società Controllate Estere (CFC) - articolo 167 del TUIR, come modificato dall'articolo 4 del decreto legislativo 28 novembre 2018, n. 142, with regard of an overview oft he Traditional and innovative classifications of taxes in Italy cfr, A. F. URICCHIO, Classificazioni tradizionali e classificazioni innovative dei tributi, in URICCHIO A., PERAGINE V., AULENTA M., Manuale di Scienza delle Finanze, Diritto finanziario e contabilità pubblica, 2018, Nel Diritto Editore, Roma.

[8] F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009, R. BETTI, G. SBARAGLIA, *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011.

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crystallised in the Treaty, as opposed to the only sectoral referability of the positive disciplines of the 'harmonised' sectors.[9]Hence, the idea that the impact of Community law on the area of direct taxation comes through the Treaty and, in particular, through the case law of the Court of Justice; the latter intervenes with a casuistic method, eliminating individual cases or individual aspects of national rules on the basis of an assessment of their incompatibility [10] - precisely - with the founding freedoms of the single market[11]. According to the italian authoritative doctrine it seems that the central theme of the Cadbury judgment relates to the CFC Framework and Community tax planning.[12] Authoritative doctrine[13] has already pointed out how, in this case, the aforementioned planning is developed through meditated company choices based on models of extraterritorial dislocation of production activities.[14] After this introduction into the italian legal order in view of the European case law the article in chapter 4 will deal with the German CFC regime and its compatibility with EU law. The FITA was enacted in order to prevent the use of international tax differentials for international tax evasion to restore the uniformity of taxation in foreign relations and thus to preserve economic equality of opportunity. The AStG can essentially be divided into four main areas: the adjustment of income in the case of internationally interconnected companies.(1st part of the AStG - § 1 AStG), the extended limited tax liability in the event of a transfer of residence to low-taxing (2nd part of the AStG - §§ 2 to 5 AStG),the taxation of the increase in assets of shares in a domestic corporation in the event of a change of residence abroad (3rd part of the AStG - § 6 AStG), the addition taxation of shareholdings in foreign intermediate companies (4th part of the AStG - §§ 7 to 14 AStG).The German Foreign Transaction Tax Act (FTTA) has, in recent history, been

[9] F. GALLO, *Mercato Unico e fiscalità: aspetti del coordinamento fiscale, in Coordinamento fiscale dell'Unioneeuropea, Milano*, 2001, pagg. 33 e seguenti.

[10] M. BEGHIN, *La sentenza Cadbury – Schweppes e il Malleabile principio della libertá di stabilimento,* Rass. Tributaria, 2007, 3, 983; cfr G. MAISTO, *Progetto Costituzione europea. Appunti di lavoro*, in "Riv. dir. trib.", 2003, IV, pagg. 124 e seguenti; A. MIRANDA PEREZ, Non discriminacion fiscal en los ambitos internacional y comunitario, Madrid, 2005, passim; sul punto anche M. POGGIOLI, *La riscossione transnazionale di crediti tributari nella prospettiva del diritto comunitario*, Bologna, ed. provv., pag. 32 e nota 55.

[11] M. BEGHIN, *La sentenza Cadbury – Schweppes e il Malleabile principio della libertá di stabilimento,* Rass. Tributaria, 2007, 3, 983; F. TESAURO, *Il ruolo della Corte di Giustizia nel coordinamento della tassazione delle società,* Schema della relazione svolta alla conferenza della Commissione europea su "EU Corporate Tax Reform: Progress and new challenges", in "Tributimpresa", fasc. 2, 2005, pagg. 3 e seguenti; F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009, Betti R., Sbaraglia G., *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011.

[12] M. BEGHIN, *La sentenza Cadbury – Schweppes e il Malleabile principio della libertá di stabilimento,* Rass. Tributaria, 2007, 3, 983.

[13] R. LUPI, *Illegittimità delle regole CFC se rivolte a Paesi comunitari: punti fermi e sollecitazioni sulla sentenza Schweppes*, in "Dialoghi di diritto tributario",2006, pagg. 1589 e seguenti.

[14] M. BEGHIN, *La sentenza Cadbury – Schweppes e il Malleabile principio della libertá di stabilimento,* Rass. Tributaria, 2007, 3, 983.

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the subject of oriticism concerning its consistency with European law. The legislator has reacted to this criticism and adapted the FT TA to be in acordance with the requirements ser forth by the European Court of Justice (ECJ) and European law. Despite the actions taken by the German legislator, doubts remain whether the FITA fulfils the requirements of European law. Morover the article deals in the fifth chapter with the examination of art. 7 ATAD.

According to Art. 7 f. ATAD, the EU member states are obliged to introduce regulations on the taxation of additions. This is intended to prevent the targeted shifting of sources of income to other states with a low level of taxation.

The use of VAT regimes is one of the established defences against abusive tax arrangements. However, they were not widespread in the EU prior to the ATAD, and those that existed differed considerably in terms of systematics and strictness. If a state forgoes such regulations, it only directly harms its own tax revenue, since the tax substrate of the state of residence of the respective (parent) company is to be protected with the addition taxation. Nevertheless, the Commission decided to include such provisions in the ATAD in order to establish a uniform minimum level of protection in the EU.

The Commission justified this quite generally with the fact that otherwise the functioning of the internal market would suffer, especially if the income was shifted to third countries with low taxation.The Commission was probably concerned with limiting the use of EU member states for tax planning and the resulting distortions of competition in general.[15] Morover the second part deals with Germany´s Foreign Tax Act (AStG) It was first introduced in 1972 as Art. 1 of the so-called Foreign Tax Reform Act (AStRG). (AStRG) was introduced.

After numerous amendments and supplements, the very detailed Application Decree (AEAStG) was published in 2004, which was intended to facilitate the handling of the law and eliminate ambiguities. The 2008 Corporate Tax Reform Act expanded and tightened the provisions of section 1 AStG on the adjustment of income. Section 1 AStG now contains a legal definition of the arm's length principle and regulations on the taxation of transfers of functions. In addition, the Annual Tax Act 2008 has made the Compatibility of the taxation of additions in accordance with §§ 7 ff. AStG with the existing case law of the ECJ. Sections 7 to 14 AStG regulate the problem of basic companies in low-tax countries. Before the introduction of the AStG, profits of foreign companies could only be taxed in Germany if they were distributed to domestic shareholders, unless there was a case of abuse within the meaning of § 42 AO. there was a case of abuse within the meaning of § 42 AO. With the aid of so-

[15] Überblick bei HEINSEN/ERB, DB 2018, 975 (975); vgl. zu neueren Entwicklungen auch EILERS/HENNING, ISR 2016, 422 (422 f.). Zu den möglichen Gründen, warum Staaten auf eine Hinzurechnungsbesteuerung verzichten, s. van HULLE, BIFD 2017, 719 (722); FEHLING in: SCHAUMBURG/ENGLISH, *Europäisches Steuerrecht*, 2. Aufl. 2020, ATAD.

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called basic or intermediate companies it was possible to retain profits abroad and shield them from German taxation.
This shielding effect, which results from the separation principle, is interrupted by the addition taxation, insofar as the income of of the foreign company is derived from passive activities and is subject to low taxation. This interim income is taxed after the end of the year in which it is earned, it is attributed to the domestic shareholders in proportion to their in proportion to their shareholding in the intermediate company. The domestic shareholder is thus placed in the same position for tax purposes as if the foreign company had made a profit distribution in the amount of the interim income. The problem of the article in concern is based on the fact that in accordance with the ECJ ruling in the Cadburry Schweppes and in accordance with the implementation of Art. 7 para. 2 lit. a, subsection 2 of the ATAD, the German legislator has introduced an activity test in § 8 para. 2 AStG, in order to justify the restriction of the freedom of establishment on proportionate grounds.
The aforementioned activity test will be analyzed in chapter 6 of the article in concern. In its ruling in the X GmbH case, the ECJ confirmed the hitherto questionable application of the activity test according to § 8 para. 2 AStG old version for situations vis-à-vis third countries. For the new ATADUmsG, the legislator nevertheless assumes that, in view of the shareholder-related control concept, an exclusion of third countries by Section 8 (3) AStG is in conformity with EU law. The ruling in the Cadburry Schweppes has provoked a standardisation of an exemption for intermediary companies from EU/EEA states. Intermediary companies from EU/EEA states are subject to the addition taxation according to §§ 7 et seq. AStG no longer apply to intermediate companies from EU/EEA states if they prove that they meet the requirements of section 8 (2) FITA. In terms of content, the provisions of the newly formulated § 8 (2) FITA do not differ in content from the letter previously issued by the Federal Ministry of Finance on the taxation of for active EU/EEA intermediate companies.[16] The application of § 8 para. 2 AStG requires that the intermediate company, in which an unlimited taxpayer within the meaning of § 7, para. 2 FITA has its registered office or management in a member state of the EU or a state party to the EEA Agreement. An interest in an intermediate company that generates intermediate income of an investment nature (section 7 (6) AStG) is not to be subsumed under the exemption provision of section 8 (2) AStG. Furthermore, the intermediary company must be engaged in an actual economic activity in the EU/EEA state. in the EU/EEA state. The legislator considers an actual economic activity is given if an intermediate company participates stably and continuously in the economic economic activity in the EU/EEA state. An indication for such a participation in economic activity in a permanent establishment is an indication of

[16] G. BRÄHLER, *Internationales Steuerrecht*, p. 514.

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such participation. This can be demonstrated on the basis of the spatial, technical and personnel equipment of the foreign intermediate company. The exchange of services between the intermediate company and affiliated companies does not preclude the qualification as an actual economic activity, provided that the arm's length principle is complied with pursuant to § 8 AStG. Only such income of the intermediate company is favoured by the exemption that has been activity (section 8 (2) sentence 5 AStG).The preconditions for stable and continuous participation in commercial transactions are not met if the intermediary company does not carry out its core functions itself, only occasionally does not carry out its core functions itself, only makes occasional capital investments or only manages manages participations without exercising a management function. A business operation business operation set up in a commercial manner does not necessarily fulfil the criterion of an actual of an actual economic activity. A further prerequisite of § 8 (2) AStG is, according to the second sentence, that there is no agreement between the tax administration of the State of residence of the intermediate company and the German tax authorities. tax authorities on the basis of the Mutual Assistance Directive or a bilateral or multilateral tax-relevant information is exchanged between the tax authorities of the state of residence of the intermediate company and the German tax authorities. Income received by foreign intermediate companies from downstream intermediate companies or permanent establishments in or permanent establishments from states outside the EU or EEA economic area. the provisions of section 8(2) AStG do not apply (section 8(2) sentences 3 and 4 AStG).Unrestricted or extended restricted taxpayers who have an interest in a foreign company are not exempt from the obligation to file a declaration for separate determination if they fall within the scope of § 8 (2) AStG. Chapter 7 analizes the aforementioned activity test in relation to third countries: the case of Switzerland.

In accordance with the ECJ ruling in the Cadburry Schweppes case and in order to implement Article 7(2)(a) of the ATAD, the legislator introduced an activity test in Section 8(2) of the AStG in order to justify the restriction of the freedom of establishment on proportionate grounds. However, since the freedom of establishment does not apply in third-country relationships, there is nothing in the eyes of the legislator to prevent a territorial restriction of the activity test to EU and EEA member states pursuant to Section 8 (3) AStG. It is explained above on the basis of the case law of the ECJ in the X GmbH case law that the addition taxation pursuant to §§ 7 to 13 AStG also restricts the free movement of capital in its new form in the version of the ATADUmsG. The control concept of § 7 (1) and (2) AStG is not exclusively based on a secure influence, so that the freedom of movement of capital is not superseded by the freedom of establishment without taking an individual view, which is inadmissible in the case of third countries. Such an

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individual consideration is nevertheless required in the special third-country case of Switzerland. The freedom of movement of capital pursuant to Article 63 TFEU can be supplanted, especially in relation to Switzerland, by the right to freedom of establishment pursuant to Article 4 TFEU in conjunction with Article 12 et seq. Annex I of the FITA, provided that the scope of protection of the FITA is open - in particular taking into account the natural persons entitled to the agreement. In this case, a restriction of the right of establishment is recognisable. In particular, justification on the grounds of preventing tax abuse is ruled out in view of the lack of proportionality.
Finally with regard of chapter 8 conclusions will be drawn in view of both the italian and german doctrine.

2. Relevance of abuse of law according to the EU case law

With reference to the issue of abuse of rights, in which the question is whether the transaction falls within a normal market logic market logic, the abusive character must be excluded due to the coexistence, which is not marginal, of extra-tax reasons that are not identified necessarily in an immediate profitability but can also be of a purely organisational nature and consist in a structural and functional improvement of the enterprise. Community case law has made a significant contribution in the area of abuse of rights. In fact, the Court of Justice of the European Communities has repeatedly pronounced on fraud to the law, avoidance abuse of rights. The first attempts of the European court to formulate a comprehensive notion of abuse of rights date back to the 1970s, with Judgment No. 33 of 3 December 1974.[17] In that judgment, the first on the subject of abuse of rights right, the judges identified two important profiles for the purpose of identifying abusive conduct. With the first profile, the Court clearly identifies the basic elements of the case circumvention of national law. This occurs in the presence of the following conditions, one of those concerns the service provider established in a Member State carries out his activity wholly or mainly in the territory of another state (so-called destination state); the other one relates to the transaction is carried out by the person for the purpose of evading the rules on the exercise of his profession, compliance with which would have been imposed on him had he been established in the state of destination. The second profile concerns the misuse of the rules on freedom of establishment and freedom to provide services. Indeed, in the present case, the applicant had used the rules on freedom of establishment to circumvent the national rule. Such conduct, which constitutes an abuse of rights, according to the Court may permit a limitation

[17] BETTI R., SBARAGLIA G., *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011, P. VALENTE, *Manuale di Governance Fiscale,* Milano, Ipsoa, 2011.

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of the application of the Treaty rules in order to combat tax elusion[18].The Court, in subsequent rulings, has extended the notion of abuse of rights in the context of the free establishment in professional matters.In a ruling in 1989, the Court ruled on a manifest inaccuracy on a professional certificate from the state of origin (4) .While respecting the directive that governed the matter (Dir. No. 64/427), the Court recognised the right of the host state to disregard the declaration issued by the state of origin, apparently in full compliance with the directive's provisions directive, if the concrete circumstances showed that it had been obtained by virtue of a fraudulent manoeuvre. Subsequently, the European courts refined the definition of abuse of rights with other rulings in the field of telecommunications. These were the Veronica[19] and TV 10[20] cases. In the former, the holder of the right, fictitiously, as shown by the facts established by the European courts, has abused the residence in violation of domestic law. In particular, Veronica was an association under Dutch law created for the performance of non-commercial commercial broadcasting activities on the national territory. The Dutch state had argued that the association had set up a company in the state of Luxembourg to carry out the activity in substance in the Dutch state.

By acting in this way, Veronica had circumvented numerous Dutch telecommunications regulations and had therefore escaped periodic supervision by the Dutch authorities. The Court, finding in the case at hand a case of abuse of Community law (melius: a misuse of Community rules), reasoned its judgment by arguing that the domestic provisions of the so-called state of of destination, which restrict movement and freedom of establishment, are necessary to pursue objectives of general interest[21] .Finally, it should be noted that the Court has already held, with regard to Article 59 of the Treaty, that a Member State cannot be denied the right to take measures to prevent the freedoms guaranteed by the Treaty are used by a provider of services whose activity is entirely or essentially directed towards its territory, to evade the rules compliance with which would be required of him if he were established in the State in question (Case 33/74 Binsbergen [1974).

Community case law has on other occasions provided useful insights. One recalls, for example, the 'Centros' judgment [22].The judges, hearing a dispute concerning the freedom of secondary establishment, made a decisive contribution to a refinement of the notion of circumvention of the law in Community law.The case concerned the refusal of the Danish Directorate-General for Trade and Companies to register a

[18] BETTI R., SBARAGLIA G., *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011, L. DANIELE, *Diritto del mercato unico europeo*, Milano, pagg. 119-120.

[19] Sent. 3 febbraio 1993, causa C-148/1991, in www.italgiure.-giustizia.it, Centro Elettronico di Documentazione.

[20] Sent. 5 ottobre 1994, causa C-23/1993, in www.italgiure.-giustizia.it, Centro Elettronico di Documentazione.

[21] Sent. 5 ottobre 1994, causa C-23/1993, in www.italgiure.-giustizia.it, Centro Elettronico di Documentazione.

[22] Sent. 9 marzo 1999, causa C-212/97, in www.italgiure.-giustizia.it, Centro Elettronico di Documentazione.

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succession of companies in Denmark to register a branch of Centros Ltd. (a limited liability company).The shareholders of that company were resident in Denmark and the registered office was in the United Kingdom. In the investigation, it turned out that the shareholders had never operated in the United Kingdom. In other words, carrying out in other words, by doing business exclusively in Denmark with the branch located in the UK, it was a typical example of a 'pseudo-foreign' company.[23]
Current Danish law recognises the possibility for branches of limited liability companies constituted under the law of another member state to operate in Denmark, subject to authorisation granted without any review of the merits. granted without any review of the merits. However, in the present case, the administration had refused the registration on the grounds that the establishment of residence in the United Kingdom constituted an avoidance device.[24]In Community law, the concept of 'abuse of rights' originates from a well-established series of of decisions of the Court of Justice in which it has affirmed the general principle (valid for all areas of law) that the formal and literal application of Community rules cannot extend to the protection of abusive practices. Community rules cannot extend to the protection of abusive practices by economic operators.[25]

In essence, the principle of substance over form has been implemented, considering that formal compliance with the literal fact of the law does not, under any circumstances, authorise the implementation of be carried out that produce results that are decidedly contrary to the purposes inspired by the law and are therefore characterised by a fraudulent intent. In particular, the Court of Justice has repeatedly stated that 'the finding that there is an an abusive practice requires, on the one hand, a set of objective circumstances from which it appears that, notwithstanding formal compliance with the conditions laid down by Community legislation, the objective pursued by that legislation has not been achieved. It requires, on the other hand, a subjective element consisting in the intention to obtain an advantage deriving from the Community legislation by artificially creating the conditions necessary for

[23] Betti R., Sbaraglia G., *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011, P. VALENTE, *Manuale di Governance Fiscale,* Milano, Ipsoa, 2011.

[24] F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009; Boria P., *La clausola anti-abuso prevista dalla direttiva ATAD: l'esperienza italiana*, "Studi Tributari Europei", 9, 2019;

[25] P. BORIA, *La clausola anti-abuso prevista dalla direttiva ATAD: l'esperienza italiana*, "Studi Tributari Europei", 9, 2019. Sul tema si veda Corte di giustizia, sentenza del 11.12.1977, causa C-125/76, Cremer; sentenza del 3.3.1993, causa C-8/92, Milk Products; sentenza del 2.5.1996, causa C-206/94, Paletta; sentenza del 12.5.1998, causa C-367/96, Kefalas; sentenza del 9.2.1999, causa C-212/97, Centros; sentenza del 30.9.2003, causa C-167/01, Diamantis; sentenza del 3.3.2005, causa C-32/03, Fini H.; sentenza del 21.2.2006, causa C-255/02, Halifax; sentenza del 6.4.2006, causa C-456/04, Agip Petroli; sentenza del 12.9.2006, causa C-196/04, Cadbury Schweppes; sentenza del 28.6.2007, causa C-79/06, Planzer; sentenza del 5.7.2007, causa C-321/05, Kofoed; sentenza del 20.6.2013, causa C-653/11, Newey.

