

Differing abuse concepts in double tax conventions: At what level and to what extent can equality be realized?

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Perceptions of unequal tax treatment are capable of having significant impact on taxpayer compliance. This effect could be considered particularly problematic in the context of different outcomes due to differing anti-abuse provisions, inter alia in double tax conventions. Against this background, this article sets out to explore treaty anti-abuse provisions specifically from an equality perspective and discuss whether, and to what extent, equality is realized at the treaty, EU and national levels. While it is argued that (the specific degree of) diverging tax assessments stemming from differing abuse concepts can be reasonably explained from a legal perspective, their wider socio-political implications should not be neglected. The article is founded on a comparative analysis to demonstrate that these effects are likely to specifically materialize in smaller economies and developing countries.

Keywords: anti-tax avoidance, BEPS, double tax convention, EU tax law, inequality in tax law.

Introduction²

Aggressive tax planning³ has shaped tax policy in the 21st century to a significant degree. In times in which increasing levels of globalization and digitalization allow for higher degrees of personal and operational mobility, the effective tax burden has become a dominant factor in strategic decisions, in particular the search for a favorable place of residence (Kokott 2018, § 1, m.no.17; Woodward 2018, 23).⁴ These developments have translated into

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³ Although the term “aggressive tax planning” is widely used in the relevant scholarly literature, as well as documents at the EU and OECD level, its essence has not yet been carved out to an extent which could provide for a uniform understanding (particularly due to the large number of players involved in the discussions). For purposes of this article, the definition used in the EU Commission Recommendation on aggressive tax planning (2012-12-06) is meant to serve as a guideline. Accordingly, aggressive tax planning is attributed the meaning of “taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability” (European Commission 2012, m.no. 2). More generally, “[a] key characteristic of the practices in question is that they reduce tax liability through strictly legal arrangements which however contradict the intent of the law” (European Commission 2012, m.no. 1). See moreover Dourado 2015, 44-5.

⁴ Compare Dagan 2018, 25-6: “for states, tax rules and tax rates have become, to a large extent, the currency of competition.”



significant losses in tax revenues from tax evasion and tax avoidance in high-tax⁵ jurisdictions (Panayi 2018, 4).⁶

This has become an even more pressing issue under the current Covid-19 pandemic which has led to unprecedented increases of public debts and the states' corresponding struggle to safeguard their refinancing (Baker 2020, 806).⁷ The broad media coverage devoted to these practices have further fuelled public pressure on policymakers to combat all kinds of forms of aggressive tax planning and thereby ensure that everyone pay their fair share (Graetz 2016, 315; Panayi 2018, 11; Collier, Pirlot and Vella 2020, 803).⁸ As such undesirable arrangements usually involve cross-border situations,⁹ these issues ought not be exclusively contemplated at the national level: While manifestations of tax evasion, tax avoidance and tax abuse are prone to hamper "the good functioning of the internal market" (Recital 2 of the Anti-Tax Avoidance Directive [ATAD]¹⁰) at the regional (EU) level, the misuse of, and the exploitation of loopholes in, double tax conventions (DTCs)—which still take in a dominant role in the international tax context¹¹—demand moreover for a search of solutions in particular at the global level.

⁵ "High-tax" being used in this regard to describe countries with a comparatively high average tax burden, traditionally represented by developed countries with a strong social welfare system, such as the Nordic countries, Germany and Austria. Low-tax jurisdictions are then defined in the negative for the purposes of this article and hence refers to all countries which basically do not match this definition (in particular countries will no or only nominal income and corporate tax rates).

⁶ To support this assessment with corresponding figures: It is estimated that the average yearly loss in tax revenues in the EU for purposes of personal and capital income tax as well as wealth and inheritance taxes totaled EUR 46 billion for 2004-2016 (European Commission 2019, 81). For purposes of corporate tax avoidance, research data point to an average yearly loss in revenues of more than EUR 35 million (European Commission 2020a, 5).

⁷ See also European Commission 2020a, 1: "Fair and efficient taxation will be even more important in the months and years ahead, as the EU and the global community seek to recover from the fallout of the COVID-19 crisis. [...] [T]he Commission will step up the fight against tax fraud and other unfair practices. This will help Member States generate the tax revenue needed to respond to the major challenges of the current crisis." See moreover Collier, Pirlot and Vella 2020, 795: "[I]t is likely that tax will play a key role in offsetting the costs of the crisis."

⁸ In this context, it should be pointed to the results of a Eurobarometer survey conducted in April 2016 according to which 75% of all Europeans demanded that the EU do more in its fight against tax fraud (European Parliament 2016). Although a clear distinction needs to be drawn between tax fraud (i.e. illegal behavior) and tax avoidance or tax abuse (i.e. behavior not covered by national criminal tax laws), the author asserts that this survey could moreover give us an idea of the state of opinion regarding the acceptance of tax avoidance and tax abuse in the EU's territory to a certain degree. This assumption is borne out of the fact that all these concepts are fundamentally rooted in our moral perceptions of fairness and justice, although it appears highly likely that a broader consent regarding its unacceptability can be reached in the context of illegal activities, such as tax fraud. These figures could yet depict a basic tendency in the societal attitude towards tax avoidance and tax abuse.

⁹ The author submits that specific forms of (acceptable or unacceptable) tax avoidance or tax abuse might manifest themselves additionally or exclusively in a national context (for example, the use of conduit companies to benefit from the advantages in the domestic corporation tax regime as an individual taxpayer). This notwithstanding, the phenomenon of (virtually) eliminating the tax burden by both businesses and wealthy individuals can most likely only be reached by way of an international tax planning scheme, which allows for (re)allocation of income to a zero-tax or low-tax jurisdiction. Compare in this context European Commission 2012, m.no. 3: "National provisions in this area are often not fully effective, especially due to the cross-border dimension of many tax planning structures and the increased mobility of capital and persons."

¹⁰ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 of 19 July 2016.

¹¹ This assertion stems from the fact that DTCs are international treaties between countries, which, over decades, have been predominantly signed with the aim to allocate the right of taxation between the contracting partners (Kokott, Pistone and Miller 2020, 202), thus contain the fundamental rules for the coordinated taxation in cross-border situations.

Whereas some DTCs have already contained anti-abuse provisions¹² prior to the developments described above, many have been amended in recent years to keep pace with these new trends, following a diverse number of techniques and logics. Different concepts are however likely to translate into differing levels of aggressiveness, depending on the concrete technical design of the applicable mechanisms. Whereas detailed provisions tailored to address particular forms of tax avoidance or tax abuse basically allow taxpayers to arrange their affairs in ways not captured by these DTC provisions,¹³ the (additional) implementation of a general anti-abuse rule (GAAR) at the treaty level could empower the contracting states to address all undesirable tax planning schemes not already addressed by these more specific means. In this sense, the existence or absence of different types of anti-abuse provisions as such, as well as differences in the legal design of these rules, can be considered to create several standards of unacceptable¹⁴ behavior for similar situations under the scopes of the diverse DTCs of a particular tax jurisdiction. These differing benchmarks could then be applicable either for purposes of the assessment of different taxpayers¹⁵ of the same country in cases when their respective cross-border situations are covered by the scopes of different DTCs,¹⁶ or even in the assessment of the same taxpayers in cases when their cross-border situations involve multiple countries.¹⁷ Against this background, it appears highly likely that anti-abuse provisions in DTCs are, among other factors, considered in cross-border tax

¹² To facilitate reading, the term “anti-abuse provision” is used in this article to describe all types of rules in tax regimes at the national, EU and international levels aimed at addressing these planning strategies.

¹³ Compare moreover Waris 2019, 127-8. This type of tax planning scheme which uses the rules themselves is sometimes referred to as “creative compliance” in academic scholarship (Freedman 2010, 719-20, with further references).

¹⁴ The term “unacceptable” is intended to cover two aspects in this context: 1) Arrangements that are apparently not covered by the lawmakers’ intent and the provision’s specific purpose, thereby unacceptable from a state/legal perspective (see also fn. 1); and 2) arrangements that are regarded as “unfair” by the general public, as the respective players do not contribute, in the public opinion, their fair share to the tax revenues and welfare pie (Dagan 2018, 12).