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obtaining it".[26]The Court of Justice has in fact developed an autonomous notion of abuse of tax law at first with reference to the regulation of VAT, stating that the taxable person is not entitled to right to deduct input VAT if 'the transactions constituting the basis for that right constitute abusive conduct' (judgment of 21 June 2011). abusive conduct' (judgment of 21.2.2006, Case C-255/02, Halifax) and subsequently with regard to the field of direct taxes, holding that the restrictive fiscal effect with respect to the freedom of establishment of the company is not allowed "unless it concerns wholly artificial arrangements intended to evade the national tax normally due' (judgment of 12.9.2006, Case C-196/04, Cadbury Schweppes).

In both decisions, the Court of Justice held that transactions carried out by persons resident in the European Union, although genuinely intended and immune from formal validity concerns which are artificially constructed and show "essentially the aim of obtaining a tax advantage' run counter to the objectives and freedoms pursued by the Treaty and must therefore be qualified as an abuse of law. In particular, the conduct may qualify as an expression of abuse of rights if the transactions at issue present the following qualifying elements. Notwithstanding the formal application of the rules and conditions laid down by the Community rules and the national transposing legislation, such transactions have as their 'essential purpose' of procuring a tax advantage, the grant of which is contrary to the objective pursued by the pursued by the Community rules; the essential aim of obtaining a tax advantage must be apparent from a set of objective elements. The Court of Justice thus proposes again in the tax field the same concepts already expressed the general principle by stating that the abusive transaction must be recognised by reason of a subjective element (the aim of obtaining a tax advantage contrary to the Community rules) to be identified, however, on the basis of a series of objective circumstances.

The abuse of rights is therefore qualified by the recurrence of two characterising elements:one of those concerns the objective circumstances indicating the lack of a concrete economic motivation for the activity other than that of obtaining an undue

[26] F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009; P. BORIA, *La clausola anti-abuso prevista dalla direttiva ATAD: l'esperienza italiana*, "Studi Tributari Europei", 9, 2019;

Regarding the abuse of law confront G. ZIZZO, *Abuso del diritto, scopo di risparmio d'impostae collegamento negoziale*, in Rass. trib., 2008, 859 ss.; CARPENTIERI, L'ordinamento tributario tra abuso ed incertezza del diritto, in Riv. dir. trib., 2008, 1053 ss.; FRANSONI, *Appunti su abuso del diritto e valide ragioni economiche*, in Rass. trib., 2010, I, 932 ss.; GIOVANNINI, Il divieto di abuso del diritto in ambito tributario come principio generale

dell'ordinamento, in Rass. trib., 2010, 982 ss.; P. PIANTAVIGNA *L'abuso del diritto nell'ordinamento europeo*, Torino, 2011; F. TESAURO, *Elusione ed abuso nel diritto tributario italiano*, in Dir. prat. trib., 2012, I, 683 ss.; G. GIRELLI, Abuso del diritto e imposta di registro, Torino, 2012; M. BEGHIN, *L'elusione fiscale e il principio del divieto di abuso del diritto*, Padova, 2013; RUSSO, Profili storici e sistematici in tema di elusione e abuso del diritto in materia tributaria: spunti critici e ricostruttivi, in Dir. prat. trib., 2016, I, 8 ss.; AA. VV. Abuso del diritto ed elusione fiscale, a cura di E. DELLA VALLE – V. FICARI – G. MARINI, Torino, 2016; M. VERSIGLIONI, *Abuso del diritto*, Ospedaletto (Pisa), 2016.

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advantage; the second one relates to the abusive purpose that consists in the aim of obtaining an advantage not provided for by the Community legislation. In this regard, in order to better understand the scope of the general principle of the prohibition of abuse of rights in tax matters, it would seem appropriate to verify the legal nature of this regulatory rule with particular regard to the Community legal system (in the context of which, as mentioned several times, the principle was originally enunciated by case law).It is well known, in fact, that alongside the rules and principles explicitly set out in the Treaty rules there is a series of principles of an implicit nature - and therefore not formalised in specific express legislative provisions - that nevertheless assume primary importance in the axiological fabric of the axiological framework of the Community order.[27] In particular, two types of principles of the European legal order can be distinguished: ordinal principles, which define the very architecture of the Community order, acting as a guarantee and qualification of the European legal area; these principles help to define the competences and relations between the European Union and the Member States and, therefore, contribute directly to the process of Community integration; they include in particular the principles of subsidiarity, effectiveness, proportionality, and loyal cooperation between States; general principles (sometimes also referred to in Community case law as fundamental principles), which instead guarantee the protection of subjective legal positions (and therefore promote and protect the rights of European citizens) and which therefore address the values of freedom, security and justice; the principles of legal certainty, the protection of trust and good faith, the principle of due process and fair trial and the prohibition of abuse of rights may be included in this category.[28]

3. The Cadbury Schweppes Ruling and the freedom of establishment

The judgment under review concerns the English regulation of CFCs and allows us to reflect on the coordination between those rules and the principle of freedom of establishment enshrined in Articles 43 and 48 of the Treaty establishing the European Community.[29]

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[27] Sul rilievo e sulla classificazione dei principi generali, ed in specie dei principi non scritti, nell'ordinamento comunitario vedi A. ADINOLFI, *I principi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli stati membri,* in Riv. it. dir. publ. com., 1994, 521 ss.; F. TORIELLO, *I principi generali del diritto comunitario: il ruolo della comparazione*, Milano, 2000; STROZZI, *Diritto dell'Unione europea. Parte istituzionale,* Torino, 2001, 221 ss. Nella letteratura internazionale vedi TRIDIMAS, *The general principles of the EU law,* New York, 2006.

[28] F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009; Boria P., *La clausola anti-abuso prevista dalla direttiva ATAD: l'esperienza italiana*, "Studi Tributari Europei", 9, 2019;

[29] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e

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Cadbury is a company incorporated in the United Kingdom. It is the parent company of a group which includes subsidiaries established in the United Kingdom, in other Member States and in third countries, including CSO as the leading subsidiary.
The Group includes two subsidiaries in which Cadbury has a 100% indirect shareholding, Cadbury Schweppes Treasury Services and Cadbury Schweppes Treasury International, both of which are established at the International Financial Services Centre in Dublin, Ireland. The business of those two subsidiaries consisted of raising and providing funds to the other entities within the group. Those subsidiaries were subiect to al tax rate of 10 per cent. The reason for the incorporation of the two Irish entities was among others to solve Canadian tax problems and to avoid a higher taxation in the UK.[30] Under UK tax law the profits of the two Irish subsidiaries of Cadbury Schweppes were subject to the UK CFC provisions. The application of these provisions was triggered because the UK parent company owned a holding of more than 50 per cent in the foreign entities and these were considered to be liable to a lower level of taxation' according to UK CFC rules due to the reduced Irish tax level of 10 per cent.
Furthermore, the exceptions foreseen under UK CFC rules for: foreign subsidiaries with an acceptable distribution policy (ie. 90 per cent of the profits are distributed within 18 months and taxed in the hands of the UK company), foreign subsidiaries with certain trading activities; foreign subsidiaries who are publicly traded or whose prolits exceed £50,000 were not fulfilled.[31]Finally also the requirements of the so-called motive test' allowing the non-application of the UK CFC legislation were not fulfilled. This regulation is found in Sections 747 to 756 and Schedules 24 to 26 of the Income and Corporation Taxes Act. 1988 (Income and Corporation Taxes Act 1988).
According to these schedules, a foreign subsidiary in which the parent company has a shareholding of more than 50% - according to the version in force at the relevant time - is treated as a fiscally transparent company. Thus, the profits earned by this foreign subsidiary are attributed to the parent company in the United Kingdom and included in its tax base, even though they were not received by the parent company. They are taxed by way of a credit against the tax paid by the subsidiary in the state of establishment.
If these profits are then paid to the parent company in the form of dividends, the tax paid by the parent company in the United Kingdom on the profits of its subsidiary is

seguenti; A. SCHNITGER, *German CFC legislation pending before the European Court of Justice - abuse of the law and revival of the most-favoured-nation-clause?* in "EC Tax Review", 2006, pag. 151.

[30] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti; A. SCHNITGER, *German CFC legislation pending before the European Court of Justice - abuse of the law and revival of the most-favoured-nation-clause?* in "EC Tax Review", 2006, pag. 151.

[31] See the opinion oft he Advocate General Leger dated 2 May 2006, Case C-196/04, Cadbury Schweppes.

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treated as additional tax paid by the subsidiary in the State of establishment and is credited against the tax payable on the dividends.
In order to follow the predicted motive test a taxpayer has to demonstrate that a reduction in United United Kingdom tax was not the main purpose, or one of the main purposes and that it was not the main reason, or one of the main reasons, for the subsidiary's existence in that accounting period. The UK court referred for preliminary ruling because of the existing uncertainties whether the CFC provisions are in line with the fundamental freedoms of the EC Treaty.[32]
This represents simply an introduction into the case and for further reading in this regard and in order to dwell more deeply in the content of the aforementioned case the reference to the interpretation of the text of the ruling pusued before the Luxembourg Court is important and necessary in order to grapple with community law.According to the dominant italian doctrine the judgement in question enables us to reason on the "horizontal" and pervasive value of the fundamental freedoms crystallised in the Treaty, as opposed to the only sectorial referability of the positive disciplines of the positive disciplines of the 'harmonised' areas. The field of direct taxation undergoes the Treaty and more deeply the case law of the Court of Justice.
Respectively the Court by means of a casuistic method eliminates individual cases or individual aspects of national rules on the basis of an assessment of their incompatibility precisely - with the founding freedoms of the single market.[33]Despite the reluctance of the Member States, as it seems even with regard of the area of taxes, even though they shoudn´t be influenced by EU law, the impact with European law can be decisive in terms of preservation, modification or evolution of the domestic discipline.
Now, income tax is the natural terrain for the development of CFC regulation, which as it seems may not be regarded anymore as a protected reserve or an 'occluded vegetable garden'. As the judgement clearly states it is, in fact, an area exposed to the lashing winds of EU law, with which we will all increasingly have to contend in the future.
As we may have noted, the central topic of the Cadbury judgement in concern relates to the CFC Framework and the Community Tax Planning.
In this case, the planning is developed through meditated business choices based on models of extraterritorial dislocation of productive activities. The main question in concern relates to the fact that in order to reduce the tax burden resulting from

[32] A. SCHNITGER, *German CFC legislation pending before the European Court of Justice - abuse of the law and revival of the most-favoured-nation-clause?* in "EC Tax Review", 2006, pag. 151; See the opinion oft he Advocate General Leger dated 2 May 2006, Case C-196/04, Cadbury Schweppes.

[33] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti.

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national income tax regulations, a company chooses to locate one or more sources of production at subsidiaries resident in other states, with the declared objective of benefiting, for income arising there, from a milder taxation regime.

Morover the judgement highlights an element which should be further considered. By interpretating whether such operations may underly to the definition of abuse of the Treaty, more correctly, as abuse of the freedoms which that Treaty guarantees to all citizens of the Member States, the Court gives an unequivocal negative answer: the relocation within the territory of the European Union of company structures set up in certain countries for the exclusive purpose of ensuring that the wealth which emerges there is taxed less does not constitute 'instrumentalisation' of the principle of freedom of establishment. The absence of abuse, therefore, determines the necessary, consequent absence of the legal action.[34]An important aspect should be highlighted in this regard. The parent company has previously identified a business objective and, having a plurality of economic-legal paths, it settles on the one which is most attractive from a tax point of view.

The italian doctrine has used this argumentative reasons but relating to various italian judgements of the Italian Court of Cassation such as Cass., 21 ottobre 2005, n. 20398 or Cass., 14 novembre 2005, the italian doctrine has criticised the conclusions reached by the judges on dividend washing and dividend stripping. It has been pointed out that, in assessing the existence or absence of valid economic reasons, one could not disregard the tax regime to which the planned business transactions should be subject.

The issue is not precisely framed.In fact, the problems addressed by the Court of Cassation through the judgments referred to above do not concern situations in which, having established a certain economic-business path, the entrepreneur opts for the least burdensome negotiation path in terms of taxation (if this determination if this determination were precluded, one would paradoxically have to observe that, having identified a plurality of negotiation scans useful for achieving an objective, the taxpayer would always have to follow the most onerous one to satisfy the expectations of the financial office). The cases dealt with by the highest court are

[34] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti; Il riferimento va a Cass., 21 ottobre 2005, n. 20398, in "il fisco", n. 45/2005, fascicolo 1, pag. 7113; Cass., 26 ottobre 2005, n. 20816 e Cass., 14 novembre 2005, in banca dati "fisconline". Per un commento a tali sentenze si veda, senza pretesa di esaustività, F. Moschetti, Abusiva "captazione" di norme fiscali di favore ed anticipi civilistici in uno "Stato sociale di diritto", in "Elusione fiscale. La nullità civilistica come strumento generale antielusivo", atti del convegno svoltosi a Padova il 15 settembre 2006, Roma, 2006, pagg. 5 e seguenti; R. Schiavolin, L'elusione fiscale come abuso del diritto: allo stato dell'arte, più problemi che soluzioni, ivi, pag. 60; M. BEGHIN, L'elusione tributaria tra inopponibilità dei vantaggi fiscali, nullità dei contratti ed "invasivo" esercizio della funzione giurisdizionale, ivi, pag. 41; R. LUPI, Episodi da non generalizzare, in "Dialoghi di diritto tributario", 2006, pagg. 1614 e seguenti.

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quite different from the latter and are characterised by the fact that, in planning its actions, the taxpayer identifies ex ante the tax objective (e.g. the allocation of a tax credit on dividends) and, on the basis of this, outlines ex post an appropriate negotiating scansion.[35]

In short, the problem of avoidance must in my opinion be projected into a different investigative dimension, especially when economic reasons struggle to make their way through business choices that appear to be exclusively inspired by the objective of tax savings. In the case dealt with by the Court of Justice, in particular, the issue concerns the location abroad of subsidiaries for which there may be no need for effective rooting in the territory.[36]Instead, we are in the presence of operations knowingly scrutinised through the lens - the only lens! - of the fiscal impact on wealth constituting income: these are choices of territorial location of production activities that rely solely on the tax advantages offered by a Member State other than that in which the parent company is resident. The reasoning that can be deduced from the first part of the judgment is, in this perspective, of disarming simplicity: the principle of freedom of establishment does not prevent companies resident in a Member State from taking advantage, 'in the light of the day', of favourable provisions in force in other Member States. The search for the most advantageous location in terms of tax effects is in no way hindered, according to a scheme that is apparently similar to that employed in Italy on the side of the application of the general anti-avoidance clause. Indeed, although the most recent domestic case law[37] has brought to light the legal principle according to which, in the presence of company operations unequivocally aimed at tax savings, it would be lawful to react through the application of civil law instruments and not of anti-avoidance clauses of a fiscal nature, I am of the opinion that the mere search for the least onerous transaction for tax purposes does not provide for reactions by of the legal system as long as the advantages achieved can be considered systematic. This is precisely the line of argumentation on which the first part of the judgment is based: what is portrayed as an operation 'in conformity with the system' is in fact that consisting in

[35] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti.

[36] R. LUNELLI, Elusione, lecito risparmio d'imposta e scelta del regime fiscale meno oneroso, in "Dialoghi di diritto tributario", 2006, pag. 1607 e specialmente pag. 1611; Il riferimento va a Cass., 21 ottobre 2005, n. 20398, in "il fisco", n. 45/2005, fascicolo 1, pag. 7113; Cass., 26 ottobre 2005, n. 20816 e Cass., 14 novembre 2005, in banca dati "fisconline".

[37] F. MOSCHETTI, Abusiva "captazione" di norme fiscali di favore ed anticipi civilistici in uno "Stato sociale di diritto", in "Elusione fiscale. La nullità civilistica come strumento generale antielusivo", atti del convegno svoltosi a Padova il 15 settembre 2006, Roma, 2006, pagg. 5 e seguenti; R. SCHIAVOLIN, *L'elusione fiscale come abuso del diritto: allo stato dell'arte, più problemi che soluzioni*, ivi, pag. 60; M. BEGHIN, *L'elusione tributaria tra inopponibilità dei vantaggi fiscali, nullità dei contratti ed "invasivo" esercizio della funzione giurisdizionale*, ivi, pag. 41; R. Lupi, Episodi da non generalizzare, in "Dialoghi di diritto tributario", 2006, pagg. 1614 e seguenti.

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exploiting the asymmetries between the (non-harmonised) provisions that, within the EU Member States, allow to minimise the impact of income tax.
More simply, according to the Court, the advantage connected with the particular extraterritorial location of the production structure does not constitute an abuse of the freedoms guaranteed by Community law. However, this arrest is partial and runs the risk of presenting the principle of freedom of establishment as a monolith insusceptible to derogations or scratches, a flag under which the best-assisted companies can conduct, in total freedom, extensive and in-depth research to identify the most appropriate'tax' location of their subsidiaries.[38]
The tax incidence may take on an unequal consistency by virtue of the concrete dislocation of income-producing structures, with regard of the overall wealth produced by subjects linked by participatory relationships. The italian doctrine illustrates the arguments that the Member States are allowed to prefer and choose territories where there is a different tax burden. The principle coined by the Luxembourg court highlights problems, which raises the question of the coexistance of anti-abuse provisions (such as, precisely, the CFCs), which, at least from the point of view of an initial framing of the discipline, would have no reason to exist in a system centred on an intangible right of freedom of establishment. The parent company has the right to choose its own place or its own pawns anywhere within the European Union, it would seem unreasonable to envisage rules aimed at opposing the aforementioned choices of appropriate territorial dislocation. The anti-abuse provisions that can coexist with the principle of freedom of establishment and which act, in relation to the latter, as a counterweight or corrective. We have two different positions in this matter. The position of the individual, who elevates the freedom of establishment to a fundamental principle of the European legal system. Under this liberalist banner, the parent company will be strong in invoking the contrast between the regulation on CFCs and Articles 43 and 48 of the EC Treaty.[39]

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[38] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti; Su questo aspetto vedi R. LUPI, Diritto tributario, Parte speciale, La determinazione giuridica della capacità economica, Giuffrè, Milano, 2007, VII, il quale, sin dalla prefazione al volume, sottolinea come sia fondamentale per la comprensione delle disposizioni spostare il ragionamento sul fronte del contemperamento di interessi, quali la semplicità, la certezza, l'effettività, la cautela fiscale e così via. Codesto modello di bilanciamento emerge, pertanto, anche nell'interpretazione offerta dalla Corte di Giustizia, la quale propone, appunto, uno schema di coordinamento tra libertà di stabilimento e problematiche elusive.

[39] F. MOSCHETTI, Abusiva "captazione" di norme fiscali di favore ed anticipi civilistici in uno "Stato sociale di diritto", in "Elusione fiscale. La nullità civilistica come strumento generale antielusivo", atti del convegno svoltosi a Padova il 15 settembre 2006, Roma, 2006, pagg. 5 e seguenti; R. SCHIAVOLIN, *L'elusione fiscale come abuso del diritto: allo stato dell'arte, più problemi che soluzioni*, ivi, pag. 60; M. BEGHIN, *L'elusione tributaria tra inopponibilità dei vantaggi fiscali, nullità dei contratti ed "invasivo" esercizio della funzione giurisdizionale*, ivi, pag. 41; R. Lupi, Episodi da non generalizzare, in "Dialoghi di diritto tributario", 2006, pagg. 1614 e seguenti.

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The counter position relating to the Member State in which the parent company is resident, which, in being affected by the choices of territorial dislocation of the subsidiaries and the consequent, unavoidable loss of revenue, may - according to the judgment - seek protection in the anti-abuse rules; this is the case when the above-mentioned foreign subsidiaries can be defined as 'structures of pure artifice, intended to evade the national tax normally due'. There are as it has been mentioned above two diverging positions namely the private one(of desirable, wide-ranging freedom) which differs with the public position (of reasonable restriction of subjective positions of advantage).

The Court shows that it draws the spectrum of application of the provisions interpreted according to a model of balancing interests. The interpretative result may be summarized as follows: the different tax treatment on the income tax side is metabolised by the system to the extent that it insofar as it (advantage) rests on operating structures (the subsidiaries) that are actually in operation; on the other hand, where companies located in low-tax countries constitute - as recalled - structures of pure artifice, the system manifests a 'crisis of rejection' and annuls those differences in tax burden that, in the face of real structures, it would instead have accepted.[40]

The Court of Justice, in coordinating the discipline of automatic allocation of taxable income for CFCs with that (discipline) concerning freedom of establishment, intends to refer to structures existing 'on paper' and, nevertheless, not functioning, not supported by requirements of effective rooting in the territory. For the ascertainment of such factual profiles then comes into play the test. Through the fundamental contribution of case law, it succeeds in confronting principles that express different subjective positions that do not coincide with those of individual citizens. The private mould of freedom of establishment is able to bend, thus assuming a sub-orderly position with regard to the Member States' need not to see their domestic tax rules on income taxation circumvented. It is easy, at this point, to make the concluding observation: the 'unequal' treatment that may well accompany situations characterised by a real need for of being rooted in the territory (for which - as mentioned - the Court considers that the CFC regulation should not operate) is transformed into 'equality' of treatment through the automatic imputation of taxable income to the parent company when the structures located abroad are 'empty boxes'.

[40] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti.

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In the judgment there is a textual reference in this regard to 'ghost' and 'screen' companies.[41]

4. German Foreign Transaction Tax Act and its compatibility with EU law

The Foreign Tax Act (AStG) was first introduced in 1972 as Art. 1 of the so-called Foreign Tax Reform Act (AStRG). After numerous amendments and supplements, the very detailed Application Decree (AEAStG)643 was published in 2004, which was intended to facilitate the handling of the law and eliminate ambiguities. The 2008 Corporate Tax Reform Act expanded and tightened the provisions of § 1 AStG on the adjustment of income were expanded and tightened. Section 1 AStG now contains a statutory definition of the arm's length principle and regulations on the taxation of transfers of functions. In addition, the Annual Tax Act 2008 clarified the compatibility of the taxation of the transfer of income according to §§ 7 ff. AStG with the existing case law of the ECJ. The AStG (FITA) was enacted in order to prevent the use of international tax differentials for international tax evasion, to restore the uniformity of taxation in foreign relations and thus to and thus to preserve economic equality of opportunity.[42]The AStG was enacted in order to prevent the use of international tax differentials for international tax evasion. tax evasion, to restore the uniformity of taxation in foreign relations and thus to and thus to preserve economic equality of opportunity.

The AStG can essentially be divided into four main areas: the adjustment of income in the case of internationally interconnected companies (1st part of the AStG - § 1 AStG),the extended limited tax liability in the event of a transfer of residence to low-tax areas (2nd part of the AStG - §§ 2 to 5 AStG),the taxation of the increase in assets of shares in a domestic corporation in the event of a change of residence abroad,the taxation of the increase in assets of a domestic corporation in the event of a change of residence abroad,the taxation of the increase in assets of a domestic corporation in the event of a change of residence abroad (3rd part of the AStG - § 6 AStG), the addition taxation of shareholdings in foreign intermediary companies (4th part of the AStG - §§ 7 to 14 AStG).

In the past, the conformity of § 1 para. 1 AStG with higher-ranking European Community law was Community law by the BFH2 and has been discussed frequently in the literature. Further developments in the case law of the ECJ as well as the introduction of Section 1 (3) AStG provide an opportunity to take another look at Section 1 AStG with regard to its conformity with European law.In the past, the

[41] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seguenti.

[42] B. CORTEZ, T. VOGEL, *The (In)Consistency of the German Foreign Transaction Tax Act with European Law*, "Intertax", 39(8/9), 2011.

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conformity of Section 1 (1) AStG with overriding European Community law was doubted by the BFH and frequently discussed in the literature. Further developments in the case law of the ECJ as well as the introduction of Section 1 (3) AStG provide an opportunity to take another look at Section 1 AStG with regard to its conformity with European law.[43] The provisions of the German Foreign Tax Act only apply to situations involving an engagement that crosses the German state border. While the OECD advises the introduction of defensive measures within the framework of foreign tax legislation and the introduction of abuse regulations, for example, in order to protect one's own tax revenue in the event of harmful tax competition, a separate approach for cross-border situations is sometimes problematic for member states of the European Union. For example, the fundamental freedoms guaranteed by the EC Treaty form the basis for a general freedom of economic activity. From an economic point of view, the prohibition of discrimination on grounds of nationality is intended to ensure the optimal allocation of, for example, goods, workers and capital. It is also intended to ensure equal treatment of citizens and companies in the European Union in accordance with the principle of fairness. As is well known, the fundamental application of the fundamental freedoms to the area of direct taxation is not precluded by the fact that this is only an area of law that is harmonised in peripheral areas.

Against the background of the cross-border service links between associated companies considered here, as well as their documentation, the freedom of establishment of Article 43 of the EC Treaty is of particular relevance, since in the case of companies associated under company law and through service relationships, it is more a question of establishment than of a pure capital investment - and thus an area of application of the freedom of capital movements and payments and thus an area of application of the freedom of capital and payment transactions.[44] The freedom of establishment is intended to guarantee the unrestricted taking up and exercise of self-employed activities as well as the establishment and management of companies in the territory of another Member State under the provisions applicable there. Establishment within the meaning of the EC Treaty means any fixed establishment serving the purpose of participating in economic activity for an indefinite period, as well as agencies, branches or subsidiaries. Establishments without economic substance in another Member State, on the other hand, do not enjoy protection by the freedom of establishment. If, in this case, cross-border linkages take place in the form of services, this can fall within the scope of application of the freedom to provide

[43] B. CORTEZ, T. VOGEL, *The (In)Consistency of the German Foreign Transaction Tax Act with European Law*, "Intertax", 39(8/9), 2011.

[44] B. CORTEZ, T. VOGEL, *The (In)Consistency of the German Foreign Transaction Tax Act with European Law*, "Intertax", 39(8/9), 2011.

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services of Art. 49 ECT, which is otherwise subsidiary to the other fundamental freedoms.According to the case law of the ECJ, the freedom of establishment is to be interpreted both as a prohibition of discrimination and as a prohibition of restrictions.In the case of inbound investment, the prohibition of discrimination is intended to ensure equal treatment in the host state in the sense of equal treatment of nationals, whereas the prohibition of restrictions prohibits the state of origin from restricting its economic entities in their choice of state of activity and, in particular, from hindering cross-border activity.[45]

Included are both overt obstacles, which are directly linked to the characteristic of the seat of a company, as well as covert obstacles, which indirectly cause unequal treatment.A prerequisite for the applicability of the prohibition of discrimination is the objectively comparable situation in which the persons or companies concerned must find themselves in comparison to nationals or national companies with regard to the tax regulation in question.

If a national legal provision is contrary to the EC Treaty, it is superseded by higher-ranking Community law with the consequence that the national provision is inapplicable within the scope of the EC Treaty.The BFH also commented in detail on the relationship between a decision of the ECJ and the prohibition of discrimination in Article 24 (4) of the DTA D-USA in its ruling of 29 January 2003. The BFH ruled that if a national legal norm or administrative regulation contradicts a prohibition of discrimination in the EC Treaty, this also constitutes discrimination within the meaning of a DTA. The effect of the inapplicability of a provision that violates the EC Treaty thus also extends to third countries with which such a DTA exists.[46]

If, in addition to the existence of an overriding reason relating to the public interest, the measure in question is suitable for achieving the objective pursued by the provision and does not go beyond what is necessary to achieve the objective, the justification of an obstructive measure can be made. This is then to be assessed as not contrary to the ECT despite its obstructive effect. can be justified. [47]

In spite of its obstructive effect, the measure is then not to be judged contrary to the ECT. This principle of proportionality is one of the general principles of Community law according to the established case law of the Court of Justice. According to this principle, sovereign measures are only lawful if they are suitable and necessary to achieve the objectives legitimately pursued by the regulation in question. If there is a

[45] B. CORTEZ, T. VOGEL, *The (In)Consistency of the German Foreign Transaction Tax Act with European Law*, "Intertax", 39(8/9), 2011.

[46] B. CORTEZ, T. VOGEL, *The (In)Consistency of the German Foreign Transaction Tax Act with European Law*, "Intertax", 39(8/9), 2011.

[47] GOEBEL, KÜNTSCHER, *Europarechtswidrigkeit der deutschen Verrechnungspreisregelungen? Ein Beitrag anlässlich der Neuregelung des Paragraphen 1 Abs. 3 ASTG.*

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choice between several appropriate measures, the least burdensome must be chosen and the burdens imposed must be proportionate to the objectives pursued.[48]

5. Introduction into the subject matter. Controlled Foreign Corporation Rules: Add back taxation with regard of the ATAD

Under Article 7 et seq. of the ATAD, EU Member States are obliged to introduce tax-based schemes.

The aim is to prevent the targeted transfer of sources of income to other countries with low levels of taxation.

Additional taxation systems are among the established defensive regimes based on abusive tax arrangements.

In the EU, however, they were not widely used before the ATAD, and the rules that existed differed considerably in terms of classification and sharpness.[49]

If a State renounces such provisions, it is true that it directly damages its own tax revenue, since the purpose of the levying tax is, in principle, to protect the tax subsidiary of the State of residence of the respective (super) company.

Nevertheless, the Commission decided to include such schemes in ATAD in order to establish a uniform minimum level of protection in the EU.[50]

The reason for this was quite generally that otherwise the functioning of the internal market would be affected, in particular when income is transferred to third countries with low taxation.[51]

The Commission seems likely to have been concerned with restricting the use of EU Member States for tax arrangements in general and the resulting distortions of competition. In its conception of Article 7 et seq. ATAD, the Commission was able to

[48] GOEBEL, KÜNTSCHER, Europarechtswidrigkeit der deutschen Verrechnungspreisregelungen? Ein Beitrag anlässlich der Neuregelung des Paragraphen 1 Abs. 3 ASTG.

[49] O. HEINSEN - S. ERB, *Reformaspekte der Hinzurechnungsbesteuerung nach §§ 7-14 ASTG im Liche aktrueller EU-Rechtsentwicklungen,* in DB, 2018, p. 975; vgl. zu neueren Entwicklungen auch S. EILERS – P. HENNING, *BEPS: Hinzurechnungsbesteuerung- BEPS und neue Rechtsentwicklungen*, in ISR 2016, p. 422 ss.; D. FEHLING, *Hinzurechnungsbesteuerung*, in H. SCHAUMBURG – J. ENGLISCH, *Europäisches Steuerrecht*, 2. Aufl. 2020, p. 793 ss.

[50] With regard of a general overview confront: O. HEINSEN - S. ERB, *Reformaspekte der Hinzurechnungsbesteuerung nach §§ 7-14 ASTG im Liche aktrueller EU- Rechtsentwicklungen,* in DB, 2018, p. 975; vgl. zu neueren Entwicklungen auch auch S. EILERS – P. HENNING, *BEPS: Hinzurechnungsbesteuerung- BEPS und neue Rechtsentwicklungen*, in ISR 2016, p. 422 ss; F. L. GIAMBRONE, *Protection in Germany of the Fundamental Rights of the European Union (Grch). Case note of the BVERF (Constitutional Court)1ST SENATE, RESOLUTION OF 06.11.2019 1 BVR 16/13 concerning the interpretation of the importance of the fundamental rights within the Basic law with regard to non fully harmonized EU law,* in, Journal of Modern Science Tom 2/47/2021; Zu den möglichen Gründen, warum Staaten auf eine Hinzurechnungsbesteuerung verzichten, s. G. V. HULLE, *European Union/OECD- Current Challenges for EU Controlled Foreign Company Rules,* Amsterdam, 2017, p. 719 ss.

[51] See Proposal of the European Commission for a Council Directive laying down rules to combat tax avoidance practices with a direct impact on the functioning of the internal market, European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, (2016) 26 final, p. 10 ff, in:(https://ec.europa.eu/transparency/documents-register/api/files/COM(2016)26_0/de00000000322231?rendition=false).

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draw on the discussions on the original draft CCCTB Directive, which had also provided for additional taxation.
However, the proposal for a regulation in that country was severely limited in its scope and was intended to intervene only in cases where sources of income are transferred to third countries.
Discussions on this proposal have shown that many Member States supported a more effective regime with a higher level of protection; other Member States, on the other hand, had expressed a fundamental reluctance to do so.
The fact that recommendations for the introduction of additional taxation were also developed in the BEPS project by the OECD and the G20 (BEPS Action 3) strengthened the position of beneficiaries of EU-wide additional taxation.
The CJEU has also had the opportunity on several occasions to consider the compatibility of (national) additional taxation systems with EU law.
The Cadbury Schweppes decision, in which the CJEU critically considered general anti-abuse regimes and derived from the fundamental freedoms the requirement that the taxpayer must be able to present genuine economic reasons for his transaction in individual cases, was particularly well-known.[52]
Article 7 ATAD does not lay down a minimum period for exceeding the abovementioned thresholds.
The limitation to certain periods, which is partly required in the literature, can indeed avoid multiple taxation (if it is stipulated that the thresholds must be exceeded for at least half of the respective tax period).
However, there is no approach to this in the wording of the ATAD.[53] Article 7 of the ATAD presupposes, first, that a taxpayer (1) controls in another State an undertaking (2) which is not taxed in the taxpayer's State of residence.[54]

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[52] S. KIRCHMAYER – G. MAYR – K. HIRSCHLER- G. KOFLER, *Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch ?*, 2017, p. 102 ss.; J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7 Rz. 33* ff, in T. HAGEMANN – C. KAHLENBERGH, *Anti Tax Avoidance Directive (ATAD) Kommentar*, 2018; D. FEHLING, *Hinzurechnungsbesteuerung*, in H. SCHAUMBURG – J. ENGLISCH (edited by), *Europäisches Steuerrecht*, 2. Aufl. 2020, p. 793 ff.

[53] S. KIRCHMAYER – G. MAYR – K. HIRSCHLER- G. KOFLER, *Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch ?*, 2017, p. 102 ff.; J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7 Rz. 33* ff, in T. HAGEMANN – C. KAHLENBERGH, *Anti Tax Avoidance Directive (ATAD) Kommentar*, 2018; D. FEHLING, *Hinzurechnungsbesteuerung*, in H. SCHAUMBURG – J. ENGLISCH (edited by), *Europäisches Steuerrecht*, 2. Aufl. 2020, p. 793 ff.

[54] S. KIRCHMAYER – G. MAYR – K. HIRSCHLER - G. KOFLER, *Anti-BEPS-Richtlinie: Konzernsteuerrecht im Umbruch ?*, 2017, p. 94 ss.; s. auch G. V. HULLE, *European Union/OECD- Current Challenges for EU Controlled Foreign Company Rules,* Amsterdam, 2017, p. 719 ss.; with regard of an overview of the turkish familiy law compared to the european principles cfr. F. L. Giambrone, *Aspekte des neuen italienischen Scheidungsrechts:"verkürzte Scheidung und die damit in der Lehrmeinung einhergehenden Auslegungsprobleme*, in: MÜHF - HAD, C.22, S.2, 2016; tracing back our original topic doubting the effectiveness of avoiding double taxation cfr. F. HAASE, *Überlegungen zur Reform der Hinzurechnungsbesteuerung*, 2017, p. 105. Umfassend zum

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Such a lack of taxation is also likely to exist in the case of dual-resident companies if an existing double taxation treaty assigns the primary right of taxation to the other state.[55]

The control is defined in more detail in Article 7(1)(a) of the ATAD and therefore exists if the taxpayer himself or together with its affiliated undertakings holds, directly or indirectly, more than 50 % of the voting rights or capital or is entitled to more than 50 % of the profits.[56]

4) This combination of legal and economic criteria is intended to ensure that only companies in which the taxpayer has a decisive influence (and thus be able to control the targeted use of that company for tax minimisation purposes) are included in the add-on taxation.

5) In the event that the respective factors are exceeded in different ownership relationships (with respect to the same controlled undertaking), the question of hierarchisation arises to avoid multiple cases of domination, with the threat of multiple taxation.[57]

In any event, purely de facto control below these thresholds is not covered.[58]

In addition, it is necessary that there is a low level of taxation in the other State.

The reason for this is the idea that the transfer of sources of income to other countries should only be counteracted if there is a tax rate differential which causes a significant reduction of his tax burden for the taxpayer — this effect does not occur if the tax burden is roughly the same.[59]

Under Article 7(1)(b) of the ATAD, a low level of taxation exists where the tax actually paid in the other State is less than the difference between the corporation tax which would have been levied on those profits in the Member State of the taxable person and the amount actually paid. More simply, it covers cases where the actual

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Merkmal der fehlenden Besteuerung J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7 Rz. 14* ss, in T. HAGEMANN – C. KAHLENBERGH (edited by), *Anti Tax Avoidance Directive* (*ATAD) Kommentar*, 2018.

[55] Op.cit; F.L. Giambrone - A. F. Uricchio, *Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen europäischen Entwicklungsprozesses*, Bari, 2020.

[56] Compare G. GINEVRA, *The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU level,* 2017, p. 122 ss.; S. KIRCHMAYER– G. MAYR – K. HIRSCHLER- G. KOFLER (edited by), *Anti-BEPS- Richtlinie*: *Konzernsteuerrecht im Umbruch*? p. 98; D. FEHLING, *Hinzurechnungsbesteuerung*, in H. SCHAUMBURG – J. ENGLISCH, *Europäisches Steuerrecht*, 2. Aufl. 2020, p. 793 ff.

[57] J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7 Rz. 24* ss, in T. HAGEMANN – C. KAHLENBERGH (edited by), *Anti Tax Avoidance Directive* (*ATAD) Kommentar*, 2018.

[58] OECD, *OECD/G20 Base Erosion and Profit Shifting Project, Designing Effective Controlled Foreign Company Rules, Action 3: 2015 Final Report*, Rz. 34 ss.

[59] Vgl. OECD, *OECD/G20 Base Erosion and Profit Shifting Project, Designing Effective Controlled Foreign Company Rules, Action 3: 2015 Final Report*, Rz. 61.

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tax in the other State is lower than half of the tax that would have been payable in the State of residence of the dominant taxpayer.[60]

It was part of the political agreement reached in the ECOFIN that this 50 % limit was not explicitly mentioned in the standard. The Commission's original ATAD draft still provided for a 40 % limit in Article 8(1)(b) (exclusively).

In writing, the rule is criticised as excessively strict because it also includes cases of low effective taxation due to loss offsetting and ignores multiple inclusions in the additional taxation systems of several countries;[61] furthermore, the relative size leads to the existence of low taxation not being assessed uniformly across the EU, but dependent on the level of taxation of the EU Member State which intends to apply the additional taxation.[62]

It is also required that the assessment of low taxation should depend on the overall result of the controlled subsidiary or permanent establishment and not on the income covered by Article 7(2) of the ATAD.[63]

In addition to controlled subsidiaries or sub-subsidiaries, Article 7 of the ATAD — contrary to the Commission's initial draft directive — also covers permanent establishments of the taxpayer in another State with low taxation.[64]

The participation thresholds laid down in Article 7(1)(a) of the ATAD are, by their very nature, irrelevant.