¹⁵ For purposes of this article, the term “taxpayer” is meant to cover both individual taxpayers and corporations. In this context, see moreover Avi-Yonah 2019, 67: “if tax evasion *by rich individuals* and tax avoidance *by multinational corporations* is allowed to undermine the ability of both developed and developing countries to provide adequate social insurance for their citizens, a violent reaction against globalization may ensue that risks ending this era of opening borders.” [emphasis added].

¹⁶ For example, taxpayer A, resident of country X, only has economic ties to country Y, whereas all cross-border activities of taxpayer B, also resident of country X, are realized in relation to country Z. In this case, the DTC between the countries X and Y is only applicable to taxpayer A, and the DTC between the countries X and Z is only applicable to taxpayer B. If these DTCs provide for different types of anti-abuse provisions (e.g. only one of the DTCs encompasses a treaty GAAR), this could lead to different results in the assessment of the taxpayers A and B at the treaty level (i.e. one is granted the treaty benefit, whereas the other is not, on account of the treaty GAAR). These fundamental reflections hold equally true in the reverse case, hence when the taxpayers A and B of the aforementioned example are residents of the countries Y and Z, respectively, and both earn (parts of) their income in the source state X, which might or might not be subject to taxation at the source (inter alia, depending on the applicable set of anti-abuse provisions).

¹⁷ For example, taxpayer A, resident of country X, performs their services to both countries Y and Z. The DTC between the countries X and Y is then applicable to their cross-border business activities involving the countries X and Y, whereas the DTC between the countries X and Z is applicable to their cross-border business activities involving the countries X and Z. If these DTCs provide for different types of anti-abuse provisions (e.g. only one of the DTCs encompasses a treaty GAAR), this could lead to different results in the assessment of the diverse cross-border relations of taxpayer A at the treaty level (i.e. for some the treaty benefit is granted, whereas for others they are refused or withdrawn, on account of the treaty GAAR).

planning.¹⁸ These rules might then effectively contribute to cementing existing, and creating additional, inequalities.

Beyond eventual legal concerns from a tax scholar's perspective,¹⁹ this assertion moreover raises fundamental questions in a socio-political context: Numerous empirical studies conducted over the last decades have indicated that taxpayers who feel disadvantageously treated compared to others within the same income group (horizontal equity), or perceive an unfair distribution of benefits and costs across income groups (vertical equity),²⁰ are more susceptible to evading taxes themselves (Hofmann, Hoelzl and Kirchler 2008, 212;²¹ Sheild Johansson 2020). Unequal treatment of taxpayers in the context of possible manifestations of tax avoidance or tax abuse could hence be considered to both fundamentally run counter to the basic concept of equity in taxation, and pose a threat to compliance, confidence in the state and solidarity in our societies (Makovicky and Smith, 9).²² These issues appear even more problematic against the background that among other things the closing of DTCs has traditionally been associated with, and linked to the idea of realizing, (at least higher levels of) both inter-nation and individual equity (Bendlinger and Kofler 2018, chapter IX. m.no. 5).

A tremendous amount of research by academic scholars across the globe has already been dedicated to the wide array of anti-abuse provisions used for DTC purposes.²³ The interplay of DTCs in general, or specifically the anti-abuse provisions encompassed, with either the EU or national tax law regimes in general, or specifically the respective anti-abuse provisions encompassed, has moreover been at the center of a large number of publications.²⁴ Some of these research efforts have been undertaken using a comparative approach.²⁵ While

¹⁸ In a similar vein, see Bammens and De Broe 2010, 51: "Even though there is a consensus that such abusive practices should be prevented, it is unclear which measures are the most effective. Quite often, it seems that measures which, in theory, serve to counter abuse are ineffective or counterproductive in practice."

¹⁹ Among other factors, equity within a tax system has been considered as one of the main features of a good policy. Compare, e.g., Pistone et al. 2019, 9-13.

²⁰ See on the concepts of horizontal and vertical equity, e.g., Pistone et al. 2019, 10-3; Waris 2019, 108-9; Lind 2020, 484.

²¹ For the sake of completeness, it needs to be stressed that the authors of this paper *vice versa* point out remaining caveats in this assertion, e.g. a probably unclear causal relation (likelihood of perceived inequity as *ex post facto* rationalization to justify tax evasion), and the influence of moderator variables, such as the taxpayer's individual social and national identity.

²² Compare Pistone et al. 2019, 7: "Developing a tax-compliant culture is equally important to tax policy, but this is only realistically achieved when taxes are viewed as justified."; specifically in the African context, Waris 2019, 115. "Indeed, it seems quite unfair that people living below the poverty line must pay taxes, whereas businesses making billions do not, which raises doubts as to the legitimacy of the fiscal and tax system."

²³ Against the background of the enormous amount of literature in this field, merely trying to all the research done would exceed the limitations to this article. The author thus resorts to referring to a number of selected publications which are cited in the following assessment. On general discussions of different types of anti-abuse provisions in DTCs, see hence, e.g., Van Weeghel 2010, 43-53; Arnold 2019, 175-97; Geringer 2021.

²⁴ The same disclaimer as for purposes of the study of diverse types of anti-abuse provisions used in DTCs (fn. 22) applies. Regarding the relationship between DTCs and domestic anti-abuse provisions, see, e.g., the country reports included in International Fiscal Association 2010 and Lang et al. 2016. Regarding the intersection between DTCs and EU tax law, see, e.g., Weber 2016; Floris de Wilde 2018; de la Feria 2020a; Danon et al. 2021; Geringer 2021.

²⁵ See Sections 4.5 and 5 in Thuronyi, Brooks and Kolozs 2016 for a comparison of the different approaches in a selected group of countries regarding the relationship of DTCs and domestic anti-abuse regimes, which moreover takes account of the different relevant legal families. For comparative analyses from the perspective of a particular tax jurisdiction, see, e.g., Duff 2010 (against the background of the legal situation for Canadian taxpayers).

the use of anti-abuse provisions in DTCs and their intersection with other legal layers can thus be considered to have been principally thoroughly discussed—albeit only to a comparatively little extent in the context with the most recent developments at the EU level²⁶—, it appears that the significance of differing concepts for the assessment of tax avoidance and tax abuse in different DTCs has not yet been specifically evaluated through the lens of equality. More precisely, no previous studies seem to have particularly focused on the question as to whether, to what extent, and on the basis of which concepts or principles, equal treatment for similar and possibly abusive situations ought (not) be realized at the treaty, EU or national levels (hence problematizing the existence of differing anti-abuse provisions in DTCs in this particular context). While such an analysis should particularly benefit from a broad, interdisciplinary approach, which would include tax policy issues as well as both legal and societal implications, it seems that a comparable study has moreover not yet been carried out.

This article thus aims to contribute to the discussion on treaty anti-abuse provisions in academic literature by applying this innovative approach described above. Equality can most likely be considered to range among the vaguest, and hence most disputed, concepts (not only) in law and philosophy²⁷ so that it might come in various forms. For purposes of this assessment, the notion of equality is applied referring to the principle of equality, which fundamentally permeates tax law (as every other field of law),²⁸ in the form of horizontal equity as the relevant benchmark. It is hence first assessed from a taxpayer's perspective whether, and to what extent, the same kind of arrangement might be differently treated²⁹ depending solely³⁰ on the existence or absence, and the particular technicalities of anti-abuse provisions in the applicable DTC. The results from this fundamental identification of differing legal results, hence potential manifestations of inequality, are then contextualized with the basic ideas shaping each of the relevant legal layers (most importantly principles, objectives and policy aims) in an effort to capture the specific way of manifestation of equality at each level.³¹ In this context, this article is particularly carried by the aim to provide and discuss explanations for potentially differing treatments of similar situations so that these potential

²⁶ Most notably, in light of the case law of the Court of Justice of the European Union (CJEU) since 2019. See in this regard Danon et al. 2021; Geringer 2021 (both addressing, inter alia, the intersection of the ATAD, the recent CJEU case law and the MLI's PPT).