The inclusion of permanent establishments makes sense for effective additional taxation, since the transfer of sources of income to foreign permanent establishments also regularly excludes the tax access of the taxpayer's country of residence in the event of a double taxation agreement with an exemption method.[65]

Therefore, the use of permanent establishments could easily eliminate additional taxation limited to subsidiaries and sub-subsidiaries.

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[60] Zu den verschiedenen Möglichkeiten der Einkünfteermittlung bei Hinzurechnungsbesteuerungssystemen s. *OECD, OECD/G20 Base Erosion and Profit Shifting Project, Designing Effective Controlled Foreign Company Rules, Action 3: 2015 Final Report*, Rz. 72 ss.

[61] S. zu diesem Tatbestandsmerkmal und den sich ergebenden Konsequenzen J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7 Rz. 54* ss, in T. HAGEMANN – C. KAHLENBERGH (edited by), *Anti Tax Avoidance Directive (ATAD) Kommentar*, 2018.

[62] S. KIRCHMAYR, *Hinzurechnungsbesteuerung*, in S. KIRCHMAYER, - G. MAYR – K. HIRSCHLER- G. KOFLER (edited by), *Anti-BEPS- Richtlinie*: *Konzernsteuerrecht im Umbruch*, p. 100; J. SCHÖNFELD, *Hinzurechnungsbesteuerung und Anti- Tax- Avoidance- Directive*, in Riv. In.Steuerrecht, 2017, p. 721; F. HAASE, *Hinzurechnungsbesteuerung und Multilaterales Instrument*, in Riv. In.SteuerRund., 2017, p. 349; J. SCHÖNFELD, *Hinzurechnungsbesteuerung und Anti- Tax- Avoidance- Directive*, in Riv. In.Steuerrecht, 2017, p. 949 ff.; A. F. Uricchio – F. L. Giambrone, *European Finance at the emergency Test*, 2020, Collana del Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo societá ambiente e culture, ISBN: 9788866119180.

[63] S. KIRCHMAYR, *Hinzurechnungsbesteuerung*, in S. KIRCHMAYER, - G. MAYR – K. HIRSCHLER- G. KOFLER (edited by), *Anti-BEPS- Richtlinie*: *Konzernsteuerrecht im Umbruch*, Art. 7 Rz. 28 ff.

[64] D. FEHLING, *Hinzurechnungsbesteuerung*, in H. SCHAUMBURG – J. ENGLISCH, (edited by) *Europäisches Steuerrecht*, 2. Aufl. 2020, S. 793 ff.

[65] S. dazu auch A. PRUSKO, *Steuerliche Missbrauchsvermeidung im Europäischen Binnenmarkt*, p. 242 ff.

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At the same time, literature criticises the fact that ATAD leaves some questions open here, such as the inclusion of permanent establishments of partnerships.[66]
The free movement of capital, which is also relevant in third-country situations, is likely to regularly retreat behind the freedom of establishment (which does not apply to third countries) because of the participation thresholds regulated in Article 7(1) of the ATAD.

5.1. Introductive aspects of the German External Tax Relations Act (AStG)
The recently revised taxation of the addition of profits pursuant to § 7 to 13 of the German External tax Relations Act (AStG) stipulates that the low-taxed passive income of a foreign intermediate company is attributed to the controlling shareholder in Germany and taxed there. The legal consequence is waived if the exculpation clause pursuant to § 8 (2) AStG is applicable, which, against the background of the freedom of establishment pursuant to Art. 45 et seq. TFEU as a result of the ECJ judgement in the Cadburry Schweppes case.[67]
Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a company resident in a Member State of profits made by a controlled foreign company in another Member State where those profits are subject to a lower level of taxation than in the first State, unless such inclusion relates only to purely artificial arrangements designed to avoid the national tax normally due.
Consequently, such a tax measure should not be applied if it is established, based on objective evidence verifiable by third parties, that the said controlled foreign company, notwithstanding the existence of motives of a tax nature, is actually established in the host Member State and carries out genuine economic activities there.[68]

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[66] With regard of the relationship between fundamental freedoms see Rz. 7.26 ff. S. aber auch J. BÖHMER – R. GEBHARDT – S. KRÜGER, *Art. 7*, in T. HAGEMANN – C. KAHLENBERGH (edited by), *Anti Tax Avoidance Directive (ATAD) Kommentar*, 2018, *Rz. 24* ff., denen zufolge es primärrechtlich geboten sein soll, den Substanztest auch ge- genüber Drittstaaten zu gewähren.

[67] EuGH v. 12.9.2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, 987 m. Anm. *Lieber* = Slg. 2006, I-8031 Rz. 70; Überblick bei O. HEINSEN - S. ERB, *Reformaspekte der Hinzurechnungsbesteuerung nach §§ 7-14 ASTG im Liche aktrueller EU- Rechtsentwicklungen*, in DB, 2018, p. 975 ff; F. L. Giambrone, *New fiscal, monetary, financial, banking and capital perspectives of the European Union*, Universitá degli Studi di Bari Aldo Moro centro Interuniversitario "Popolazione, Ambiente e Salute", 2021, ISBN: 979-125965-002-3; vgl. zu neueren Entwicklungen auch ST. EILERS – P. HENNING, *Hinzurechnungsbesteuerung – BEPS und neue Rechtsentwicklungen*, in ISR, 2015, p. 422 ff. Zu den möglichen Gründen, warum Staaten auf eine Hinzurechnungsbesteuerung verzichten, s. G. V. HULLE, *European Union/OECD- Current Challenges for EU Controlled Foreign Company Rules*, Amsterdam, 2017, p. 719 (722) ff.

[68] European Court of Justice, EuGH v. 12.9.2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, in FR 2006, 987 with annotations of *Lieber* = Slg. 2006, I-8031 paragraph 70; F. L. Giambrone, *Transpotion of the Judgements of the European Court of Justice in Germany. Case note regarding the abnormal use of checks in the Judgement of 5 May 2020 of the German Federal Constitutional Court from a Fiscal point of view*, in Rivista di Diritto finanziario e scienza delle Finanze , Anno LXXX Fasc. 3 -2021; A.F. Uricchio, *Das geltende italienische staatliche Steuersystem*, in A.F.

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The activity test is also originally intended for the relationship under company law within the EU and EEA area according to its basis in secondary law.
Nevertheless, the exception provision pursuant to Art. 7 (2) (a) sub-section 3 ATAD shall in principle be applicable vis-à-vis third countries, unless this is excluded by the transforming Member State.[69]
The German legislator has made use of this exclusion right and, pursuant to § 8 (3) AStG, analogously to Sec. 8 (2) Sentence 1 AStG old version, has limited the exculpation clause of § 8 (2) AStG as amended by ATADUmsG territorially to the EU or EEA territory.
According to the wording of § 8 (3) AStG, the exculpation cannot therefore apply to situations in which the intermediary company in question is resident in a third country.
This could result in a contradiction with European primary law, in that the freedom of movement of capital is generally applicable in relations with third countries, and the freedom of movement of capital is specifically applicable in relations with Switzerland the right of establishment enshrined in the Agreement on the Free Movement of Persons (FTA) are violated.[70]

6. General considerations concerning the violation of the free movement of capital in Germany

6.1. Case law on § 8 (2) AStG (Foreign transaction Tax Act) old version
Concerns regarding the exclusion of the activity test for third country situations have already been raised in connection with § 8 (2) AStG old.[71]
The Baden-Württemberg Tax Court ruled on a case in which a Swiss resident company was identified as an intermediate company and the extended addition taxation pursuant to § 7 (6) and (6a) AStG old version was applied without verifying an actual economic activity within the meaning of Sec. 8 (2) AStG, old version.[72]
An appeal was filed by the BFH (Federal Tax Court) against the ruling of the Baden-Württemberg Tax Court.
The BFH again submitted the facts of the case to the ECJ with the question of whether the free movement of capital pursuant to Art. 63 et seq. TFEU was violated

URICCHIO., F. L. GIAMBRONE, *Neue Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen Europäischen Entwicklungsprozesses*, 2020, Cacucci Editore, Bari.

[69] G. HÖRNICKE - G. KRAFT, *Hinzurechnungsbesteuerung*: *Außensteuerrecht Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, in. Internationale Steuerrundschau, 2022, p. 1 -10.

[70] Abkommen zwischen der Europa◎ischen Gemeinschaft und ihren Mitgliedstaaten einerseits und der Schweizerischen Eidgenossenschaft andererseits u◎ber die Freizu◎gigkeit v. 21.6.1999, AS 2002, 1529, zugl. ABl. EU 2002 Nr. L 114, 6.

[71] G. KRAFT – T. MOSER, *The German CFC Rules: Overview, Deficits and Reform Proposals*, in Intertax, 2014, p.130 ff.

[72] Finanzgericht Baden-Wu◎rttemberg Urteil v. 21.10.2014 , Nr. 6 K 2550/12.

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and whether, in this case, the application of the so-called standstill clause pursuant to Article 64 (1) TFEU could be applied.[73]

In its judgment in the X GmbH case, the ECJ stated that although a regulation such as the taxation of the addition of capital restricted the free movement of capital by placing investments in third countries at a disadvantage, it could be justified by the prevention of purely artificial and thus abusive tax arrangements.[74]

On the other hand, the justification does not apply if there is an exchange of information in tax matters between the countries concerned, which allows the examination of allegedly artificial arrangements that are not economically justified.[75]

Since, against the backdrop of the free movement of capital, the artificial arrangement relates to the participation process and not, as in the context of the freedom of establishment, to the establishment process, extended requirements are placed on the substance test, there with the opposite conclusion that the requirements should rather be lower.[76]

Thus, case law requires that the tax authorities be given the opportunity to verify the proof of substance and that an exchange of information in the sense of a major information clause must therefore necessarily be agreed with the relevant state.

In the year in dispute 2005, however, there was only the insufficient minor information clause in Art. 27 Double Taxation Treaty-Switzerland, old version, which limits the exchange of information to treaty purposes and cannot be extended to the enforcement of national law like the major information clause.

Accordingly, the application of the exculpation clause pursuant to § 8 (2) AStG old does not violate the free movement of capital in the case in dispute. As expected, the Federal Fiscal Court agrees with the opinion of the ECJ.

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[73] S. MÜLLER – J. KOLLMANN, *Rechtsprechung kompakt: Hinzurechnung: Unionsrecht und Hinzurechnungs-besteuerung von Zwischeneinkünften mit Kapitalanlagecharakter im Drittstaatenfall*, in ISR, 2017, p. 370 ff.; F. L. Giambrone, *Finanzföderalismus als Herausforderung des Europarechts*, 2020

[74] European Court of Justice, Grand Chamber, judgement of 26 february 2019, - C-135/17, ECLI:EU:C:2019:136 - X GmbH, in ISR, 2019, p. 170, in Ubg 2019, 229 with annotations of Esteves Gomes = FR 2019, p. 313; CR. E. GOMES – F. SCHINDLER – C. POHL, *Hinzurechnungsbesteuerung von Zwischeneinkünften mit Kapitalanlagecharackter im Drittstaatenfall (EuGH v. 26.2.2019 - C – 135/17 – X Gmbh*), in Ubg, 2019, S. 229 ff.

[75] European Court of Justice, Grand Chamber, judgement of 26 february 2019, - C-135/17, ECLI:EU:C:2019:136 - X GmbH, in ISR, 2019, p. 170, in Ubg 2019, 229 with annotations of Esteves Gomes = FR 2019, 313 with annotations of Böhmer/Schewe paragraph 95; F. L. Giambrone, *Aspekte des türkischen Familienrechts unter Würdigung rechtserheblicher familienrechtlicher Aspekte des italienischen und österreichischen Rechts. Eine Rechtsvergleichung*, 2016 ISBN: 9788866115496; CR. E. GOMES – F: SCHINDLER – C. POHL, *Hinzurechnungsbesteuerung von Zwischeneinkünften mit Kapitalanlagecharackter im Drittstaatenfall (EuGH v. 26.2.2019 - C – 135/17 – X Gmbh*), in Ubg, 2019, p. 229 ff; J. BÖHMER – B. SCHWE, *Hinzurechnungsbesteuerung*, in Finanzrundschau, 2019, p. 313 ff.

[76] Compare J. SCHÖNFELD, *Die Anwendung der Hinzurechnungsbesteuerung im Verhältnis zur Schweiz*, in IStR, 2016, p. 416 ff.; Vgl. Auch L. DAUTZENBERG, *Interventions for preventing falls and fall-related factures in comunity-dwelling older adults: A systematic review and network meta – analysis*, in FR, 2021, p. 602 paragraph. 3; G. HÖRNICKE - G. KRAFT, *Hinzurechnungsbesteuerung*: *Außensteuerrecht Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, in. Internationale Steuerrundschau, 2022, p. 1 -10.

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In addition, it notes that, moreover, the standstill clause does not apply to the present case, since the amendments by the StSenkG applicable from 2001 (at least for a short time) undermine the grandfathering. With regard to facts of the recent past, the latest changes by the ATADUmsG further promote this argumentation.[77]

To this end, it must first be remembered that, unlike the other fundamental freedoms, the free movement of capital was unilaterally established by the EU Treaty in relation to other countries in the world. It is therefore also relevant for all investments in third countries, and therefore the tax treatment of investments in third countries can always be examined from the point of view of EU law based on additional taxation.

The first is the possibility of denying the existence of a restriction as such, arguing that the burden does not go beyond the burden found in Germany, and second, there is the possibility of referring to the fact that the situation of foreign investment is not comparable to that of a corresponding domestic investment, so that other measures are needed, and thirdly, of course, there is still the possibility that it is a restriction that the EU Treaties expressly allow as an exception.

The last option is above all the standstill clause, which allows the Member States to maintain in certain parts of the movement of capital such restrictions which already existed on 31.12.1993 (i.e. on the date on which the free movement of capital was incorporated into the text of the Treaty).

This possibility of justification is more likely to be ruled out in the specific case, since the German regulations on additional taxation have been amended several times; since a fundamental redesign of the additional taxation is pending during the ATAD implementation, they will be able to take effect even less than before.

If, with regard to the grounds for the judgment of the ECJ, the Federal Fiscal Court initially decided only for the extended additional taxation pursuant to § 7 sec. 6 and 6a AStG old version, that at least in the presence of equivalent administrative assistance restricts the free movement of capital and proof of activity must also be granted in the case of third countries, it confirmed this view a short time later for the regular Additional taxation according to § 7 section 1 AStG old version.[78]

Also in the appeal proceedings to a judgment of the FG Münster,[79] the Federal Fiscal Court reaffirms its line of jurisdiction. The Federal Ministry of Finance reacted to the case law of the Federal Fiscal Court with a letter of application.[80]

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[77] L. DAUTZENBERG, *Interventions for preventing falls and fall-related factures in comunity- dwelling older adults: A systematic review and network meta – analysis*, in FR, 2021, p. 602 paragraph 2.

[78] A. SCHNITGER – S. KRÜGER – L. F. NIELSEN, *Neues zur Unionskonformität der erweiterten Hinzurechnungsbesteuerung*, in IStR 2019, p. 340 (346); F. L. GIAMBRONE, *New Fiscal, monetary, financial, banking and capital perspectives of the European Union*, 2021 .

[79] FINANZGERICHT Münster, *Urteil vom 30.10.2014 - 2 K 618/11 F*; C. KAHLENBERG, *Erfassung passiver Einkünfte als aktiver Grundstücksahandel gem. § 8 AStG von ausländischer (Schweizer) Zwischengesellschaft und Unionskonformität der §§ 7 ff. AStG*, in ISR 2015, p. 306 (Kahlenberg).

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Accordingly, proof of an actual economic activity can also be provided in the case of third countries, provided that the more precisely defined administrative assistance requirements in the sense of a large administrative assistance theft in accordance with Article 26(1) of the OECD-MA.[81]

A distinction must be made in an information clause under Article 26(1) OECD-MA between a large information clause and a small information clause.

If a large information clause has been agreed, information is exchanged both on the implementation of the DTA and on the implementation of the domestic tax law of the other state.

On the other hand, if a small information clause is agreed, only the transmission of such information is carried out that is necessary for the implementation of the DTA (i.e. to avoid double taxation); the exchange of information is thus limited to the taxes covered by the DTA. Such small information clauses are agreed, for example, in the DTAs with developing countries, but also with Australia, Israel, Japan and South Africa as well as with the tax haven countries, as far as there is any information traffic with them at all.

The exchange of information is limited by the principle of reciprocity (see the wording in Art. 26 sec. 1 sentence 1 OECD-MA: "exchange the information"), for example German tax authorities will only carry out an external audit at the request of another state if there are equivalent investigative possibilities abroad.

The exchange of information is still limited by the requirement of the probable relevance for taxation in the recipient state to prevent (double) taxation contrary to the agreement.

This follows from the wording: 'for the purpose of implementing this Agreement or for the administration or application of national law relating to taxes of any kind (...) probably significant (...), as far as the taxation corresponding to this right does not contradict the agreement" in Article 26.1 sentence 1 OECD-MA. In this context, the question arises as to whether the request for information is to be regarded as the

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[80] BUNDESMINISTERIUM FÜR FINANZEN, *BMF- Schreiben v. 17.3.2021 - IV B 5 - S 1351/19/10002:001. „Anwendung des § 8 Absatz 2 AStG* in BStBl I, 2021, p. 342 .

[81] BUNDESMINISTERIUM FÜR FINANZEN, *BMF- Schreiben v. 17.3.2021 - IV B 5 - S 1351/19/10002:001. „Anwendung des § 8 Absatz 2 AStG* in BStBl I, 2021, p. 342; Ch. SMEKAL/ E. THEURL, *Finanzkraft und Finanzbedarf von Gebietskörperschaften,* Böhlau Verlag; with regard of the taxation and civil aspects concerning the turkish family law assets confront F L. Giambrone, *Einige Aspekte zu den Begriffen Errungenschaft und Eigengut im türkischen gesetzlichen Güterstand der Errungenschaftsbeteiligung*",in:Annales de la faculté de droit d Istanbul XLVI, N.63, 285-305,ISSN: 0578-9745, 2014; in view of our original topic concerning the delivering of proof of an actual economic activity, which may be also also provided in the case of third countries, in accordance with Article 26(1) of the OECD-MA cfr. J. EIMLER, *BMF-Schreiben v. 17.3.2021,* in FR 2021, p. 452: *Auslegung des § 8 Abs. 2 AStG durch die Finanzverwaltung,* in FR, 2021, S. 822 ff.; S. KÖHLER, *BMF zu Gegenbeweis bei Hinzurechnungsbesteuerung-Gegendarstellung leider notwendig*, in ISR, 2021, p. 201 ss.; G. HÖRNICKE - G. KRAFT, *Hinzurechnungsbesteuerung*: *Außensteuerrecht Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, in. Internationale Steuerrundschau, 2022, p. 1- 10 ff.

ultima ratio of a clarification of the facts. On 17.06.2012, the OECD Council adopted a new commentary on Art. 26 OECD-MA on tax administrative assistance.
According to this, international administrative assistance must no longer only be provided in individual cases, but also in the case of group enquiries in which the persons concerned must be identified by specific search criteria. However, "fishing expeditions" remain prohibited.
Representatives of Switzerland have also agreed to this amendment. Under this condition, the possible proof procedure is dichotomous.[82]
First of all, in the sense of an activity test, an actual economic activity must be proven on the basis of a "targeted use of resources in the host member state".[83]
There must be active, permanent and sustainable participation in local market events as well as material and personnel resources that allow the independent exercise of core functions.[84] According to local understanding, the view expressed in the BMF letter can be derived from the ECJ's explanatory statements under paragraph 84.
First of all, it should be noted that the ECJ has made a negative distinction by stating that the concept of 'purely artificial design' in the context of the free movement of capital, 'not necessarily' with the indications referred to in paragraphs 67 and 68 of the judgment of 12.9.2006, Cadbury Schweppes Overseas (...), C-196/04 on the serious economic reality of the establishment of a company'.
The quantitative and qualitative requirements for the proof of relief in the area of protection of the free movement of capital therefore do not automatically coincide, i.e. one hundred percent. However, this does not rule out overlaps.
Regarding the indications mentioned in the ECJ decision of 12.9.2006 in connection with the freedom of establishment, the ECJ[85] even states that "these indications may

[82] A. SCHNITGER – R. GEBHARDT – S. KRÜGER, *Hinzurechnungsbesteuerung und Unionsrecht*, in IWB, 2021, p. 344 (355).

[83] BUNDESMINISTERIUM FÜR FINANZEN, *BMF- Schreiben v. 17.3.2021 - IV B 5 - S 1351/19/10002:001. „Anwendung des § 8 Absatz 2 AStG* in BStBl I, 2021, p. 342; Vgl. § 8 Abs. 2 Satz 4 AStG i.d.F. ATADUmsG.

[84] BUNDESMINISTERIUM FÜR FINANZEN, *BMF- Schreiben v. 17.3.2021 - IV B 5 - S 1351/19/10002:001. „Anwendung des § 8 Absatz 2 AStG* in BStBl I, 2021, p. 342, 3; J. EIMLER, *BMF- Schreiben v. 17.3.2021, Auslegung des § 8 Abs. 2 AStG durch die Finanzverwaltung*, in FR 2021, p. 822 (825 f.); A. SCHNITGER - R. GEBHARDT- S. KRÜGER, *Hinzurechnungsbesteuerung und Unionsrecht*, in IWB, 2021, p. 344 (346 ff.); kritisch S. KÖHLER, *BMF zu Gegenbeweis bei Hinzurechnungsbesteuerung – Gegendarstellung leider notwendig*, in ISR, 2021, p. 201 (204 ff.); compare § 8 Abs. 2 Satz 2 AStG i.d.F. ATADUmsG.

[85] Ch. SMEKAL/ E. THÖNI, *Österreichs Föderalismus zu teuer?*, Institut für Föderalismusforschung,Innsbruck; for an overview of the comparison relating to the nomophylactic function of the ECJ in tax matters cfr. C. GIUSTI/ F. L. Giambrone, *The nomophylactic function of the European Court of Justice in tax matters within the italian and German experience. Possible Dispute Settlement Solutions for the Member States,* in, comparative law review 2019, ISSN: 2983-8993. According to the authors try to highlight through some case law examples, the role of the ECJ, which has defined the fundamental dialectic of Community tax law, identifying positive and negative elements of the path of development of tax liberalization consistent with the aims of European integration. It can be affirmed however, that the main object of the decisions of the European Court of Justice regards the application of the principle of non-discrimination and non-restriction of Community freedoms, and in particular cases where the exercise of tax power by individual States may impede the system of competition and thus alter the functioning of the common

also serve as indications of the existence of an artificial arrangement in the context of the application of the rules on the free movement of capital, if it proves necessary to establish the economic reason for a participation in a company, which does not carry out its own economic activities'.

It follows that, in the context of the free movement of capital, the economic activities and the associated substance requirements of the foreign company must also be assessed to prove the relief.

According to the ECJ, the concept of purely artificial design "in the context of the free movement of capital include any provision where the main objective or one of the main objectives is to artificially transfer profits generated by activities in the territory of a Member State to third countries with low levels of taxation'.

This addresses a "second component"[86] of the exoneration evidence, which addresses the purpose of holding the participation.

By requiring both sufficient "proof of substance" in third-country cases with regard to the activity carried out by the foreign company and proof of the purpose of holding the participation, i.e. motivation for participation in the foreign company, the Federal Ministry of Finance´s letter thus expresses the following understanding of the tax administration by the ECJ case law: in third-country cases, an artificial arrangement already exists if the foreign company – taking into account the segmenting approach – does not pursue sufficient economic activity of its own in the other state.

In doing so, the tax authorities are expressing their assessment, which is to be made in this regard according to the statements of the ECJ in paragraph 84 of its decision of 26.2.2019. In this case, there is no need for a separate examination of the holding of the participation, if any, existing special tax motivation.[87]

The situation is different in cases with a connection with third countries, in which the foreign company pursues its own economic activity. Since it is not yet clear whether obtaining a tax advantage is the main purpose or one of the main purposes of the participation, it is necessary to further separate examination of this question.[88]

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market. The examination, in this paper, of the case law of Italy and Germany shows that the Italian legal system can transpose the judgments of the Court of Justice making them immediately applicable by its courts while the German legal system manifests legal difficulties in the automatic transposition of the judgments of the European Court of Justice; for an overview concerning the cost of entitlements between debt control, extraordinary finance instruments and windfall taxes cfr. A.F. Uricchio, *Il costo dei diritti tra controllo del debito, strumenti di finanza straordinaria e windfall taxes,* in «Rivista di diritto finanziario e scienza delle finanze»,2018; Ch. SMEKAL/ E. THEURL, *Finanzkraft und Finanzbedarf von Gebietskörperschaften,* Böhlau Verlag.

[86] J. EIMLER, *BMF- Schreiben v. 17.3.2021, Auslegung des § 8 Abs. 2 AStG durch die Finanzverwaltung*, in FR, 2021, p. 822 (825 f.).

[87] A. SCHNITGER – S. KRÜGER – L. F. NIELSEN, *Neues zur Unionskonformität der erweiterten Hinzurechnungsbesteuerung*, in IStR 2019, p. 340 (345) ff.

[88] A. SCHNITGER – S. KRÜGER – L. F. NIELSEN, *Neues zur Unionskonformität der erweiterten Hinzurechnungsbesteuerung*, in IStR 2019, p. 340 (345) ff.; J. BÖHMER – B. SCHEWE, *Hinzurechnungsbesteuerung*, in Finanzrundschau, 2019, p. 322 ff.; for a deeper insight regarding the european fiscal taxation compare F. L.

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Regarding third-country situations, the tax authorities thus place higher demands on the proof of discharge than in cases subject to the scope of protection of the freedom of establishment.

The fact that the ECJ case law can be understood in this direction will also be partly represented in the literature.[89]

In practice, however, the numerous diverging and conflicting views suggest that there are just as many points of discussion or dispute.

Outsourcing is excluded. At the second stage, the tax authority must prove, by means of the motive test, that there is no purely artificial arrangement by the participation.

The tax administration is based on the provisions of the CJEU in Case X GmbH, according to the arrangements in the context of the free movement of capital and thus, unlike the case of Cadburry Schweppes, they should be considered artificial even if they originate in EU Member States and aim at making profits in (any) third countries or to shift low-taxing areas.[90]The Federal Ministry of Finance calls for proof of "strong" economic areas for reasons which are not primarily intended to obtain a tax advantage.[91]

Giambrone, *Finanzföderalismus als Herausforderung des Europarechts,* Collana del dipartimento Jonico in "Sistemi Giuridici ed Economici del Mediterraneo: societá, ambiente e culture", 2020, according to whom analyses show that national fiscal policy can make an effective contribution to stabilisation. Against this background, the Stability and Growth Pact and budgetary consolidation in good times are in the in the self-interest of each member state. International transfers - for instance within the in the framework of a fiscal capacity at the Union level - are not necessary as a stabilisation instrument; In order to come back to the original topic in question regarding the interpretation of the ECJ and its concept of purely artificial design "in the context of the free movement of capital include any provision where the main objective or one of the main objectives is to artificially transfer profits generated by activities in the territory of a Member State to third countries with low levels of taxation'; for an overview concerning the Environmental emergencies and imposition cfr. A. F. URICCHIO, *Environmental emergencies and imposition.* In: AA. VV.. (ed.): A. F. URICCHIO - G. SELICATO - M. AULENTA, La dimensione promozionale del Fisco (2015); tracing back our original topic whether obtaining a tax advantage is the main purpose or one of the main purposes of the participation cfr. N. FÄRBER, *Ausweitung des Substanztest auf Drittsaatenfälle*, IWB 2019, p. 812 ss.; A. SCHNITGER – R. GEBHARDT – S. KRÜGER, *Hinzurechnungsbesteuerung und Unionsrecht*, in IWB, 2021, p. 344 ss; s. aber auch z.B. S. KÖHLER, *Hinzurechnungsbesteuerung im Drittstaatenfall kann ab 2001 durch die Kapitalverkehrsfreiheit gesperrt sein*, Internat.SteuerRund. 2020, p. 175 ss.; G. HÖRNICKE- G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformitaet des § 8 Abs. 3 AStG*, ISR 2022, S. 1 ff.

[89] D. HECKERODT – G. TITZ – M. PETER, *Finale Verlustberücksichtigung- Eine Analyse der Schlussanträge der Generalanwältin Kokott am EUGH zur finalen Verlustberücksichtigung*, in IStR, 2019, p. 683 ff.

[90] Compare European Court of Justice, judgement v. 26.2.2019 - C-135/17, ECLI:EU:C:2019:136, Ubg 2019, 229 m. Anm. Esteves Gomes, FR 2019, 313 with annotations of Böhmer/Schewe Rz. 84 - X GmbH; S. KÖHLER, *BMF zu Gegenbeweis bei Hinzurechnungsbesteuerung – Gegendarstellung leider notwendig*, in ISR, 2021, S. 201 ff.; J. EIMLER, *BMF-Schreiben v. 17.3.2021*, in FR 2021, p. 452: *Auslegung des § 8 Abs. 2 AStG durch die Finanzverwaltung,* in FR, 2021, S. 822 ff.

[91] BUNDESMINISTERIUM FÜR FINANZEN, Urteil v. 17.3.2021 - IV B 5 - S 1351/19/10002:001, BStBl. I 2021, 342, 4. Vgl. abweichend EuGH v. 26.2.2019 - C-115/16, ECLI:EU:C:2019:134 - N Luxembourg 1.

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Thus, the Court of Justice only imprecisely implements the requirements of the Court of Justice, according to whose will the economic activity (freedom of establishment) or the purposes of the design (capitalisation) are evident.
A test of motives is not required by § 8(2) of the External Tax Act (AStG), as amended, and is the only free interpretation of the ECJ's judiciary in order to cure the rule contrary to the free movement of capital in the case of third countries.

6.2. The relevance of § 8(3) of the External Tax Act, as amended by the Act implementing the Anti-Tax Avoidance Directive (ATADUmsG) with regard of the exceptions of the activity test enshrined towards third countries

In spite of the requirement of the CJEU, the legislature, by means of Paragraph 8(3), has: External Tax Act as amended by the Act implementing the Anti-Tax Avoidance Directive (ATADUmsG) apart from this, the activity test under Section 8(2) of the External Tax Act should be allowed in the case of a third country.
The explanatory memorandum refers, first, to the exclusion of third countries authorised by Article 7(2)(a)(3) of the Anti-Tax Avoidance Directive (ATAD) and, secondly, to the case-law of the Court of Justice in Test Claimants in the FII Group Litigation.
Accordingly, in cases where the applicable rule is based on the greater influence of a shareholder on the basis of his shareholding, the freedom of establishment is to be limited to the area of freedom of establishment and thus the freedom of movement of capital, which also protects participation and which is applicable in third countries, is to be displaced in cases where the applicable rule is based on the greater influence of a shareholder on the basis of his shareholding.
Accordingly to the case-law of the Court of Justice, the restriction on the free movement of capital must, according to the settled case-law of the Court of Justice, be restricted to the scope of protection and thus the freedom of capital protection, which also protects the interests of participation and which is applicable in the case-law in third countries, is to be replaced by Article 7 of the Act of First Instance. Since, according to the legislature, the latter only relies on a certain influence, the scope of protection of the freedom of establishment to be taken into account exclusively in relation to the European Union applies only.
In the first place, it must be said that an assessment of primary law does not preclude the requirement of the Secondary Anti-Tax Avoidance Directive (ATAD) that, in accordance with Article 7(2)(a), subsection 3, Anti-tax Avoidance Directive (ATAD) may be excluded from the activity test for third countries. It is true that the legal interpretation has found that a law resulting from a final harmonisation of secondary

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law must no longer be measured in accordance with primary law, but rather by that harmonisation measure.[92]

However, on the one hand, that view is in dispute that the assessment on the basis of the harmonisation measure must not mean the exclusion of primary requirements.[93]

On the other hand, it is doubtful whether the nature of final harmonisation in the case of the Anti-Tax Avoidance Directive (ATAD) is at all fulfilled, since the national legislature, in view of the minimum level of protection laid down in Article 3 of the Anti-Tax Avoidance Directive (ATAD), has remained a visible scope for transposition in the transformation of the Directive. Consequently, the secondary legislation cannot shield the transformed standard from a prima facie case.

In the second place, the legislature's argument is open to discussion that the free movement of capital is replaced by the freedom of establishment, which is not applicable in the case of non-member countries, which gives priority protection on the basis of the recast rule.

The extent of the scope of the provision at issue is decisive for the delimitation of the fundamental freedoms.

According to settled case-law of the European Court of Justice (CJEU) and the Bundesfinanzhof (Federal Finance Court, BFH), the free movement of capital can only be pushed by the freedom of establishment if the rule in question is based solely

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[92] European Court of Justice, Chamber 1, judgement 8 march 2017, C-14/16; European Court of Justice, Chamber 6, judgement 20 december 2017, C-504/16; European Court of Justice, Chamber 6, judgement 20 december 2017, C-613/16; HÖRNICKE - G. KRAFT, *Außensteuerrecht Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, in ISR, 2022, p. 1 ff.

[93] European Court of Justice, Schlussanträge GAin Kokott v. 10.1.2019 - C-607/17, ECLI:EU:C:2019:8 – Memira paragraph 23 f.; E. REIMER, *Steuerliche Diskriminierung und Beschränkung*, Rz. 7.19, in H. SCHAUMBURG - J. ENGLISCH, *Europäisches Steuerrecht*; for a better understanding regarding some judgements of the ECJ in sport matters cfr. C. Giusti/ F. L. Giambrone, *The Biffi Judgement and the Suarez case. Judicial decision of the ECJ and possible reforms of the italian civil code from an european point of view*, 2020, in, Annali del CERSIG, ISBN: 9791280164100, according to the authors through its judgments Biffi 1 and UB (both 2019), the ECJ set new accents by further extending the effect of the special characteristics of sport (Article 165 TFEU). In doing so, the ECJ expanded them in a way that sports federations had most likely not hoped for, let alone expected. However, as the present contribution will show, the two decisions were not so inconsistent either, they systematically applied the special characteristics and the term common market developed by the ECJ for decades, long before the political decision of the Fontainebleau European Council (1984) to implement a programme for the achievement of agenuine internal market in 1985-92, as a dynamically legitimate, dynamically developed by the ECJ, functionally interpretable, economic policyoriented legal property (again) confirmed.; with regard of a deeper understanding of some principles of Italian tax law: the ability to pay principle and the associated tax base cfr. A.F. Uricchio/ F.L.Giambrone, *Einige Prinzipien zum italienischen Steuerrecht: das Leistungsfähigkeitsprinzip und die damit einhergehende Bemessungsgrundlage*, in A.F. Uricchio/ F.L.Giambrone, *Neue Entwicklungen im italienischen Steuerrecht als Herausforderung des neuen Europäischen Entwicklungsprozesses*, 2020, Cacucci Editore, Bari.

J. SCHÖNFELD - B. ELLENRIEDER, Das Verhältnis von Primär – und Sekundärrecht- oder: Gibt es gegen Primärrecht immunisiertes Recht?, StuW, 2019, S. 253 ff.; R. WACKER, *Zur praktischen Konkordanz von Grundfreiheiten und EU-Richtlinien auf dem Gebiet der direkten Steuern*, in K.D. DRÜEN - R. HEY - R. MELLINGHOFF (Hrsg.), *100 Jahre Steuerrechtssprechung in Deutschland 1918-2018*, FS BFH, 2018, S. 781 ff.

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on a certain influence on the decisions of the company, that is to say, a (company) control.
On the other hand, where a rule covers (also) 'participations made with the sole intention of investing money without any influence on the management and control of the undertaking', the free movement of capital applies.[94]

6.3. Interpretation of Paragraph 7(2) of the External Tax Act, as amended by the Act implementing the Anti-Tax Avoidance Directive (ATADUmsG)
In order to determine whether the free movement of capital extends its scope of protection, it is necessary to examine whether Paragraph 7 of the Law on Foreign Tax covers only situations in which there is a certain influence on the intermediary company by the taxpayer.
In detail, Paragraph 7(2) of the AStG specifies the following mastery—State of affairs which (in each case involving related persons) fulfils the subjective circumstances of Section 7 of the External Tax Act:
• The taxpayer holds more than half of the voting rights in the intermediary company, either directly or indirectly; or
• the taxpayer holds, medium or immediate, more than half of the shares in the nominal capital of the intermediate company; or
• the taxpayer is entitled, medium or direct, to more than half of the profits or liquidation proceeds of the intermediate company.
It is justifiable that the first two acts of control indicate a certain influence of the tax provisions on the decisions of the intermediary company.
Both the voting rights and the shareholding in the nominal capital in the amount of over 50 % generally mean control of the company and of its capital.[95]Nevertheless, the ECJ also affirmed the application of the free movement of capital in a case in which the shareholding was almost 100 percent, but at the same time a minimum participation rate of 10 percent was prescribed by law.
In contrast, the more than half-yearly (indebtedness) claim to the profit or liquidation proceeds of the intermediate company, without any further links under company law being relevant according to the wording.[96] In contrast to voting rights and shareholdings, which are in the abstract at the beginning of the value chain, where a secure influence is important economically, profit sharing under debt law does not,

[94] J. KOKOTT, *Das Steuerrecht der Europa*‿*ischen Union*, § 3 paragraphs 96, 99.
[95] European Court of Justice, chamber V, judgement 24 november 2016, C-464/14, ECLI:EU:C:2016:896 - SECIL, IStR 2017, 118 paragrah 40, 79; G. KRAFT, *Die Abgrenzung der Kapitalverkehrsfreiheit von der Niederlassungsfreiheit*, in NWB, 2018, p. 698; Ch. SMEKAL/ E. THÖNI, *Österreichs Föderalismus zu teuer?*, Institut für Föderalismusforschung,Innsbruck;
[96] S.E. BÄRSC - X. DITZ - C. ENGELEN - C. QUILITZSCH, *Die Zwei-Sa*‿*ulen-Lo*‿*sung zur Reform des internationalen Steuerrechts vom Oktober 2021,* DStR 2021, 1785 (1786); G. HÖRNICKE – G. KRAFT, *Außensteuerrecht Die zweifelhafte Unionsrechtskonformita*‿*t des § 8 Abs. 3 AStG,* in ISR, 2022, S. 1 ff.

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prima facie, influence the operational and strategic company decisions, since the creditor of the profit distribution does not automatically have a participation or control option.[97]

For example, the case of a part-party loan agreement containing a profit-sharing clause setting out the share of the profit as a transfer fee for the loan instead of a fixed interest rate determined.[98]

However, it can be considered that a more than half-time right to profit in practice is often based on a corresponding shareholding and that this reflects congruently the relative level. However, there is no need to examine the specific individual case since, according to the ECJ, this is to be carried out only in Union conduct.