²⁷ This assertion is particularly borne out of the fact that our notions of equality are traditionally shaped, inter alia, by our moral perceptions, our cultural background and our political opinions. This issue is further touched upon in Section 5. In a similar vein, compare moreover Dagan 2018, 19.

²⁸ Which to the author hence seems to be the probably most suitable approach for a tax scholar.

²⁹ I.e. translate into a higher or lower tax burden.

³⁰ At least in theory. Regarding other factors which might to diverging results in practice, see Section 5 (at the end).

³¹ For example, the author argues in Section 3 that on account of the strict bilateral character underlying tax treaty law, the principle of equality materializes in the tax treaty context by way of the requirement of treating taxpayers *under the same DTC* equally, while the differing treatment under different DTCs is not addressed by the concept of equality (due to absence of comparable situations).

manifestations of inequality can indeed be considered logical and justifiable in the current legal environment.³²

Due to the sheer amount of more than 3,000 DTCs in effect by the time of the publication of this article (Avi-Yonah 2019, 3; Kokott, Pistone and Miller 2020, 202), this assessment is carried out using predominantly the three DTCs signed by Austria with Germany, the United States of America (US) and the United Kingdom (UK) as examples (together example DTCs). Hence, the discussion of the particular significance and manifestation of equality in the three relevant legal layers (i.e. tax treaty, EU and national tax laws) is preceded by a presentation of the anti-abuse provisions included in the three example DTCs. These provisions are moreover contextualized with the legal situations in the other example DTCs as well as other tax treaties signed by the respective contracting states. The assessment of the technical details in the treaties,³³ and the subsequent evaluation of similarities and differences are driven by the objective of laying the groundwork for the following identification and discussion of representative patterns in tax policies and the analysis of socio-political implications.

The three example DTCs were chosen not only for their practical relevance, given the importance of these countries for Austria's foreign trade sector,³⁴ but more importantly on account of the significant differences regarding the types of anti-abuse provisions included in these treaties, which should lead to a fruitful discussion of matter.³⁵

For purposes of this article, treaty rules of the example DTCs are singled out as anti-abuse provisions by the author using the following criteria:

- In the case of anti-abuse provisions that can be found in a large number of double tax treaties (on account of the common use of the OECD Model Tax Convention (MTC) as a negotiation basis), the characteristic of treaty rules as anti-abuse provisions is particularly deduced from respective explanations on the reasoning for their introduction in the OECD MTC commentary (OECD 2017).³⁶ This method is based on the premises that

³² In this context, the author expressly welcomes future research in this field, which could build on the basic considerations articulated in this article and further explore the significance of equality in these situations from various angles (particularly, but not only, through the lens of anthropology, philosophy and sociology).

³³ I.e. the existence and absence of particular types of anti-abuse provisions (in particular GAARs, specific anti-abuse rules (SAARs), reservation clauses which expressly confirm the applicability of domestic anti-abuse provisions in the treaty context, preambles expressly referring to the prevention of tax evasion and tax avoidance as an auxiliary objective, as well as their concrete design).

³⁴ Germany was Austria's most important trading partner; the US was 2nd and the UK was 9th, regarding Austrian exports, in 2018 and 2019. See the interim report on foreign trade at the Austrian Chamber of Commerce [WKO]. 2020. http://wko.at/statistik/Extranet/AHstat/AH_12_2019v_Bericht.pdf?_ga=2.148848179.567476996.1592654873-244435675.1589636039 (Accessed 2021-07-11). The author intentionally used data from earlier years, on account of the extraordinary circumstances underlying the years 2020 and 2021, which are likely to replicate rather non-representative figures.

³⁵ The author submits that a comparative analysis on the basis of three example DTCs is almost naturally not prone to provide for a full picture of differing approaches in the global tax treaty network. The selection has thus been made in order to keep the analysis within manageable proportions. This notwithstanding, the assessment of three example DTCs should provide for sufficient substance for purposes of the subsequent analysis.

³⁶ In this context, the author particularly refers to the OECD MTC and the OECD MTC commentary against the background that the OECD MTC was also used as a negotiation basis for purposes of the three example DTCs. The above-mentioned

these circumstances allow us to reasonably assume that the respective contracting partners shared the OECD's intent when they chose to implement these provisions in their DTC (Lang 2012, 123). References to publications by academic scholars and tax practitioners where the quality of these treaty rules as anti-abuse provisions is discussed are then used as a supplementary argument.

- In the case of peculiarities in a specific tax treaty or deviations from a country's general tax treaty policy, the author particularly resorts to the intent pursued by the respective contracting states. In this context, the intent underlying these provisions is derived from the accompanying documents³⁷, publications issued by officials in charge of the respective negotiations³⁸, and the relevant scholarly literature³⁹. To support the argument, the general tax treaty policies of the respective contracting states are moreover deduced by way of comparison of the relevant provisions with similar rules in other DTCs in order to identify common patterns.⁴⁰

In the following assessment the term “anti-abuse provision” is understood in a wide sense. For the purpose of this article, the term “anti-abuse provision” is not meant to only refer to clauses which are traditionally regarded as mechanisms to capture all sorts of tax avoidance or tax abuse (i.e. “full-fledged” anti-abuse provisions), but moreover to cover specific elements in allocative rules or method articles in the selected DTCs that are equally intended to achieve one of these objectives.⁴¹ The term “anti-abuse provision” is moreover used as an umbrella concept to describe general anti-abuse rules (GAARs)⁴², specific anti-abuse rules (SAARs),⁴³ reservation clauses which expressly allow the respective

considerations can however be considered equally viable *mutatis mutandis* for purposes of the UN MTC and the related commentary. This assertion is further backed by the fact that the OECD and the UN DTCs include broadly identical rules. Compare Avi-Yonah 2019, 51: “Remarkably, about 80 percent of the text of any two tax treaties is identical because they all follow the OECD and UN model treaties, which themselves have become more similar to each other.”

³⁷ Most notably, the protocol or memorandum of understanding (MOU).

³⁸ On the Austrian side, Helmut Loukota, Heinz Jirousek and (currently) Sabine Schmidjell-Dommes have been in charge with the leadership and management of the relevant DTC negotiations over the last three decades. They have constantly published on their proceedings and gave insights into the key motives and the contracting states' intents regarding the individual treaty design. As these articles entail first-hand knowledge regarding the Austrian tax treaty policy, they prove particularly valuable for the purpose of this article, and are thus included in the further valuation. Where feasible, insights from the other delegations regarding their views on the concrete tax treaty negotiations, or statements from officials from the relevant financial authorities on their countries' general tax treaty policies are additionally taken into account (for example, Michael Wichmann and Gert Müller-Gatermann regarding the German side).

³⁹ As cited in the respective Subsections 2.2-2.4.

⁴⁰ Compare from the German perspective, Lüdicke 2011, 1080: “Lastly, any foreign state could picture the German approach in negotiations from the DTCs signed in the past years anyway.” (author's translation).

⁴¹ Other types of anti-abuse-provisions which are not included in one of the three example DTCs are hence not included in the following assessment. This applies, for instance, to so-called anti-fragmentation rules, as implemented in Article 5 paragraph 4a of the OECD MTC, which address efforts to avoid the establishment of permanent establishments (PEs) in foreign countries by splitting up activities into smaller units.

⁴² I.e. provisions that generally address all sorts of tax avoidance and/or tax abuse.

⁴³ I.e. provisions that are aimed at counteracting particular abusive or circumvention schemes, for example base erosion through unusually high and deductible payments between related parties, or the creation of double non-taxation through the use of hybrid financial instruments.

contracting states to apply their domestic anti-abuse provisions, and preambles emphasizing the respective treaty's auxiliary objective to prevent tax evasion and tax avoidance⁴⁴.