However, in a context, which concerns the tax treatment of dividends from sources in a third country, it must be assumed that the examination of the subject-matter of national legislation is sufficient to assess whether the tax treatment of dividends from sources in a third country falls within the provisions of the Treaty on the free movement of capital.'[99]

Thus, this practice case is not relevant for the grammatical interpretation with regard to third countries. The historical-teleological interpretation may lead to a different conclusion.

The telos of additional taxation may have a diffusive effect, but[100] at least correspond to the fight against tax avoidance by means of (corporate) CFC schemes (controlled foreign corporation rules). In addition to a debt-law element, a company law element is therefore necessary in order to establish a dominant position.[101]

To this extent, the sole criterion of control under the law of liability of the more than half-time profit claims pursuant to Section 7(2) of the External Tax Act (AStG) could be a regulatory gap which is contrary to the plan, which must be closed by means of teleological reduction.

In other words, the legislature seems to regard the sure influence as a necessary condition of a controlled society without having correctly translated that requirement into the wording of the law.

Consequently, the broad criterion of a more than half-time share of profits must not trigger the legal consequence of additional taxation, provided that no additional

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[97] M. KÜHN - T. SCHIENKE- OHLETZ , *Die geplante Reform der Hinzurechnungsbesteuerung nach §§ 7 ss. AStG unter Beachtung europarechtlicher Vorgaben*, in BB, 2020, S. 1562 ff.

[98] C. KAHLENBER - C. QUILITZSCH, *Das Ende der Hinzurechnungsbesteuerung in Drittstaatenfällen*, in IStR, 2021, S. 135 ff.

[99] European Court of Justice, Grand Chamber, judgement 13 november 2012 , C-35/11 EuGH v. 13.11.2012, ECLI:EU:C:2012:707 - Test Claimants in the FII Group Litigation, in IStR 2012, p. 924 paragrah 93 ff

[100] G. KRAFT in Kraft, Vor § 7 AStG Rz. 20.

[101] X. DITZ – F. WASSERMEYER, *Vor §§ 7-14 AStG Rz. 84,* in FLICK – F. WASSERMEYER – BAUMHOFF - SCHÖNFELD (edited by), *Außensteuerrecht*, 2021.

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conditions under company law are met. However, such an interpretation is contrary to the secondary law basis of the provision, since Article 7(1)(a) of the Anti-Tax Avoidance Directive (ATAD) also requires that the criterion of dominance under the law of obligations of qualifying profit-sharing is required, without linking it to the simultaneous fulfilment of a company-law situation.[102]

The minimum level of protection provided for in Article 3 of the Anti-Tax Avoidance Directive (ATAD) prohibits that criterion from being cast within narrow limits.

A directive-compliant interpretation of Paragraph 7(2) of the External Tax Act (AStG) therefore does not allow teleological reduction. This conclusion is also the result of an examination of the internal system of the norm, since a social-legal element to be read in at most is the domination criterion of the profit claims with the other mentioned subjective elements of fact would be redundant.[103]

Further support results from the adoption of the Act in concert pursuant to the first sentence of Paragraph 7(4) of the External Tax Act (AStG), which, in addition to Paragraph 7(2) and (3) in conjunction with Paragraph 1(2) of the External Tax Act (AStG), characterises as close persons who show a concerted conduct. Consequently, potentially marginally involved persons are included in the control concept of Section 7 of the External Tax Act (AStG) and (continued) portfolio or free float shareholdings are registered.[104]

This is regularly only a fictitious control, but not an actual sure influence. This is not altered by the fact that an apparently concerted behaviour of the persons may indicate a certain influence on the basis of equal interests in individual cases, but not in general.

Since Paragraph 7 of the Law on Taxation in Foreign Relations (External Tax Act) does not only focus on a certain influence, the broader scope of protection of the free movement of capital applies.

Consequently, the legislator's view cannot be accepted that, in the case of regular taxation of additions, the activity test may be carried out on a territorial basis. In the light of the open free movement of capital, Paragraph 8(2) and (3) of the Law on Taxation in Foreign Relations (AStG) must be assessed against the case-law of the Court of Justice in the light of the old version of Paragraph 8(2) of the AStG in X GmbH. The existence of a large mutual assistance clause is essential in order to justify the application of the activity test in a third country.[105]

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[102] X. DITZ – C. QUILITZSCH, *Die Neuregelung der Hinzurechnungsbesteuerung durch das ATAD-Umsetzungsgesetz,* in Ubg, 2021, p. 485 ff.

[103] R. GEBHARDT – S. KRÜGER, *Die Hinzurechnungsbesteuerung im Drittstaatenfall. BFH, Urteil v. 22.5.2019 – I R 11/19 und Anmerkungen zum Entwurf für ein ATADUmstG*, in IWB 2020, p. 109 ff.

[104] X. DITZ – O. EKINCI, *Substanztest nach § 8 Abs. 2 AStG Aktuelle Entwicklungen und Analyse des BMF-Schreibens vom 17.3.2021*, Ubg 2021, p. 361 ss.

[105] Paragraph 8(4) of the AStG takes that criterion into account only in the case of the European Union.

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This circumstance is not taken into account in the law in the case of a third country apart from Paragraph 8(4) of the AStG, so that it is logical to conclude that Paragraph 8(2) and (3) of the Law on Taxation in Foreign Relations (AStG) is to be regarded as contrary to EU law by excluding third countries and, in particular, Switzerland. An interpretation in conformity with EU law can therefore only be made against the wording of Paragraph 8(3) of the Law on Foreign Tax (AStG).

7. General aspects concerning the right of freedom of establishment as a fundamental freedom in relation to third countries: the case of Switzerland

7.1. Treaty and Liberties

Switzerland is a special case among third countries. The free movement agreement between Switzerland and the EU,[106] concluded in 1999 and entered into force in 2002, contains mobility guarantees based on the fundamental freedoms of EU law, which are regarded as freedoms in the relationship between Switzerland and the EU Member States. In contrast to the EEA Agreement, however, there is no direct adoption of the provisions of EU law.[107]

In doing so, the Agreement, in accordance with Article 16(1) of the FZA (Free Movement Agreement between the Swiss Confederation and the European Community and its Member States), refers to the application of freedoms, including barriers and barriers, in the same way as European fundamental freedoms, and stresses the consideration of the case-law of the Court of Justice, Article 16(2) of the FZA (Free Movement Agreement between the Swiss Confederation and the European Community and its Member States).[108]

Although, in accordance with the first sentence of Article 16(2) of the FZA (Free Movement Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States), that is to say only the case-law passed before the conclusion of the agreement, the purpose of the internal market approximation of laws is also to allow interpretation in the light of recent case-law, in so far as the Court of Justice does not deviate from its previous legal training.[109] The

[106] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 21.6.1999, AS 2002, 1529, p. OJ 2002 L 114, 6; HÖRNICKE/KRAFT, *Außensteuerrecht Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, ISR 2022, p. 1 ff.

[107] B. KAHIL- WOLFF – R. MOSTERS, *Das Abkommen u*˘*ber die Freizu*˘*gigkeit EG Schweiz*, in EuZW 2001, p. 5 ss.

[108] A. SÖFFING – J. F. BRON, *Die Wegzugsbesteuerung im Verhältnis zur Schweiz unter Berücksichtigung des Freizügigkeitsabkommens*, RIW, 2009, p. 358 ff.

[109] K.D. DRÜEN – J. HEY – R. MELLINGHOFF, *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018*, FS BFH, 2012, p. 1995.

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objective of the FZA is to ensure that the free movement of persons under the TFEU is, at least in part, in relation to Switzerland to implement.[110]

To that end, Articles 3 and 4 of the FZA (Free Movement Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States) regulate both the entry and the right of residence and occupation of employed and self-employed workers.

The right to freedom of establishment is further specified in Article 12 et seq. Annex I FZA. Article 15(2) of Annex I, read in conjunction with Article 9 of Annex I of the FZA (Free Movement Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States), requires a specific prohibition of discrimination, which explicitly also concerns 'tax advantages'.

A self-employed worker of the other State may not, on the basis of his nationality, be treated differently from an inland Member State.

In addition, freedom of establishment in accordance with Article 15 of Annex I of the FZA contains a prohibition of restriction, which is not explicitly named in accordance with the prevailing teaching, but which, inter alia, read into the legislation in the light of Article 16(2) of the FZA.[111]

The prohibition of the prohibition of restrictions laid down in Article 16(2) of the FZA provides that an unjustified State measure taken by a contractual partner of the FZA (freedom of movement agreement between the Swiss Confederation, on the one hand, and the European Community and its Member States) it must not be appropriate to restrict the mobility guarantees provided for in the Agreement and, therefore, as regards freedom of establishment, do not prevent a person protected by the Convention — including nationals — from being free to choose the place to pursue his/her self-employed activity.[112]

In accordance with Article 12(1) of Annex I in conjunction with Article 15 of Annex I to the FZA, the right of establishment protects all self-employed workers who are nationals of a contracting party to the FZA and wish to establish themselves in the State of another contracting party to pursue their activities.

The scope of the freedom of establishment under Articles 3, 4 in conjunction with 12 et seq. of Annex I to the FZA is essentially comparable and, in particular, with regard to the entry and residence of persons Article 49 TFEU. Nevertheless, the freedoms enshrined in the FZA fall short of the fundamental freedoms of the TFEU.[113]

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[110] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 142 .

[111] S. OESTERHALT, *Diskriminierungsverbote im internationalen Steuerrecht der Schweiz*, in Archiv für Schweizerisches Abgabenrecht 2010/2011, p. 269 ss.

[112] M. REICH – B. KÖNIG, *Europäisches Steuerrecht*, p. 47 ss.

[113] C. HARDT, *Art. 25 DBA Schweiz*, in F. WASSERMAYER (edited by), *Doppelbesteuerung: DBA. Loseblatt Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, 2022, Rz. 104.

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Since, while Article 54 TFEU extends the personal scope of the right to freedom of establishment to legal persons, under Article 12(1) of Annex I of the FZA, only natural persons and associations of persons qualify for the right of establishment of the FZA; however, the Convention should also be able to protect legal persons if their establishment indirectly to a natural person who can rely on the protection of the Convention is based on the fact that it is established by virtue of that person's right of establishment. The material scope of Article 12 of Annex I to the FZA and Article 49 TFEU is congruent, based on Article 16 of the FZA.[114]

7.1.1. Displacement of the free movement of capital in individual cases

Paragraph 7 of the AStG is a neutral provision which, in abstract terms, does not focus solely on a secure influence or solely on the intention of investing money.

In the case of the European Union, it is therefore necessary to examine the circumstances of the specific individual case in order to determine whether the freedom of establishment or the free movement of capital defines the scope of protection. In the case of a third country, it is not necessary to examine the specific individual case, since, under Article 63 TFEU, only the free movement of capital may apply and an examination of the other fundamental freedoms in the light of their territorial restriction is excluded.[115]

Something else must apply to the special relationship with Switzerland, in which the right of establishment enshrined in the FZA, in conjunction with Article 12 et seq. of Annex I of the FZA, has a protective effect and, under Article 49 TFEU at least partially equivalent freedom, competes with the free movement of capital pursuant to Article 63 TFEU.[116]

Since the FZA, pursuant to Article 216 TFEU, is a member of the EU legal order,[117] would counteract its purpose if, instead of a delimitation customary in the relationship with the European Union, the freedom of movement of capital always extends its scope of protection, unless a freedom of the FZA (Free Movement Agreement) is exclusively concerned.

Similarly, the Court of Justice in the Wächtler case, in which the Court of Justice preferred the application of the FZA right of establishment over the examination of the free movement of capital consequently, the considerably softer free movement of capital cannot generally take precedence over the right of establishment of the FZA.

Consequently, a case-by-case examination similar to the EU case is shown.

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[114] WEIGELL, *Steuerstrafrecht*, IStR 2006, 190 (193).

[115] European Court of Justice, Grand Chamber, judgement 13 November 2012, C-35/11

[116] C. HARDT, *Art. 25 DBA Schweiz*, in F. WASSERMAYER (edited by), *Doppelbesteuerung: DBA. Loseblatt Kommentar zu allen deutschen Doppelbesteuerungsabkommen*, 2022, Rz. 13.

[117] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 32 .

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The examination on a case-by-case basis leads to the fact that the right of establishment under Article 4 in conjunction with Article 12 et seq. of Annex I to the FZA may supersede the free movement of capital pursuant to Article 63 TFEU, provided that a certain influence is established within the meaning of the ECJ's case-law in the specific circumstances.[118]

It is true that an interpretation of the FZA in accordance with the first sentence of Article 16(2) of the FZA can automatically take over only the case-law of the Court of Justice, which was given up to the conclusion of the FZA in 1999. Nevertheless, the ECJ has already explained in its earlier case-law the delimitation of the free movement of capital from the freedom of establishment[119]and confirmed in recent case-law.

The CJEU deals with a situation in which a company resident in Switzerland triggered the German taxation of additions in the case X Gesellschaft with limited liability and, in this context, examines the free movement of capital without referring to the FZA-Establishment Law.[120]

This can be explained by the fact that the passive income at issue in the main proceedings was investment in nature and, consequently, triggered the increased additional taxation under Paragraph 7(6) and 6a (AStG) of the old version.[121]

Since the increased additional taxation covers abstract shareholdings of just 1 %, which precisely do not indicate a certain influence, the application of the freedom of establishment or the right of establishment in competition with the free movement of capital is excluded.

The Court thus did not have to examine the application of the FZA and the potential suppression of the free movement of capital.

The Federal Finance Court should have come to a different conclusion when the court applied the judgment of the Court of Justice in Case X, limited liability company, to a situation in which the sole shareholder of a limited liability company opposed the general taxation of additions. If the plaintiff's right to enter into an agreement was justified, it would probably have been appropriate for the firm influence of the shareholder to have the primary examination of the FZA law of establishment.

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[118] European Court of Justice v. 1.6.1999 - C-302/97, ECLI:EU:C:1999:271 - Konle, Slg. 1999, I-3099 paragraph 22.

[119] European Court of Justice v. 19.7.2012 - C-31/11, ECLI:EU:C:2012:481, ISR 2012, 23 (Steger) - Scheunemann, EuZW 2012, p. 751 paragraph 30; F. L. Giambrone, *Tax Treatment of professional football players remuneration in Germany and Italy. A comparative and EU analysis of a sector with tax gaps from a fiscal and administrave angle,* in, amministrativ@mente,FASCICOLO N. 1/2022, ISSN 2036-7821.

[120] European Court of Justice v. 26.2.2019 - C-135/17, ECLI:EU:C:2019:136 - X GmbH, ISR 2019, 170 = Ubg 2019, 229 m. Anm. Esteves Gomes = FR 2019, 313 with annotations of Bo◉hmer/Schewe paragraph 26 ff.

[121] European Court of Justice v. 26.2.2019 - C-135/17, ECLI:EU:C:2019:136 - X GmbH, ISR 2019, 170 = Ubg 2019, 229 m. Anm. Esteves Gomes = FR 2019, 313 with annotations of Bo◉hmer/Schewe paragraph 12.

In another case, the Baden-Württemberg Federal Court ruled on the suspension of the implementation of the additional taxation applied by a taxpayer on the basis of the unexplained application of the activity test under EU law in cases outside the EU.[122]

The defendant tax office rejected the taxpayer's objection, since the freedom of establishment could not develop protection due to a lack of EU/EEA membership of Switzerland and the FZA did not make any statements as to the interests of legal persons in the present case. Although the Fiscal Court of Baden-Württemberg upheld the application for suspension of implementation, it did not deal with the application in question of the free movement agreement between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA).

This also applies in relation to Switzerland, especially since only a few decisions of the CJEU have been issued so far on the importance of the free movement agreement for tax law and there is no doubt that there that the free movement agreement entered into force on 1.6.2002 and may be legally relevant for the additional taxation in the case of the applicant.[123]

7.2. Infringement of the Agreement between the Swiss Confederation and the European Community on the free movement of persons regarding the law of establishment

With regard to the prohibition of restrictions to be read in Article 15 of Annex I to the Free Movement of Persons Agreement between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA), the question is raised in writing whether the right of establishment of the FZA allows an application of the activity test under Paragraph 8(2) of the Law on Taxation in Foreign Relations (AStG) in the case of an intermediary company resident in Switzerland, without any final answer to it being found.[124] In any event, only Mayer comes to the conclusion, with regard to Paragraph 8(2) of the AStG, that the right of establishment of the FZA enjoys its protection.

Protection under the right of establishment must be protected by the right of establishment.

From a personal point of view, according to the above explanation, the person controlling the intermediary company within the meaning of Paragraph 7 of the AStG must be a natural person entitled to the agreement or a legal person in which in turn a natural person entitled to the agreement is a controlling party. As regards the objective scope of protection, it is necessary that the intermediate company fulfils the

[122] FINANZGERICHT Baden-Wu◎rttemberg, Beschluss v. 12.8.2015 - 3 V 4193/13, in EFG, 2016, p. 17.

[123] FINANZGERICHT Baden-Württemberg, Beschluss v. 12.8.2015 - 3 V 4193/13, EFG 2016, 17 Rz. II.2.a.

[124] X. DITZ - F. WASSERMAYER, *Vor §§ 7-14 AStG*, in FLICK – WASSERMAYER - BAUMHOFF – J. SCHÖNFELD, *Außensteuerrecht. Kommentar*, 2021, *Paragraph* 70.

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criteria of establishment and self-employed activity within the meaning of Article 12(1) of Annex I of the FZA.

The terms are in accordance with Article 16(2)(Freedom of movement agreement between the Swiss Confederation, of the one part, and the European Community and its Member States) to be interpreted in the light of the law further developed by the Court of Justice, so that stable and lasting participation in the economic life of the State of establishment, as well as the self-assessment of activity and a business risk with the result of a benefit, are required.[125]

In those circumstances, the material scope of the right of establishment is open and the person entitled to the agreement may rely on Article 4, read in conjunction with Article 12 and Annex I, to the free movement of persons between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA). Sections 7 and 8 of the AStG could infringe the right of establishment.

Since the legal consequence of additional taxation is limited, in the first place, to domestic tax entities who, as a result of their company-law involvement abroad, are potentially subject to a tax consequence which would not have occurred in purely domestic cases and which may deter a taxpayer from setting up a settlement abroad, it is conceivable that the prohibition of restrictions laid down in Article 12 of Annex I, read in conjunction with Article 15 of Annex I of the FZA, may be infringed.

An extension to non-residents is conceivable in view of the new concept of domination based on shareholders in accordance with Section 7(2) of the AStG, so that a violation of the prohibition of discrimination could also be discussed.

However, the result seems to be congruent with that of the prohibition of restrictions examined here.[126]

The question of a restriction of lower law could be answered with reference to the case-law of the Court of Justice in Cadburry Schweppes.[127]

The Court accepts in the affirmative that freedom of establishment is restricted on the ground that the legislation at issue precludes the exercise of a tax advantage.[128]

However, it should be noted that, in accordance with the first sentence of Article 16(2), the free movement of persons agreement between the Swiss Confederation and the European Community and its Member States (FZA) must be taken into account only the case-law of the Court of Justice, which was adopted before the conclusion of the FZA.

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[125] European Court of Justice v. 14.9.2006 - C-386/04, ECLI:EU:C:2006:568 - Centro di Musicologia Walter Stauffer, FR 2007, 242, Slg. 2006, I-8203 paragraph 18.

[126] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 359 ff.

[127] TH. STANDELMANN, *Rechtsschutz in Steuersachen in der Schweiz*, in K.D. DRÜEN – J. HEY – R. MELLINGHOFF (edited by), *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018*, FS BFH, 2012, p. 1995.