This article is structured as follows. First, the various types of treaty anti-abuse provisions used in the three example DTCs are displayed, while further discussing similarities and differences between these DTCs, as well as in comparison to other DTCs closed by the respective contracting states (Section 2). This assessment of the technical aspects provides the foundation for the following discussion of the practical impact of the identified theoretical differences in legal design, which could, at a first glance, indicate manifestations of unequal treatment. The author yet argues that these differentiations indeed do not conflict with the principle of equality due to the absence of comparable situations. This conclusion is drawn against the background of the theory and role of bilateral tax treaties, as well as their characteristic as customized agreements. It can hence be found that these forms of differing treatments are reasonably explainable, and indeed expectable, in the current legal environment. It is further shown that this assertion basically holds true when we include the Multilateral Instrument (MLI) in our analysis, which allows the signatories to bolster their existent DTCs with additional anti-abuse provisions in "multilateralism à la carte"⁴⁵ fashion. This notwithstanding, it is argued that the potential introduction of uniform abuse concepts through the MLI is prone to establish harmonized standards for purposes of the covered tax agreements (CTAs) (to some extent).

Beyond this elaboration from a legal perspective, the degree of deviation between the abuse concepts in a particular tax jurisdiction's DTCs is moreover contextualized with the realities in tax treaty policies, taking the political and economic powers of the involved countries and the corresponding imbalance in the countries' bargaining positions into account. It is deduced from the findings of the analysis carried out under Section 2 that the tendency of divergent anti-abuse provisions can most likely be traced back to the characteristics of the respective country as a more or less puissant tax jurisdiction. These insights are then discussed in the context of potential political and societal implications, where it is argued that the perception of possibly unfair treatment in comparison to other taxpayers falling under different DTCs might increase the likelihood of tax avoidance or tax abuse. To increase acceptance among taxpayers, the author suggests, among other things, the issuing of (more detailed) explanations on the negotiation process and the reasons behind the legal design of the individual tax treaties in the legal materials, and other forms of increased inclusion of the general public in the tax treaty process (Section 3).

⁴⁴ Which can prove useful for interpretation purposes pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT). See in more detail in particular Subsection 2.4.

⁴⁵ Panayi 2018, 115.

Against the background of the findings at the treaty level, it is further assessed how, and to what extent, European income and corporate tax laws and the case law of the Court of Justice of the European Union (CJEU) come into play and contribute to establishing uniform criteria in the assessment of potentially abusive arrangements in the context of bilateral tax treaties. It will be shown in this context that, first, a harmonization in accordance with the idea of most-favored nation treatment⁴⁶ cannot be realized at the EU level on account of the absence of comparable situations according to the CJEU case law, and, second, that the anti-abuse provisions of the traditional corporate tax directives are devised as such that they only prevent to remove an eventually more favorable legal treatment under their scope (i.e. only correct potential overriding effects for purposes of intra-EU DTCs). It is then argued that the EU legal layer is however prone to affect our preliminary findings from Section 3 to some degree, as both the anti-abuse provisions in the ATAD and the EU anti-abuse principle need to be taken in consideration by the Member States also for third-country situations falling under their scopes. The reason behind the remaining differences and hence possible limitations to the concept of equality (as described above) are then traced back to the current state of play regarding the division of powers between the EU and the Member States in the field of direct taxation, which again allows for a logical and reasonable explanation of limitations to the realization of equality at the EU level (Section 4).

The last part of this assessment takes us to the national level to assert the impact of domestic legal traditions and principles, as well as the significance of national fiscal interests for purposes of a harmonized assessment of possibly abusive arrangements in the tax treaty context. On account of the use of three DTCs closed by Austria as models in the argumentation, these issues are meaningfully discussed against the background of Austrian national tax law. It is accordingly shown that the domestic abuse concept, as reflected in both the economic approach underlying Austrian income and corporate tax laws and the domestic GAAR, is to be taken into account at the level of allocation of income (from the Austrian perspective). This legal tradition inherent to the Austrian domestic income and corporate tax laws hence translates into a broadly harmonized assessment of possibly abusive cross-border arrangements, which would equally lead to more comprehensive manifestations of equality. These findings are compared to the legal situations in Germany, the US and the UK to illustrate that the concrete result at the domestic level yet critically depends on the respective national laws and abuse doctrines. On the basis of these insights, it is argued that the potentially higher degrees of equal treatment at the domestic level fundamentally result from requirements in the national constitutional systems, but moreover from the states' fiscal interests and—when

⁴⁶ In this context, the concept of most-favored nation treatment refers to the idea that the most favorable treatment according to the existing provisions in DTCs ought to be analogously applied to all taxpayers (in the EU). Compare, e.g., Kofler and Schindler 2005, 530. For similar considerations in an international context, see moreover Avi-Yonah 2019, 145-6.

we further consider socio-political aspects—their fundamental political responsibility towards their citizens. In this context, the author argues that the concrete manifestation and significance of the principle of equality is yet to be (re)negotiated in our societies in a specific national context. Beyond these fundamental considerations, it is shown that a full realization of the principle of equality is moreover limited at the domestic level on account of multiple factors, most importantly the requirement of the existence of comparable situations, the inherent necessity to balance out the principle of equality with other principles of national taxation systems, and the occurrence of other, non-tax factors (Section 5).

The article closes with an overview over the main findings and an outlook on possible topics for future research in this field (Section 6).

Identification and comparison of anti-abuse provisions in three example Austrian double tax conventions

Introduction

In order to be able to discuss the relevance of equality in the different legal layers relevant in the context of cross-border tax planning schemes, it appears necessary to illustrate in a first step that a remarkably large number of differing abuse concepts may indeed be applicable for purposes of different DTCs, in particular for smaller economies with a high degree of dependency on foreign trade and investment such as Austria.⁴⁷ For this purpose, a comparison based on the characteristics of anti-abuse provisions in the three example DTCs should suffice. Beyond a mere presentation of their technical details, these provisions are contextualized with comparable rules in the other example DTCs, as well as in other DTCs signed by the respective contracting states, while particularly the level of coherence in the Austrian and the other three countries' tax treaty networks is placed at the center of the discussion (in an effort to lay the groundwork for the following discussion of tax policy and societal implications in Section 3).

Before initiating a detailed evaluation of the anti-abuse provisions in the three example DTCs, the fundamental characteristics of the Austrian tax treaty network should yet be presented in a nutshell in order to give the international audience an idea of the development, the status quo and the main goals pursued in Austrian tax treaty policies. As of writing, Austria has signed DTCs with 93 countries,⁴⁸ among which 39 developing countries (according to the definition used by the OECD⁴⁹)- It hence does not seem far-fetched to claim that Austria

⁴⁷ The latter is discussed in detail in Section 3.

⁴⁸ See the list published on the webpage of the Austrian Ministry of Finance (BMF): BMF 2021. It should however be noted that some DTCs have not (yet) come to effect, such as the DTCs closed with Argentina, Libya and Syria.

⁴⁹ Compare GOV.UK 2021. It should yet be borne in mind that the OECD's definition appears to be rather broad, as it also includes emerging economies such as Brazil, China, India or South Africa.

provides for a comparably tight-knit treaty network.⁵⁰ Particularly remarkable appears the significant broadening of the Austrian tax treaty network during the last decades. Austria was accordingly able to increase the number of contracting partners from 15 in the early 1960s and 44 in 1998 to 78 in 2008 (Jirousek 1998, 127; Jirousek 2008, 43; Lang 2012, 108). These figures seem all the more impressive considering that according to statements from the Austrian then-delegation leader, 80% of the (tight) personnel resources were used for the revisions of existing treaties in 1998 (Loukota 1998, 127). This noticeable development can most likely be explained against the background of the main pursuits in Austrian tax treaty policy: As a comparably small and export-oriented economy, Austria has been determined to extend its treaty network in order to boost international economic relations, safeguard the country's international competitiveness and provide for a higher degree of legal certainty for both its residents and foreign investors (Loukota 2008, 44-6; Lang 2012, 108).⁵¹ These treaties are usually negotiated on the basis of the OECD MTC and broadly mirror the provisions recommended therein (Bendlinger and Kofler 2018, chapter IX. m.no. 14).

Isolated anti-abuse provisions in specific articles: The example of the Austrian-German DTC

The Austrian-German DTC⁵² is an example of a DTC which has originally included neither a GAAR nor an explicit reference to the treaty's possibly auxiliary purpose to prevent tax avoidance and tax abuse in the DTC's title or preamble.⁵³ By contrast, this treaty mainly provides provisions tailored to counteract specific forms of avoidance or prevent the misuse of specific allocation rules, as is to be displayed in the following. Diverging opinions on the issue to what extent anti-abuse provisions should be implemented in this treaty might serve as an explanation, particularly if we consider the potential threat to locational advantages.⁵⁴

⁵⁰ In the same vein, Lang 2012, 108.

⁵¹ Compare Jirousek 2013, 17: "The primary goal in the convention policy of a state of the size and political significance such as Austria cannot be, already from a pragmatic point of view, to have particular, from its own perspective desirable objectives unconditionally and uncompromisingly implemented, but rather to establish a level playing field for domestic investors in the respective country of destination regarding both competitors in the country of destination and main competitors from third countries" (author's translation).

⁵² "Convention between the Republic of Austria and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Wealth including Protocol," issued in BGBl. III 2002/182 (in Austria).

⁵³ See in this regard, for example, the Austrian-US DTC's title: "Convention between the United States of America and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income" [emphasis added].

⁵⁴ See in this regard (on the status of the ongoing negotiation process between Austria and Germany) Loukota 1998, 131: "A convention draft, which is orientated in its technical details as far as possible in accordance with the OECD recommendations, exists; regarding certain fundamental questions, *particularly to what extent anti-tax avoidance provisions are to be implemented without threatening the location*, the widest possible convergence of differing opinions could already be reached." (author's translation; emphasis added). Explanations by officials of the German delegation point to the same direction. See Runge 1998, 33: "The negotiations with Austria have shown so far that the German negotiators proved to be flexible and did not insist on each of their demands. However, it needs to be emphasized that a

Article 10 paragraph 2, Article 11 paragraph 1 and Article 12 paragraph 1 of the Austrian-German DTC mirror the beneficial ownership requirement of the OECD MTC. The beneficial ownership concept has been included in the OECD MTC 1977 in an effort to prevent the abusive claim of the treaty benefits concerning passive income (reduction or elimination of taxation at source), most notably by way of installing conduit companies in one of the contracting states (Vogel 1985, 374; Meindl-Ringler 2016, 322; Danon 2018, 34).

In a similar vein, Article 11 paragraph 6 and Article 12 paragraph 5 of the Austrian-German DTC mimic the OECD MTC provisions by stipulating limitations to the recognition of interest and license payments in cases of a special relationship between the payer and the beneficial owner if the transactions' conditions do not meet the arm's-length standard (ALS)⁵⁵. The OECD MTC commentary enumerates intra-group payments and payments between family members as examples for payments between related parties (OECD 2017, Art. 11 m.nos. 33-4 and Art. 12 m.nos. 23-4). The reasons for the inclusion of these provisions relate to the eventuality that related parties would rather agree on unusually high interest or license payments in their transactions, compared to similar arrangements with unrelated third persons (OECD 2017, Art. 11 m.no. 32 and Art. 12 m.no. 22; Aigner, Aigner and Buzanich 2019, Art 11. m.no. 78).⁵⁶ These clauses can hence be qualified as anti-abuse provisions against the background that, among other techniques, interest and licence payments form a comparatively simple and thus commonly used means to erode the tax base in high-tax jurisdictions and shift profits to countries with a more favorable tax environment (from the respective taxpayer's perspective) (Bendlinger 2018, chapter XIII m.no. 421). The practical relevance of this issue is probably best illustrated by the fact that the OECD dedicated one of the 15 BEPS Actions (i.e. Action 4) exclusively to recommendations on how to counteract base erosion through interest deductions and other financial payments deductible in the source state.⁵⁷ Such planning structures are thus

treaty revision additionally needs to ensure protection from undesirable exploitations of the treaty." (author's translation).

⁵⁵ "Arm's length" is defined in *Black's Law Dictionary* as "of relating to, or involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship" (Garner 2019, 134).

⁵⁶ These provisions resonate with a similar anti-abuse provision at the EU level for purposes of the Interest-Royalties Directive (Council Directive [EC] 49/2003 of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157/49 of 26 June 2003). Article 4 paragraph 2 of the Interest-Royalties Directive hence foresees a comparable (counter-)exception to the general obligation to exempt interest and royalty payments from a taxation in the source state to avoid double taxation within the EU in the case of unreasonably high payments between related parties. If an arrangement is to trigger its application, Article 4 paragraph 2 of the Interest-Royalties Directive similarly demands for an adjustment only to the extent that does not meet the ALS. This can be already be derived from the CJEU's settled case-law regarding domestic interest-limitation rules (see therefore the leading case C-524/04 *Test Claimants in the Thin Cap Group Litigation* EU:C:2007:161). Article 4 paragraph 2 of the Interest-Royalties Directive and Article 11 paragraph 6 of the Austrian-German DTC should hence ultimately lead to the same result, albeit that Article 4 paragraph 2 of the Interest-Royalties Directive would eventually precede Art 11 paragraph 6 of the Austrian-German DTC in the case of a conflict of laws on account of the primacy of EU law.

⁵⁷ In this sense OECD 2015b, m.no. 1: "The use of third party and related party interest is perhaps one of the most simple of the profit-shifting techniques available in international tax planning."

apparently considered by the OECD (and the CJEU⁵⁸) as to possibly entail an abusive character.

Regarding interest payments, Article 11 paragraph 2 of the Austrian–German DTC moreover includes an exemption from the general principle of taxing interest payments solely in the state of residence (Article 11 Paragraph 1 of the Austrian–German DTC) for purposes of deductible payments from rights and claims that convey profit participation. If the characteristics of a particular financial instrument thus match the definition of the exemption rule, this DTC provides the source state with an unlimited right to tax the related payments. The provision explicitly lists items of income from a silent partnership, certain types of shareholder loans (“partiarische Darlehen”) and participation bonds (“Gewinnobligationen”) as types of financial instruments that can be considered to meet the requirements. The main reason behind the implementation of this exemption rule was apparently an effort to prevent base erosion by making use of hybrid financial instruments (Bendlinger 2018, chapter XIII m.no. 410; Aigner, Aigner and Buzanich 2019, Art. 11 m.no. 89; Kirchmayr and Geringer 2020b, Art. 11 m.no. 34). This provision yet embodies a deviation from both the contemporary Austrian and German tax treaty policies which now unanimously aim to minimize or eliminate the right of taxation at source for interest payments in their treaties in order to encourage foreign investments (Wichmann 2011, 1082; Müller-Gatermann 2012, 1033; Jirousek 2013, 21; Lüdicke 2013, 37). It may thus not come as a surprise that identical rules can only be found in three other Austrian DTCs that were signed with countries as diverse as Cuba, Turkey and Venezuela (Aigner, Aigner and Buzanich 2019, Art. 11 m.no. 89).⁵⁹ Against this background, Article 11 paragraph 2 of the Austrian–German DTC could thus be described as a particularity in the Austrian tax treaty network. This assumption is further backed by the fact that, as of writing, neither the Austrian nor the German MTCs include a similar rule in the respective interest articles.⁶⁰ Although no such explanation is explicitly provided by the treaty text, the protocol or the legal materials accompanying the implementation process in

In this context, it appears remarkable that royalties, which could be analogously attributed the characteristics described above, have been expressly excluded from the best practice approach; compare OECD 2015b, m.no. 39. Germany has implemented a comparable limitation rule for purposes of royalty payments in its domestic corporate tax law regime, which has however raised severe concerns regarding its compatibility with the requirements of EU law. With regard to the aim of this article, these issues are not further elaborated in the following assessment.