[128] European Court of Justice, Grand Chamber, judgement 12 september 2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, p. 987 with annotations of Lieber, Slg. 2006, I-8031 paragraph 46.

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The same applies to recent jurisprudence and thus also to the judicate in Cadburry Schweppes, which adds new aspects to the former CJEU judicature and does not have to be taken into account.[129]

Nevertheless, it seems likely that the same conclusion should be drawn for the lower law of the FZA, as the Court of Justice has done for freedom of establishment under Article 49 TFEU.

For, in accordance with the prevailing doctrine, a prohibition of restrictions in Article 15(1) of Annex I Free movement agreements between the Swiss Confederation and the European Community and its Member States (FZA) are read in, thus any worsening of cross-border situations has a restrictive effect on purely domestic situations.[130]

Admittedly, the offsetting of the foreign tax against the additional amount under Paragraph 12 of the AStG could mean that there is no comparatively disadvantageous and thus restrictive taxation. A less favourable treatment, however, consists of the fact that, in purely domestic cases, the taxpayer may use distribution privileges such as the partial income tax procedure under Paragraph 3(40) of the Income Tax Act (EStG) or the rate of payment tax pursuant to Paragraph 32d(1) in conjunction with Paragraph 43(5) of the Income Tax Act (EStG) or the box privilege pursuant to Paragraph 8b of the Corporation Tax Act (KStG) and Paragraph 9(7) of the Trade Tax Act (GewStG), which are prohibited under the fourth sentence of Paragraph 10(2) of the AStG in the case of addition under foreign tax law.[131]

In the Cadburry Schweppes case, the CJEU has held that it is possible to justify it on overriding reasons in the public interest and thus to prevent abuse.

Nevertheless, for the purposes of proportionality, the legislation in question must not go beyond what is necessary.

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[129] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 359 ss.

[130] A. EPINEY – R. MOSTERS – S. THEUERKAUF, *Die Rechtsprechung des EuGH zur Personenfreizügigkeit*, in ZBJV, 2005, p. 1 ss.; N. HÄCK, *Stundung der Vermögenzuwachssteuer (§6 AStG) bei Wegzug in die Schweiz*, in IStR, 2011, 797 ss.; P. HINNY, *Das Diskriminierungsverbot der Personenverkehrsabkommens im Schweizer Steuerrecht*, in FStR, 2004, p. 165 ss.; S. OESTERHALT - A. OPEL, Reform der *Verrechnungssteuer und Umsatzabgabe. Bundesgesetz vom 17. Dezember 2021 zur Stärkung des Fremdenkapitalsmarkts*, in Expert Focus, 2021, p. 74 ss.;for a better understanding regarding the future of the European scenarios compare A. F. URICCHIO/F.L.GIAMBRONE, *The EU budget powering the recovery plan for Europe*, in, Open Review of Management, Banking and Finance, 2020, ISSN 2058-7422 ; S. OESTERHALT – M. DUBASCH, *Anwendungsbereich des Meldeverfahrens bei geldwerten Leistungen*, in Expert Focus, 2021, p. 74 ff.; Frist *Bundesgericht vom 19.1.2011*, in ASA, 2010/2011, p. 269 ff.

[131] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 360 ss.

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However, the lack of differentiation between situations which, on the one hand, are based on an artificial arrangement and, on the other hand, a genuine economic activity, makes the justification of the anti-abuse defence disproportionate.[132]
In this context, the Court has made clear that the taxable person who may rely on the freedom of establishment must be given the opportunity to establish a genuine economic activity. For this reason, the German legislature has adopted Paragraph 8(2) Law on Taxation in Foreign Relations (AStG) in order to cure the old version of Paragraphs 7 to 14 of the AStG to cure the restriction on freedom of establishment, which is considered to be widely probable.[133]
Without this possibility of proof, the justification for anti-abuse reasons based on purely artificial arrangements must be disproportionate.[134]
Against the background of the Agreement on the free movement of persons between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA) shall be based on Article 21(3) of the FZA for any justification. First, it refers to the effective enforcement of taxation as a justification.
This reason does not apply in the context of additional taxation. It is true that Switzerland does not provide recovery aid in tax matters. However, this is not necessary for the purpose of additional taxation, as taxation is in any case done with the taxpayer resident in Germany and access by the German tax authorities is easily possible.[135]
In order to ensure effective fiscal control, only mutual assistance in information matters is therefore necessary. Since its revision on 1 January 2011, Article 27(1) of the Double Taxation Convention-Switzerland contains a large information clause that satisfies the demands of the ECJ and the Federal Fiscal Court.
First sentence of Article 27(1) of the DBA-Switzerland: "The competent authorities of the Contracting States shall exchange information likely to be relevant for the implementation of this Agreement or for the application or enforcement of national law relating to taxes of any kind and designation [...]."
In addition, there is a separate mutual assistance agreement between the two States, which, in its current version entered into force on 1 January 2017.[136] Since 2017 at the latest, the German tax administration has been given an instrument to verify

[132] Compare European Court of Justice, Grand Chamber, judgement 12 september 2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, p. 987 with annotations of Lieber, Slg. 2006, I-8031 paragraph 63 ff.
[133] Jahressteuergesetz 2008 (JStG 2008) v. 20.12.2007, BGBl. I 2007, p. 3150 ff.
[134] F. REICHE, *§ 8 AStG* Paragraph 129, in F. HAASE (edited by), *Außensteuergesetz.*
[135] European Court of Justice, Grand Chamber, judgement of 26 february 2019, C-581/17, ECLI:EU:C:2019:138 - Wa◎chtler, ISR 2019, 436 (Hummel).
[136] Agreement between the Swiss Confederation and the European Union on the automatic exchange of information on financial accounts to promote tax honesty in international situations of 26.10.2004, as amended on 27.5.2015, AS 2005, p. 2571.

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allegedly artificial arrangements with intermediate companies. Second, Article 21(3) of the FZA refers to the prevention of tax evasion and, therefore, to the prevention of abuse, which is also recognised by the Court of Justice, which is assigned to overriding reasons in the public interest.[137]
Notwithstanding the diffuse telos of Paragraphs 7 to 13 of the AStG 104, this purpose must be recognised as an inherent part of the taxation of additions and as a legitimate ground for justification, which is established in the history of the legal institution. Sections 7 to 13 of the AStG are directed against base companies and thus against purely artificial arrangements for obtaining tax advantages.
On this point, the Court of Justice in Cadburry Schweppes follows its own and Article 16(2) of the Agreement on the free movement of persons between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA) to be taken into account in the interpretation of the case-law in ICI and classifies such provisions as an avoidance of abuse. A transfer of this view of the case-law to Article 21(3) of the FZA appears appropriate.[138] However, the CJEU has held that a rebuttable (abuse) presumption is always the more lenient remedy compared to an irrefutable presumption.
It also works accordingly for the purposes of the Agreement on the free movement of persons between the Swiss Confederation, of the one part, and the European Community and its Member States (FZA), of the justification on the basis of a tax anti-abuse defence is not appropriate and therefore disproportionate in so far as there is no possibility of counter-proofing a genuine or, at most, essential economic activity in the State of establishment.
In any event, it is not sufficient for the theoretical possibility that exculpation, normally curative on the basis of Paragraph 8(2) of the AStG, may be possible if, pursuant to Section 8(3) of the AStG, this is immediately excluded for states without EU or EEA membership and thus also for Switzerland.[139]

8. Final analysis

The jurisprudential review analysed shows the development of the notion of abuse of rights in every area of the Community legal order, including tax law, and the guiding criteria for counteract it.

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[137] Compare just European Court of Justice, Grand Chamber, judgement 12 september 2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, p. 987 with annotations of Lieber, Slg. 2006, I-8031 paragraph 47 .

[138] Compare European Court of Justice, Grand Chamber, judgement 12 september 2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, p. 987 with annotations of Lieber, Slg. 2006, I-8031 paragraph 63 ff.

[139] In this way § 8 paragraph 2 AStG old version; J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 365 f.

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The jurisprudential evolution of the Court of Justice has decisively influenced the case law national jurisprudence with regard to combating the phenomenon of abuse of rights and the criteria for its identification.
In Community law, the concept of 'abuse of rights' originates from a well-established series of of decisions of the Court of Justice in which it has affirmed the general principle (valid for all areas of law) that the formal and literal application of Community rules cannot extend to the protection of abusive practices. Community rules cannot extend to the protection of abusive practices by economic operators. economic operators.
The Court of Justice has in fact developed an autonomous notion of abuse of tax law first with reference to the regulation of VAT, stating that a taxable person does not have the right
right to deduct input VAT if 'the transactions giving rise to that right constitute abusive conduct abusive conduct' (judgment of 21.2.2006, Case C-255/02, Halifax) and subsequently with regard to the field of direct taxes, holding that the restrictive fiscal effect with respect to the freedom of establishment of the company is not allowed "unless it concerns wholly artificial arrangements intended to evade the national tax normally due' (judgment of 12.9.2006, Case C-196/04, Cadbury Schweppes).[140]
The Court of Justice thus reiterates in the tax field the same concepts already expressed in general general principle by stating that the abusive transaction must be recognised
by reason of a subjective element (the aim of obtaining a tax advantage contrary to the Community rules) to be identified, however, on the basis of a series of objective circumstances.
The abuse of rights is therefore qualified by the recurrence of two characterising elements:
1. the objective circumstances indicating the lack of a concrete economic motivation for the activity other than that of obtaining an undue advantage;
2. the abusive purpose that consists in the aim of obtaining an advantage not provided for by the Community legislation.
Although references to the prohibition of abusive tax transactions can be found in various rules aimed at countering fraudulent behaviour of taxpayers with respect to

[140] For a better understanding and a better international taxation case law overview cfr. F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009, R. BETTI, G. SBARAGLIA, *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011.

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the application of Community rules, the notion of abuse of rights finds its substratum in a comprehensive manner from EU case law.[141]

The Court of Cassation therefore readjusted the case law followed by the Court of Justice and emphasised the essentiality of the aim of obtaining a tax advantage as a decisive index for the recognition of abusive conduct. decisive indicator for the recognition of abusive conduct. As has been made clear in course of the present discussion, the path followed by the Italian Supreme Court in transposing of the principle of abuse of rights, must be taken as a guarantee of the degree of interdependence between the domestic legal system and the Community legal system.

In the European legal system there was no specific anti-abuse rule that has instead become established as a jurisprudential principle. established as a jurisprudential principle and later as a soft-law rule in the Commission Recommendation of 6 December 2012 on aggressive tax planning. aggressive tax planning.

In the years to come, these issues have acquired an increasingly significant role in the international and domestic legal debate. Taking the cue provided by the aforementioned Recommendation Commission Recommendation and adapting to the provisions of the Parent-Subsidiary Directive, Italy has equipped itself with its own, autonomous general anti-abuse rule.[142]

Therefore, when transposing the ATAD Directive, the national legislature did not have to adapt itself to to the provision in Article 6 concerning the obligation to introduce the anti-abuse clause because the Italian tax system already had a rule in that specific field.

In order to draw some concluding remarks concerning the judgement of the Cadbury Schweppes we could generally affirm that the parent company has previously identified a business objective and, having a plurality of economic-legal paths, settles on the one that, on the whole, is most attractive from a tax point of view. Instead, we are in the presence of

operations knowingly scrutinised through the lens - the only lens! - of the fiscal impact on wealth constituting income: these are choices of location territorial location of production activities that rely solely on the tax advantages offered by a Member State other than that in which the parent company is resident.

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[141] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE, *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e

[142] For a better understanding and a better international taxation case law overview cfr. F. ARAMINI, Partner, Studio CMS Adonnino Ascoli & Cavasola Scamoni, *L'abuso del diritto nella giurisprudenza della Corte di Giustizia CE. La giurisprudenza della Corte di Giustizia in tema di imposte dirette*, 2009, R. BETTI, G. SBARAGLIA, *L'abuso del diritto in materia tributaria: la giurisprudenza comunitaria*, "il fisco", fascicolo 1, 39/2011.

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The reasoning that can be deduced from the first part of the judgment is, in this perspective, of disarming simplicity: the principle of freedom of establishment does not prevent companies resident in a Member State from taking advantage, 'in the light of the day', of favourable provisions in force in other Member States.
The search for the most advantageous location in terms of tax effects is in no way hindered, according to a scheme that is apparently similar to that employed in Italy on the side of the application of the general anti-avoidance clause.
The statement seems pertinent.
Indeed, although the most recent domestic case law[143] has brought to light the legal principle according to which, in the presence of company operations unequivocally aimed at tax savings, it would be lawful to react through the application of civil law instruments and not of anti-avoidance clauses of a fiscal nature. I fully agree with the dominant doctrine according to which the mere search for the least onerous transaction for tax purposes does not provide for reactions by of the legal system as long as the advantages achieved can be considered systematic.[144]
This is precisely the line of argumentation on which the first part of the judgment is based: what is portrayed as an operation 'in conformity with the system' is in fact that
consisting in exploiting the asymmetries between the (non-harmonised) provisions that, within the EU Member States, allow to minimise the impact of income tax. More simply, according to the Court, the advantage connected with the particular extraterritorial location of the production structure does not constitute an abuse of the freedoms guaranteed by Community law.[145]
On the one hand, it is evident how, in allowing the best tax location of subsidiaries, the Court accepts the idea that, for the same overall wealth produced by parties linked by shareholding relationships, the tax incidence may take on an unequal consistency by virtue of, precisely of the concrete dislocation of income-producing structures.
Territorial choice thus becomes the vehicle - a legitimate vehicle - for differentiating the tax burden.

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[143] For an overview concerning the sustainability and incentive tax policy cfr. A. URICCHIO, *Sustainability and incentive tax policies*, in Caterino D. and Ingravallo (eds.), *L'impresa sostenibile alla prova del dialogo dei saperi, Dialogi Europaei*, 2020; A. URICCHIO (2020). *Sustainable reclamation in the new Charter of Principles presented by the Minister of the Environment*, in AmbienteDiritto, no. 3/2020.

[144] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seg.

[145] M. BEGHIN, *La senzenza Cadbury schweppes e il malleabile principio della libertá di Stabilimento*, in Rassegna tributaria, 2007, 3, 983 ss; E. DELLA VALLE , *Tassazione degli utili della società controllata e rispetto del diritto di stabilimento*, in "Corr. trib.", 2006, pagg. 3347 e seg.

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On the other hand, however, the principle coined by the Luxembourg court raises the question of the survival of anti-abuse provisions (such as, precisely, the CFC on CFCs), which, at least from the point of view of an initial framing of the discipline, would have no reason to exist in a system centred on an intangible right of freedom of establishment.

In fact, taking as a starting point the fact that the parent company can place its pawns anywhere on the European chessboard, it would seem unreasonable to envisage rules aimed at opposing such choices of appropriate territorial dislocation.

In accordance with the judgment of the Court of Justice in Cadburry Schweppes and on the implementation of Article 7(2)(a)(2) of the ATAD, the legislature, by means of § 8(2)Act on Taxation in Foreign Relations (AStG) introduced an activity test to justify the restriction of freedom of establishment on proportionate grounds. Notwithstanding paragraph 1, a foreign company shall not be an intermediary company in respect of income for which it is established that the company carries out a substantial economic activity in the State in which it has its registered office or management.

This presupposes, in particular, the use of the material and human resources necessary for the performance of the activity in that State. The activity must be carried out independently by sufficiently qualified personnel.

The essential economic activity of the company is to be attributed only to the company's income generated by that activity and only to the extent that the arm's length principle (§ 1) has been observed. Sentences 1 to 3 shall not apply if the company has its essential economic activity carried out predominantly by third parties.

One of the fundamental principles of German tax law is the separation principle, according to which corporations are tax entities to be separated from their shareholders and are taxed independently from them.

If a legal person has its exclusive tax link abroad, the income generated by that company is not taxable in Germany even if the company's shareholders are partly or even wholly resident in Germany.

Such income shall be taxed only if they arrive at the shareholders as distributions of profits. As a result, a taxpayer who engages in an activity indirectly through a foreign corporation and accumulates his profits therefore fully benefits from lower taxation abroad.

Non-acquired profits are privileged in the event of distribution by Paragraph 32d of the EStG or Paragraph 3(40) of the EStG and Paragraph 8b of the KStG.

If, on the other hand, the taxpayer directly carries out his activities abroad without establishing a permanent establishment, he does not benefit from the international

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tax differential and his income is fully taxed on account of the world income principle.[146]

In order to contain tax arrangements resulting from this situation, the additional taxation of Paragraphs 7 et seq. of the AStG created an exception to the principle of separation. Accordingly, the shielding effect of the legal person is broken if it is misused to reduce the domestic tax burden by shifting income to an intermediate non-transparent company established in a low-tax country.

According to these arrangements, an intermediary company established in a low-tax country exists where unrestricted taxpayers are directly or individually owned by at least 50 % in a foreign company and the profits of that company are subject to taxation of less than 25 % (Paragraph 8(3) of the AStG).

A further condition is that the company earns "passive" income, all income being regarded as "passive" which is not expressly covered by the activity catalogue of Paragraph 8(1) of the AStG. If the conditions for additional taxation are met, it is assumed, for the purposes of German taxation, that the unrestricted taxpayer's shareholder directly generated the passive income of the foreign intermediary company in the amount of its shareholding ratio.

The provisions of Paragraph 32d of the EStG, Paragraph 3(40) of the EStG and Paragraph 8b of the KStG do not apply to the taxation of the additional amount thus determined. As a result, an additional tax burden eliminates the tax advantages resulting from the shielding effect and the lower taxation of the legal person abroad. Domestic shareholders are taxed as if they had received their income directly, whereby foreign taxes can be calculated on income and corporation tax under Paragraph 12 of the AStG.[147] According to the prevailing opinion, the additional amount is also subject to trade tax,[148] excluding the offsetting of taxes paid abroad against the trade tax.[149]

Additional disadvantages arise from the application of Paragraph 3c(2) of the EStG, which means that 40 % of the expenditure relating to the holding of shares in the intermediate company with the shareholding in the intermediate company is subject to a prohibition on deduction in the case of shareholders subject to income tax (Section 10(2), fourth sentence, of the AStG). In addition, under Paragraph 3(41) of the EStG, actual distributions of the added profits are to be made exempt only if the

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[146] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 55 ss.

[147] G. PROTZEN, *§ 7 AStG, Steuerpflicht inländischer Gesellschafter*, in G. KRAFT (edited by), *Außensteuergesetz: AStG*, paragraph 8.

[148] Compare A 38 Abs. 1 Satz 6 Nr. 2 GewStR; BUNDESFINANZHOF, Urteil v. 21.12.2005, I R 4/05, in IStR, 2006, 457; with a different opinion Th.RÖDDER, *Ist der Hinzurechnungsbetrag gewerbesteuerpflichtig*, in IStR, 2009, p. 873 (877).

[149] G. HÖRNICKE- G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, ISR 2022, p. 1 ff.

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distribution takes place within seven years and the taxable person proves that the additional tax is taxed. There were serious doubts as to the compatibility of the additional taxation with EU law when the Free Movement Agreement was concluded.[150]

However, it was only after the ECJ in Cadbury Schweppes had dealt with the British counterpart to the German tax system that the German legislature was obliged to act.[151] In the aforementioned case, the CJEU had ruled that the inclusion of the income of a foreign subsidiary in the tax base of its unrestricted taxable partners was not compatible with EU law, provided that the involvement of the foreign subsidiary was not a "purely artificial arrangement".[152]

In response to that judgment, the German legislature introduced the provision of Paragraph 8(2) of the AStG. Accordingly, if the intermediate company is established in an EU/EEA country, the taxable person concerned may, under certain circumstances[153], prove that there is no abusive arrangement in this particular case.