⁵⁸ This assertion is borne out of the fact that the CJEU has discussed the compatibility of domestic interest limitation rules with the fundamental freedoms in light of the justification ground of the prevention of abuse, for the first time in the case C-324/00 *Lankhorst-Hohorst* EU:C:2002:749 (at paras. 37-8).

⁵⁹ Compare Article 11 paragraph 4 of the Austrian–Cuban DTC (“Convention between the Republic of Austria and the Government of the Republic of Cuba for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital,” issued in BGBl. III 2006/149 (in Austria)); the protocol to the Austrian–Venezuelan DTC (“Convention between the Republic of Austria and the Bolivarian Republic of Venezuela for the Avoidance of Double Taxation and the Prevention of Fiscal Avoidance and Evasion with Respect to Taxes on Income and on Capital,” issued in BGBl. III 2007/33 (in Austria)); Article 11 paragraph 4 of the Austrian–Turkish DTC (“Agreement between the Republic of Austria and the Republic of Turkey for the Avoidance of Double Taxation with Respect to Taxes on Income,” issued in BGBl. III 2009/96 (in Austria)).

⁶⁰ The current version of the Austrian MTC is included as Annex I in Lang, Schuch and Staringer 2013 (427-30). The current version of the German MTC is on file with the author.

Austria⁶¹, there are two reasons for the inclusion of this provision in these four Austrian treaties that appear particularly reasonable to the author: On one hand, Article 11 paragraph 2 of the Austrian–German DTC (and its equivalents) might be seen as a relict reflecting outdated tax policy interests. On the other hand, it could be assumed the Austrian delegation tries to include this type of provision in tax treaties despite its general policy in relation with certain tax jurisdictions where the classification of these kinds of hybrid financial instruments in the combined domestic tax laws could provide opportunities for double non-taxation.

Article 13 paragraph 2 of the Austrian–German DTC contains a specific rule on the taxation of capital gains from the alienation of shares in real estate companies. This regulation was included to ensure the taxation of capital gains from the selling of real estate at source no matter whether the real estate is directly owned by the seller or the ownership is provided by holding the shares in a corporation owning the real estate. It can thus be considered as a means to counteract undesirable tax planning schemes, which would allow the circumvention of the real estate clause through the interposition of a corporation (Föhls 2009, 261-2; Schaumburg 2017, m.no. 19.143; Arnold 2019, 85-6).⁶² Although Article 13 paragraph 2 of the Austrian–German DTC basically equals the corresponding provision in Article 13 paragraph 4 of the OECD MTC,⁶³ these measures yet differ significantly in detail. Article 13 paragraph 2 of the Austrian–German DTC does not include a 365-day observation period,⁶⁴ but instead exclusively refers to the relationship of the values at a certain point in time (Hasanovic and Neubauer 2014, 314; Marchgraber 2014, 463).⁶⁵ Article 13 paragraph 2 of the Austrian–German DTC moreover only refers to directly owned immovable property, whereas Article 13 paragraph 4 of the OECD MTC also takes indirect ownership⁶⁶ into account (Kirchmayr and Geringer 2020c, Art. 13 m.no. 21).⁶⁷ Lastly, the values relevant for an assessment for purposes of

⁶¹ Compare ErlRV 695 BlgNR 21. GP, 22-3 (AT) (regarding the Austrian–German DTC). See moreover ErlRV 259 BlgNR 22. GP, 3 (AT) (regarding the Austrian–Cuban DTC); ErlRV 1507 BlgNR 22. GP, 4 (AT) (regarding the Austrian–Venezuelan DTC); ErlRV 526 BlgNR 23. GP, 3 (AT) (regarding the Austrian–Turkish DTC).

⁶² Compare moreover Vann 1998, Section V, Subsection F: “A taxpayer can easily avoid those rules by holding the relevant assets in a company and then selling the shares in the company.”

⁶³ In contrast to Article 13 paragraph 4 of the OECD MTC, the Austrian–German DTC refers to immovable property’s value prevailing over other property’s, instead of stipulating a fixed 50% threshold. However, it is undisputed among scholars and the financial authorities that the provisions are to be granted the same essence in meaning. Compare Austrian Ministry of Finance [BMF] of 10 April 2017, EAS 3379 (AT); Bräumann and Moshhammer 2019, Art. 13 m.no. 83.

⁶⁴ The 365-day observation period has been implemented in Article 13 paragraph 4 of the OECD MTC through the 2017 update in an effort to tackle schemes designed to avoid its applicability. Compare OECD 2017, Art. 13 m.no. 28.5; Bräumann and Moshhammer 2019, Art. 13 m.no. 55a.

⁶⁵ Austrian Ministry of Finance [BMF] of 4 June 2013, EAS 3326 (AT).

⁶⁶ I.e. through a chain of corporations.

⁶⁷ The OECD extended the scope of paragraph 4 in the 2017 update to entities that do not issue shares, but can be assessed similar to stock corporations; see OECD 2017, Art. 13 m.no. 28.5; Bräumann and Moshhammer 2019, Art. 13 m.no. 55a. Although the scope in the Austrian–German DTC is restricted to corporations, excluding partnerships and trusts, this difference does not cause a differing assessment in practice, as the German and Austrian national taxation systems stipulate a look-through regime regarding partnerships and trusts. Accordingly, gains from the alienation of shares in partnerships and trusts that own immovable property are considered gains from the partial alienation of immovable property, which are also taxed in the state where the property is located (albeit under Article 13 paragraph 1 of the Austrian–German DTC).

Article 13 paragraph 2 of the Austrian–German DTC are the book values derived from the last financial statements prior to the alienation, not the fair values (which usually constitute the relevant factor in valuation; Staringer 1999, 107; Bräumann and Moshhammer 2019, Art. 13 m.no. 58; Kirchmayr and Geringer 2020c, Art. 13 m.no. 21).⁶⁸ This particularity of the Austrian–German DTC⁶⁹ cannot be derived from the provision’s wording, but from a respective statement in the protocol, which further clarifies regarding its intent that the use of the book values should facilitate valuation.⁷⁰ All three identified divergences from the clause recommended in Article 13 paragraph 4 of the OECD MTC yet provide for comparatively easy circumvention of the application of Article 13 paragraph 2 of the Austrian–German DTC.⁷¹ The concrete design of Article 13 paragraph 2 of the Austrian–German DTC hence effectively undermines the provision’s purpose to counteract undesirable tax planning structures (Staringer 1999, 106-7; Kirchmayr and Geringer 2020c, Art. 13 m.nos. 21-2).⁷²

Founded on the corresponding rule in the OECD MTC, Article 17 paragraph 2 of the Austrian–German DTC extends the application of the specific allocation rule for artists and sportspersons to third persons most notably to prevent the circumvention of taxation in the source state and redistribution of profits to a more favorable jurisdiction (OECD 2017, Art. 17 m.no. 8; Schaumburg 2017, m.no. 19.142; Bendlinger 2018, chapter XIII. m.no. 667; Toifl 2019, Art. 17 m.no. 65).

Finally, Article 23 paragraph 2 (c) of the Austrian–German DTC basically foresees the exemption method for dividends pursuant to Article 10 *leg.cit.* paid by German corporations to Austrian shareholders, which are not set off from the profit taxed in Austria. Its applicability is yet restricted insofar as the exemption is provided “subject to the corresponding national provisions of the Austrian tax law.”⁷³ According to Austrian scholars (Lechner 1999, 88-90), this reservation should yet not only refer to the general participation exemption rule (Article 10 of the Austrian Corporate Tax Code [KStG]⁷⁴), but moreover include the domestic switch-over clause (then-Article 10 paragraph 3 of the KStG). It can be

⁶⁸ Austrian Ministry of Finance [BMF] of 19 April 2010, EAS 3146 (AT); of 9 December 2010, EAS 3193 (AT); and of 18 April 2011, EAS 3214 (AT).

⁶⁹ Indeed, this valuation method appears to be used for no other Austrian DTC.

⁷⁰ See paragraph 4 of the protocol to the Austrian–German DTC.