To that end, the taxpayer must demonstrate that the foreign company carries out an "actual economic activity" in its State of residence and has a sufficient level of foreign substance. If such proof is successful, the company in question is not to be classified as an intermediate company and no additional taxation is required. The possibility of proof of discharge is granted only if the intermediate company has its registered office in an EU/EEA country.

Furthermore, pursuant to the third sentence of Paragraph 8(2) of the AStG, there is no possibility of counter-proofing in respect of interim income obtained through sub-companies or permanent establishments in third countries. Although there were obviously considerations in the run-up to the reorganisation as to whether the possibility of a counter-proof under the free movement agreement should also be opened for companies established in Switzerland,[154] these were not included in the text of the law.

Thus, even here, privileges of EU/EEA behaviour, which makes EU law necessary, were not transferred to Switzerland. The question therefore arises as to the extent to

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[150] H. HAHN, *Das ICI-Urteil des EuGH und die Hinzurechnungsbesteuerung gema~ß §§ 7 ff. AStG*, in IStR, 1999, p. 609 ss.; W. SCHÖN, *Hinzurechnungsbesteuerung und Europa~isches Gemeinschaftsrecht*, in DB, 2001, p. 940 ss.

[151] European Court of Justice, Grand Chamber, judgement 12 september 2006, C-196/04.

[152] J. MAIER, *Die steuerlichen Implikationen der Mobilita~tsgarantien des Freizu~gigkeitsabkommens Schweiz-EU*, p. 55 ss.

[153] Compare European Court of Justice, Grand Chamber, judgement 12 september 2006, C-196/04. The question presented in another proceeding, whether § 20 Abs. 2 AStG is contrary to EU law, but was denied by the ECJ (compare EuGH, Urteil v. 06.12.2007, Rs. C-298/05, Slg. 2007, I-10451 - Columbus Container Services, Rz. 57; a.A. noch SA des GA Mengozzi v. 29.03.2007, Rs. C-298/05 - Columbus Container Services, Rz. 199). The subject of the proceedings was the taxation of the German shareholders of a comman dit company under Belgian law, which had its registered office in Belgium and was taxed there as a centre of coordination.

[154] J. SCHÖNFELD, vor §§ 7-14, in H. FLICK – F. WASSERMAYER – H. BAUMHOFF – J. SCHÖNFELD, *Außensteuerrecht Kommentar*(AStG), paragraph 246.

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which this is compatible with the free movement agreement. In the literature, this question has already been asked occasionally, but has not been answered exhaustively. However, since the freedom of establishment does not apply in relation to third countries, the legislature considers that there is nothing to prevent a territorial restriction of the activity test to EU and EEA Member States pursuant to paragraph 8(3) of the AStG. According to the aforementioned paragraph 8 (3) AStG Paragraph 2 shall apply only if the foreign company has its registered office or its management in a Member State of the European Union or a State party to the EEA Agreement. In the light of the case-law of the CJEU in Case X, Limited Liability Company, it is explained above that the additional taxation pursuant to Paragraphs 7 to 13 AStG also in its recast form in the version of the Act implementing the Anti-Tax Avoidance Directive (— ATADUmsG) restricts the free movement of capital.

In this perspective we should recall Paragraph 7 (1) of the AStG states, that where an unlimited taxpayer controls a corporation, association of persons or property within the meaning of the Corporation Tax Act, which has neither its head office nor its head office in Germany and which is not exempt from corporation tax liability pursuant to Section 3(1) of the Corporation Tax Act (foreign company), the income for which that company is an intermediary company shall be taxable on the basis of the unlimited taxpayer's direct and indirect participation in the nominal capital.

Indirect shareholdings are irrelevant to the tax liability referred to in the first sentence, as far as, in the case of a person mediating the holding in that foreign company, additional taxation has been made in accordance with this Act or a comparable foreign scheme and the income added there from is therefore not subject to a low overall taxation within the meaning of Section 8(5).

If the shareholding in the nominal capital of the foreign company is not decisive for the distribution of profits of the foreign company or if the company has no nominal capital, the income referred to in the first sentence shall be taxed based on the profit distribution criterion.

The first to third sentences shall also apply to a limited taxpayer in as far as the shareholding in the foreign company is directly or indirectly attributable to a resident permanent establishment of the taxpayer through which an activity within the meaning of Section 15(2) of the Income Tax Act is carried out.

Moreover paragraph 7 (2) AStG states that, control within the meaning of paragraph 1 shall apply where, at the end of the marketing year in which the foreign company received the income referred to in paragraph 1 (the relevant marketing year), more than half of the voting rights or more than half of the shares in the nominal capital are attributable to the taxpayer alone or with him or more than half of the shares in

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the nominal capital, or directly or indirectly entitled to more than half of the profit or liquidation proceeds of that company.[155]
The concept of dominance laid down in Paragraph 7(1) and (2) of the AStG does not focus exclusively on a certain influence, so that the freedom of movement of capital is not suppressed by the freedom of establishment without any individual consideration which is inadmissible in the case of a third country.
Such an individual consideration is nevertheless required in the specific case of third countries in Switzerland.
The free movement of capital under Article 63 TFEU may be superseded, in particular in relation to Switzerland, by the right to freedom of establishment under Article 4, which states that Nationals of a Contracting Party and members of their families shall have the right to remain in the territory of the other Contracting Party after the end of their gainful employment, in conjunction with Article 12 et seq. of Annex I to the FZA, provided that the protection conferred by the FZA is open, in particular by reference to the natural persons entitled to the agreement.
In this case, a restriction on the right of establishment can be seen.[156]
There is no justification for the prevention of tax abuse in the light of the lack of proportionality.[157]
Some theses emerge and may be summed up as a result of this work, which will be highlighted in the following.[158] Unlike the EEA Agreement, the Agreement on the Free Movement of Persons does not intend to fully integrate Switzerland into the internal market.[159]
There is no comprehensive guarantee of the four freedoms. Instead, the free movement of persons is liberalised in isolation based on an international treaty.
To this end, the agreement contains provisions that reproduce the relevant aspects of the Community law in force at the time of the conclusion of the agreement, whereby the text of the treaty includes many literal provisions of primary and secondary Community law. Overall, the Agreement on the Free Movement of Persons thus extends, at least in principle, the free movement rules of Union law to Switzerland, without, however, integrating them into the internal market. According to the preamble, the aim of the agreement is to realise the free movement of persons

[155] J. SCHÖNFELD, vor §§ 7-14, in H. FLICK – F. WASSERMAYER – H. BAUMHOFF – J. SCHÖNFELD, *Außensteuerrecht Kommentar*(AStG), paragraph 246.
[156] Th. COTTIER - R. MATTEOTTI, *Der Steuerstreit Schweiz-EG: Rechtslage und Perspektiven*, in: A. EPINEY – M. WYSSLING (Hrsg.), *Schweizerisches Jahrbuch für Europarecht 2006/2007*, Zürich, u.a., 2007, p. 221 ss.
[157] A. FEHRENBACHER, *Freier Personenverkehr zwischen der Schweiz und den Mitgliedstaaten der Europäischen Gemeinschaft - Änderungen durch das bilaterale Abkommen zur Personenfreizügigkeit*, in NVwZ, 2002, S. 1344 ff.
[158] G. HÖRNICKE - G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, ISR 2022, p. 1 ss.
[159] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 360 ss.

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between the European Community and Switzerland "on the basis" of the regulations applicable in the internal market.[160]

This realisation of the free movement of persons takes place on a static basis. This means that even if the Agreement on the Free Movement of Persons adopts Community regulations, this adoption is always limited to the acquis as of 21 June 1999. Switzerland thus decouples itself from the dynamic development of EU law to preserve its sovereignty.

To safeguard the objective of the agreement in the preamble, Art. 16 section 2 FMPA stipulates that, as far as terms and provisions of Community law are taken over in the agreement, these are to be interpreted with binding consideration of the case law of the ECJ on the corresponding provisions and terms in Union law.

According to the wording of the agreement, the adoption of ECJ case law is limited to the state of case law as of 21 June 1999. However, rulings handed down later are also to be considered if they do not contain any substantive extension of the acquis communautaire reached on 21 June 1999.

In addition, if the agreement is interpreted correctly, ECJ rulings in which the ECJ interprets the guarantees of Union law more narrowly after the conclusion of the agreement than in the rulings issued before the cut-off date must also be considered.[161]

The rights granted by the agreement are directly applicable and can be enforced before the national courts of the agreement states.

The supreme competence of interpretation with regard to the Member States of the European Union is vested in the ECJ. From a substantive point of view, the Agreement on the Free Movement of Persons, unlike Union law, does not provide for a general right to free movement outside the economic freedoms.

Non-employed persons are only granted a right of entry and residence subject to compliance with certain conditions. The agreement grants all workers a right to freedom of movement. In terms of content, this legal guarantee largely corresponds to the EU freedom of movement for workers according to Art. 45 TFEU.[162]

Only further developments of the acquis communautaire which took place in this area after 21 June 1999 are not taken over. The Agreement grants self-employed persons a right to market access and equal treatment with nationals. The rights granted by the agreement - at least as far as natural persons are concerned - are largely identical to those of EU law.

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[160] A. FEHRENBACHER, *Personenfreizügigkeit zwischen den EG-Mitgliedstaaten und der Schweiz*, in Zeitschrift für Ausländerrecht und Ausländerpolitik, 2002, p. 278 ss.

[161] G. HÖRNICKE - G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformita*‿*t des § 8 Abs. 3 AStG*, ISR 2022, 1-10; J. MAIER, *Die steuerlichen Implikationen der Mobilita*‿*tsgarantien des Freizu*‿*gigkeitsabkommens Schweiz-EU*, p. 360 ss.

[162] J. KOKOTT, *Das Steuerrecht der Europäischen Union*, Art. 45 TFEU.

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A significant difference is that the agreement, unlike EU law, does not grant legal persons their own right of establishment.
Discrimination against legal persons can therefore only be covered by the agreement if the corresponding unequal treatment also constitutes discrimination against a natural person behind the corporation.
The Agreement's freedom to provide services is only granted as a freedom of persons and not as a freedom of products. However, the rights to freedom of movement granted in this respect also fall short of the status of Union law. The agreement only guarantees the right to provide "short-term" services without restrictions.
The rights of the recipients of services are limited in the Agreement on the Free Movement of Persons to rights of residence and movement.
Freedom of correspondence services is not granted at all. The Agreement guarantees a comprehensive prohibition of discrimination on grounds of nationality in the areas covered by it, which is to be interpreted in accordance with the prohibition of discrimination in Union law.[163]
In addition to the prohibition of overt discrimination on grounds of nationality, it therefore also includes a prohibition of covert discrimination in which the unequal treatment is linked to criteria such as residence or domicile. It is disputed whether the agreement also guarantees a ban on restrictions in the area of the free movement of workers and the freedom of establishment.
When interpreting the agreement, there are better reasons for believing that the agreement at least also contains a ban on discrimination by the state of origin.
A corresponding interpretation of the prohibition of discrimination in Annex I should be derived from Art. 1 para. 2 Annex I FMPA (right to leave the country), Art. 2 para. 1 Annex I FMPA (guarantee of an absolute right to market access) and Art. 16 section 2 FMPA.[164]
The rights guaranteed by the Agreement establish restrictions for the national tax legislator.
The guarantees of the Agreement are comprehensive in their wording and do not contain any area exception for tax law.
Art. 9 para. 2 of Annex I of the FMPA[165] explicitly provides for the right to equal access to privileges under tax law, literally taking over Art. 7 section 2 of Regulation 1612/68. In addition, Art. 21 of the FMPA contains rules on the relationship of the

[163] A. EPINEY, *Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommens*, in ZBJV, 2005, p. 1-31.
[164] A. EPINEY, *Das Abkommen über die Personenfreizügigkeit - Überblick und ausgewählte Aspekte*, in A. ACHERMANN – A. EPINEY – W. KALIN- M.S. NGUYEN,(edited by), *Jahrbuch für Migrationsrecht 2004/2005*, 2005, p. 141-156.
[165] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

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agreement to the double taxation agreements, on the comparability of taxpayers and on specific justifications under tax law, which would hardly be necessary if there were a scope exception for tax law.
Finally, the objective of the treaty also speaks in favour of such an interpretation.[166]
The prohibition of discrimination under tax law guaranteed by the Agreement is to be interpreted in accordance with Art. 16 para. 2 FMPA.
Within the scope of protection of the Agreement, it is thus in principle identical with the prohibition of discrimination under Union law.
Only a case law of the ECJ extending the rights of free movement after the conclusion of the agreement is not to be taken into account.
The provision of Art. 21 section 1 FMPA should not result in any significant restrictions of the free movement rights granted by the agreement. If interpreted correctly, the provision primarily represents an explicit adoption of the Gilly case law.
According to Art. 21 para. 1 FMPA, the agreement should have no influence on the definitions of the double taxation agreements or the allocation of taxation powers between the participating states.
The interpretation of Art. 21 section 2 FMPA is of great importance for the interpretation of the agreement.
On the basis of the wording of this provision, there are at least doubts as to whether limited taxpayers are also covered by the tax discrimination prohibitions of the agreement.
Only the inclusion of taxpayers with unlimited tax liability according to § 1 section 3 EStG[167] seems unproblematic in view of the wording of the agreement, the agreement materials and the purpose of the regulation.
The justification grounds of "effectiveness of tax supervision" and "prevention of tax evasion" are included by the agreement in Art. 21, section 3 FMPA.[168]
These are to be interpreted in the light of the ECJ case law[169] that preceded the conclusion of the agreement.
Regarding the justification of the "effectiveness of tax supervision", certain special features resulting from Switzerland's limited administrative assistance in tax matters must be taken into account.

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[166] J. MAIER, *Die steuerlichen Implikationen der Mobilitätsgarantien des Freizügigkeitsabkommens Schweiz-EU*, p. 371 ss.; G. HÖRNICKE - G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformität des § 8 Abs. 3 AStG*, in ISR 2022, p. 1- 10.

[167] J. HOTTMANN – M. BECKERS- H. SCHUSTEK, *Einkommensteuer, § 1 section 3 EStG*, 2019.

[168] Art. 21 section 1 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

[169] U. EVERLINGE, *Das Niederlassungsrecht in der EG als Beschränkungsverbot*, in, W. SCHÖN, (Hrsg.), *Gedächtnisschrift für Brigitte Knobbe-Keuk*, Köln, 1997, p. 607-625.

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It should be noted that Switzerland only provides administrative assistance for assessment periods from 2011 onwards to an extent that is comparable to the standard of the Administrative Assistance Directive.
In addition, the problem of Switzerland's lack of cooperation regarding mutual recovery assistance also exists for the future.
The justification of "avoiding tax evasion" is essentially identical to the corresponding justification under EU law. Only the concrete interpretation of the term "artificial arrangement" as defined by the ECJ in Cadbury Schweppes does not seem to be necessarily transferable.
The other unwritten justification grounds of Union law - the coherence argument, the principle of territoriality and the justification ground of the balanced distribution of taxation powers - are also to be adopted either in accordance with Art. 16 para. 2 FMPA or as more restrictive new case law for the Agreement on the Free Movement of Persons.
Other grounds for justification, those which the ECJ has already explicitly rejected in the context of Union law, should also have no justification in the Agreement on the Free Movement of Persons.
Another violation of the Agreement on the Free Movement of Persons is likely to be the fact that Swiss citizens, who are subject to unlimited tax liability in Germany after exercising their free movement rights, are affected by the provisions of § 2a EStG[170] regarding losses incurred in Switzerland.
In addition, the agreement prohibits the application of the provisions of § 2a EStG to EU/EEA citizens in the cases of §§ 2a, section 1, n. 1 to 4 EStG, provided that a prohibition of discrimination by the state of origin is affirmed. This applies analogously to § 2a, section 1, no. 7 EStG if an activity within the meaning of §§ 2a, abstract 1, no. 1 to 4 EStG[171] is exercised via a controlling interest in a domestic corporation.
Unlike in the cases in which a Swiss citizen is affected by the provision of § 2a EStG, not all sub-regulations of the provision fall within the scope of protection of the agreement. Finally, the application of exit taxation under section 6 of the AStG to Swiss citizens who, after having been gainfully employed in Germany, move to another EU/EEA state, or return to Switzerland is also contrary to the agreement. If the prohibition of discrimination by the state of origin is affirmed, the application of exit taxation to a German citizen who moves to Switzerland to pursue gainful employment there should also violate the agreement.

[170] § 2a Einkommensteuergesetz.
[171] W. ZENTHÖFER - U. GROBSHÄUSER – A. SCHLENK – S. SHMIDT - H. SCHUSTEK, *Einkommensteuer*, 14 Auflage, 2021.

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This does not apply to a move for private reasons. The corresponding tax may be assessed, but on application it is to be deferred without interest until the actual sale of the shares. In the case of a move to Switzerland, however, a deferral is only offered against the provision of collateral.

For the period prior to the revision of the double taxation agreement between Germany and Switzerland,[172] it is also justified, due to the inadequate administrative assistance provided by Switzerland up to that time, to demand complete proof of ownership of the shares from the taxpayer each year based on objectively verifiable documents.

Losses incurred in Germany between the departure and the actual sale must also be considered to reduce tax, provided that they cannot be taken into account in Switzerland.

The Agreement on the Free Movement of Persons only has a limited impact on the taxation of the transfer of income. The Agreement on the Free Movement of Persons only applies if a natural person is at[173] least indirectly established in Switzerland.

If a prohibition of discrimination by the state of origin is affirmed and the income from the self-employed activity is subject to an overall higher tax burden than in the domestic case due to the additional taxation, there is an encroachment on the agreement rights.

If, after the revision of the double taxation agreement between Germany and Switzerland, Switzerland provides administrative assistance in accordance with the OECD standard for assessment periods after 2011, an existing encroachment on treaty rights can at best be justified based on an expanded concept of abuse compared to Union law.

Such an extension of the concept of abuse could result from the fact that the very restrictive case law of the ECJ in this respect in the Cadbury Schweppes case[174] is not to be bindingly applied in the interpretation of the agreement as new case law according to Art. 16 para. 2 sentence 1 of the Agreement on the Free Movement of Persons (FMPA).[175]

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[172] A. EPINEY, *Das Abkommen u⌣ber die Personenfreizu⌣gigkeit - U⌣berblick und ausgewa⌣hlte Aspekte*, in A. ACHERMANN – A. EPINEY – W. KALIN- M.S. Nguyen,(Hrsg.), *Jahrbuch fu⌣r Migrationsrecht 2004/2005*, 2005, p. 45 ss.

[173] A. EPINEY, *Zur Bedeutung der Rechtsprechung des EuGH fu⌣r Anwendung und Auslegung des Personenfreizu⌣gigkeitsabkommens*, in Zeitschrift des Bern. JuristenV., 2005, p. 1 ss.

[174] Compare European Court of Justice, Grand Chamber, judgement 12 september 2006 - C-196/04, ECLI:EU:C:2006:544 - Cadbury Schweppes, FR 2006, p. 987 with annotations of Lieber, Slg. 2006, I-8031 paragraph 46.

[175] J. MAIER, *Die steuerlichen Implikationen der Mobilita⌣tsgarantien des Freizu⌣gigkeitsabkommens Schweiz-EU*, p. 375 ff.; G. HÖRNICKE- G. KRAFT, *Außensteuerrecht: Die zweifelhafte Unionsrechtskonformita⌣t des § 8 Abs. 3 AStG*, ISR 2022, 1- 10.

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