⁷¹ For example, by interposing another corporation while only selling the shares in the mother company (i.e. the corporation at the top of the chain). See also Vann 1998, Section V, Subsection F: “While the purpose of the rules on companies is understandable, in practice it is not possible to prevent nonresidents from using variations on the same stratagem to avoid these rules. Rather than selling the shares in the resident company directly holding the relevant assets, a taxpayer can hold the assets through several tiers of companies (usually located in tax havens); it is then possible for one higher-tier nonresident company to sell the shares in the nonresident company below it in the tier and so effectively dispose of assets that may be several tiers below.”

⁷² Compare in this regard the reasoning on the implementation of the 365-day observation period through the 2017 update in OECD 2017, Art. 13 m.no. 28.5: “This change was made in order to address situations where assets are contributed to an entity shortly before the sale of the shares or other comparable interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in a Contracting State.” See, for an example which illustrates the possibly differing results in tax assessments in practice, Section 3 (fn. 161).

⁷³ Author’s translation.

⁷⁴ “Körperschaftsteuergesetz,” BGBl. 1988/401, as last amended by BGBl. I 2021/3.

assumed that the newly introduced, ATAD-based controlled foreign companies (CFC) rule, and amended versions of the domestic switch-over clause (both implemented in Article 10a of the KStG),⁷⁵ should also be covered by this reservation, if we bear in mind the apparently dynamic character of the reference to the Austrian domestic provisions. Both CFC rules and switch-over clauses can be considered typical examples of anti-abuse provisions: While CFC rules fundamentally counteract tax evasion and tax avoidance by (re-)attributing income from subsidiaries in low-tax jurisdictions to their parent companies (Avi-Yonah 2019, 38-46; Arnold 2019, 125-137), switch-over clauses provide for a transition from the exemption to the credit method if untaxed or low-taxed income is shifted to a high-tax jurisdiction in particular through the exploitation of domestic participation exemption rules (European Commission 2016b, 8-9). Against this background, The Austrian reservation on the applicability of the exemption method for dividend payments could thus be considered to contain elements of an anti-abuse provision.⁷⁶ As this clause has moreover been included in the Austrian MTC,⁷⁷ it seems reasonable to assume that it generally forms an integral part of the basis for negotiation in Austrian tax treaty policy.

The aforementioned treaty-based anti-abuse provisions addressing specific situations are accompanied by Article 28 paragraph 2 of the Austrian–German DTC, which expressly entitles the respective state of residence to apply its domestic anti-abuse provisions to counteract “abusive arrangements and unfair tax competition.”⁷⁸ Article 28 paragraph 2 of the Austrian–German DTC mirrors a wide-spread phenomenon in international tax treaty policy, as DTCs frequently contain a rule which explicitly allows for the application of national anti-abuse provisions (Helminen 2013, 99; Holmes 2014, 393).⁷⁹ This provision (and similar reservations in other DTCs) appears remarkable if we bear in mind that the inclusion of such a rule inherently requires a fundamental and intentional acknowledgement by the two contracting states that different abuse concepts are likely to be applied to similar situations for purposes of the same tax treaty (in accordance with the respective domestic abuse doctrine).⁸⁰ This assertion is borne out of the fact that each tax jurisdiction, although influenced

⁷⁵ See in detail Section 5.

⁷⁶ By contrast, Germany did not place a similar reservation on inverse situations. See in this regard Article 23 paragraph 1 of the Austrian–German DTC.

⁷⁷ Article 22 paragraph 1 (c) leg.cit.

⁷⁸ Author’s translation. Paragraph 15 of the protocol to the Austrian–German DTC further concretizes that “abusive arrangements” are to be understood as such which appear unusual, inadequate, and solely aim at tax avoidance, i.e. where no non-tax reasons for a specific structure or transaction exists so that it can solely be explained by the purpose of avoiding taxes. Accordingly, they are assumed for situations in which the chosen structure seemed irrational or incomprehensible if the tax-saving effect were to be (theoretically) eliminated. This description mirrors the typical phrasing in the settled case law on the Austrian GAAR prior to the ATAD’s adoption (see also Kofler 2010, 102). Regarding the term “unfair tax competition,” Austria and Germany further reached an agreement that it is to be interpreted as “harmful tax practices” according to the relevant OECD and EU legal documents.

⁷⁹ From a taxpayer’s perspective, the implementation of such reservation clauses can be welcomed, as they basically provide for a higher degree of legal certainty.

⁸⁰ That is, in addition to the unequal treatment stemming from Austria’s reservation declared in Article 23 paragraph 2 (c) of the Austrian–German DTC.

by tendencies to harmonize abuse concepts at the supranational and international level, has developed and cultivated its autonomous rules, principles and case laws against the background of domestic taxation systems over the course of time. These reflections do not only exist in theory, but are indeed prone to gain practical relevance. For example, the settled case law of the Administrative Court (VwGH), Austria's supreme court in tax matters, allows for a parallel applicability of SAARs and the domestic GAAR,⁸¹ whereas the Federal Fiscal Court (BFH), its German equivalent, rejects the idea of applying the German domestic GAAR within the scope of a specific domestic or treaty-based anti-abuse provisions by virtue of the *lex specialis* rule⁸² (Loukota 2010, 586-7; Drüen 2016, 300-2; Schaumburg 2017, m.no. 19.133).

Against this background, it can be principally welcomed (in particular from an equality perspective) that the Austrian-German DTC has only recently been bolstered by the MLI. In a nutshell, the MLI is a multilateral treaty negotiated at the OECD level to ensure a quick implementation of coherent abuse concepts in a large number of DTCs in an effort to avoid the necessity of renegotiating them separately (Panayi 2018, 153-7; Kokott, Pistone and Miller 2020, 202). For purposes of the Austrian-German DTC, the applicability of the MLI translates into:

- First, the inclusion of a preamble text which expressly declares the prevention of tax evasion and tax avoidance as an auxiliary purpose of the treaty (Article 6 of the MLI);
- Second, the implementation of a principal purpose test (PPT) as a type of treaty GAAR (Article 7 of the MLI);
- Third, specific anti-abuse rules for permanent establishments (PEs) situated in third jurisdictions (Article 10 paragraphs 1 through 3 of the MLI).

It remains to be seen whether, and to what extent, in particular the inclusion of a treaty GAAR will affect the case laws of the contracting states cited above.⁸³

To summarize, the Austrian-German DTC does not originally include a general rule addressing a wide array of abusive arrangements, but indeed only includes punctual measures aimed at tackling specific tax planning schemes. This treaty moreover expressly allows the contracting states to apply their domestic anti-abuse provisions in order to combat abusive arrangements and unfair tax competition, which most likely produces differing results if we consider the

⁸¹ E.g., Verwaltungsgerichtshof [VwGH] [Administrative Court] of 9 Dec. 2004, 2002/14/0074 (AT); Verwaltungsgerichtshof [VwGH] [Administrative Court] of 10 Aug. 2005, 2001/13/0018 (AT).

⁸² E.g., Bundesfinanzhof [BFH] [Federal Fiscal Court] of 31 May 2005, I R 74, 88/04 (DE), m.no.19.

⁸³ Although the MLI's PPT should ideally be unanimously interpreted and applied in the participating countries, it can yet not be ruled out that these countries could be inclined to read into the MLI's PPT what might best match their traditional domestic abuse concepts (and their fiscal interests). Compare Lang 2014, 659: "National courts may reach completely different judgments, and they are often unable to free themselves from the fiscal interests of their state. *In dubio pro patria* (when in doubt, for his country) seems to be a principle that often determines the case law on treaties." [emphasis in original].

differences in the respective domestic abuse doctrines. For purposes of the following comparative analysis in Section 3, we should particularly keep in mind that the Austrian–German DTC has recently been bolstered by the MLI, which most notably brings about the implementation of both a modified preamble and a PPT.

Preventing treaty shopping through a limitation on benefits clause in addition to specific anti-abuse provisions: The example of the Austrian–US DTC

The implementation of a limitation on benefits (LOB) clause in Article 16 of the Austrian–US DTC⁸⁴ stems from the US tax treaty policies initiated in the 1980s, which has demanded that all newly negotiated treaties include a significant LOB article (Ault 1997, 21; Kofler 2018a, 45; Avi-Yonah 2019, 6 and 145). It is indeed one of very few Austrian treaties entailing such an anti-abuse provision (Staringer 2015, 172).⁸⁵ This assertion is borne out of the fact that it is in accordance with the general Austrian tax treaty policy to avoid the implementation of LOB clauses in their treaties, which is confirmed by the fact that, first, the Austrian MTC does not entail an LOB article, and, second, Austria has opted for the exclusive implementation of a PPT through the MLI (while additionally making a reservation regarding the unilateral application of the MLI’s LOB article by the respective contracting partner; Kofler 2018b, 59). Considering the tremendous differences between the treaty’s contracting partners regarding their political and economic powers, it may yet not come as a surprise that the Austrian delegation nevertheless basically accepted the US position, while primarily focusing to have specific provisions implemented that would level the playing field for Austrian taxpayers in the competition with US and third-country companies (i.e. the headquarters test; Jirousek 2013, 17).⁸⁶

In a nutshell, LOB articles can be described as extensions to the treaty’s residency test (Ault 1997, 21). These provisions hence exhaustively define the circumstances under which a person resident in one of the contracting states is basically eligible to be granted the rights of the corresponding DTC. Individuals, public entities and not-for-profit organizations whose shareholders or beneficiaries predominantly pass the LOB test are generally entitled to claim the rights set out in this DTC (Article 16 paragraph 1 (a), (d) and (g) of the Austrian–US DTC).⁸⁷ Other taxable entities need to pass one of the following: the active

⁸⁴ “Convention between the United States of America and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income,” issued in BGBl. III 1998/6 (in Austria).

⁸⁵ The Austrian–Japanese DTC (“Convention between the Republic of Austria and the Republic of Japan for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance,” BGBl. III 2018/167 (in Austria)) can be named as a further example.

⁸⁶ These assertions are further backed by observations made by *Hugh Ault* from the US perspective. Compare (in the context of the “tie-breaker” rule for purposes of the determination of a corporation’s place of residence) Ault 1997, 15: “The Treaty resolves this issue by giving priority to the place of incorporation. This is consistent with the position taken in the [US] Model Treaty. [...] The US has usually not been successful in getting the other treaty partner to agree to the incorporation test and the Austrian treaty is significant in this respect.” See on the Austrian tax treaty policy in more detail Subsection 2.1 and, for its socio-political implications, Section 3.

⁸⁷ However, they could still be refused the rights pursuant to the Austrian–US DTC if they failed the triangular case test (see below).

trade or business test, the foreign ownership/base erosion test, the public company test, the headquarters test or the triangular case test. Fulfilling the criteria of any of these is required every tax year, to take changes in circumstances into account.

The active trade or business test (Article 16 paragraph 1 (c) of the Austrian–US DTC) asks the resident to engage in the active conduct of a trade or business, thus not only performing asset-managing activities (except for bank and insurance companies; Gröhs 1997, Art. 16 m.nos. 10-3), while the income derived in the other contracting state needs to be generated in connection with, or be incidental to, that trade or business. The purpose of this test is hence to deny the treaty benefits to shell companies that have been interposed in one of the contracting states with the intent of qualifying for applicability under the treaty (Schuch 1997, 81-5).⁸⁸ The MOU enumerates criteria that, if met, convey a sufficient amount of substance (safe harbor clause) (Schuch 1997, 85-90).⁸⁹ The MOU moreover clarifies that the active trade or business test can also be passed in cases of indirect engagement in qualified trade or business activities, as long as the relevant subsidiaries meet the requirements.⁹⁰ The active trade or business test must be assessed for each item of income on a stand-alone basis.⁹¹

The foreign ownership/base erosion test (Article 16 paragraph 1 (d) of the Austrian–US DTC) refuses the access to the treaty benefits in situations where a conduit company is founded in one of the contracting states to achieve beneficial treatment under the DTC regime for shareholders who do not predominantly fulfil the criteria of one of the LOB clause's tests themselves (foreign ownership test). The arrangement moreover needs to be realized in a way that results in a passing through of income through interest and royalty payments or other types of obligations (base erosion test) (Gröhs 1997, Art. 16 m.nos. 15-7; Widhalm 1997, 93).

Corporations whose shares are substantially and regularly traded on a recognized stock exchange, or are at least 90% owned by no more than five such companies, meet the standards of the public company test (Article 16 paragraph 1 (e) and (f) of the Austrian–US DTC) (Sauer 1997, 113-4). Given the regulatory mechanisms applicable to these listed corporations, it is assumed that they provide a sufficient level of substance and “solidity” (Gröhs 1997, Art. 16 m.no. 18). This notwithstanding, the terms “shares,” “substantial” and

⁸⁸ See the MOU to the Austrian–US DTC, Re Article 16 (LOB), Para. 1 (c), example IV. See also Austrian Ministry of Finance [BMF] of 6 June 2006, EAS 2737 (AT).

⁸⁹ Consequently, if the average of 1) the ratio of the value of assets used or held for use in the active conduct of the trade or business in the resident state to all (or a proportionate share of) the value of the assets so used or held for use in the other contracting state and 2) the ratio of gross income derived from the active conducting of trade or business in the resident state to all (or a proportionate share of) the payroll expense of the trade or business for services performed in the other states jointly exceed 10% and 7.5% each. If one of the 7.5% thresholds is not met, the average of the ratios for that factor in the three preceding taxable years can be taken into account instead.

⁹⁰ See MOU to the Austrian–US DTC, Re Article 16 (LOB), Para. 1 (c), which encompasses a number of situations. See also Austrian Ministry of Finance [BMF] of 7 Jan. 2020, EAS 3422 (AT).

⁹¹ See also IRS 1996, 67: “These determinations are made separately for each item of income derived from the other State. It therefore is possible that a person would be entitled to the benefits of the Convention with respect to one item of income but not with respect to another.”

“regular,” crucial for any assessment under the public company test, are however defined neither in the DTC nor the corresponding MOU, which gives way for potentially inconsistent interpretations by the contracting states. Recognized stock exchanges are only such registered according to the US Securities Exchange Act (SEC) to the effect that public companies whose shares are traded on (most importantly) EU stock exchanges automatically fail the public company test (Sauer 1997, 131-3).

If a corporation is identified as a recognized headquarters company for a multinational corporate group, it is eligible to be granted the treaty’s rights, on account of the headquarters test (Article 16 paragraph 1 (h) of the Austrian-US DTC). For purposes of this assessment, the MOU enumerates seven criteria to be met by the headquarters or controlled companies (Schuch and Toifl 1997, 140-3).⁹² In contrast to the active trade or business, foreign ownership/base erosion, or public company tests, a clause similar to the Austrian-US DTC’s headquarters test was not included in the LOB clause of the US MTC 1996.⁹³ It can hence be assumed that at the time of negotiation of the Austrian-US DTC the headquarters test did not commonly form part of US double tax treaty negotiations.⁹⁴ The driving force behind the implementation of the headquarters test indeed appears to have been the Austrian delegation that apparently intended to preserve and strengthen Austria’s position as an attractive place of residence for headquarters (Schuch and Toifl 1997, 137).⁹⁵ This assertion appears to be backed by the fact that similar clauses had been previously implemented, *inter alia*, in Article 22 paragraph 1 (d) of the Swiss-US DTC and Article 26 paragraph 3 of the Dutch-US DTC (Ault 1997, 22). Both of these countries basically share with Austria the characteristics of comparatively small economies with a limited domestic market, which hence rely to a higher extent on exports and/or capital import (Loukota 1998, 127).

The triangular case test (Article 16 paragraph 4 of the Austrian-US DTC) addresses income from interest and royalty payments that is generated in the US and attributable to a PE in a third jurisdiction. In cases when these items of income are subject to a tax rate lower than 60% of the general corporate tax rate

⁹² E.g., a substantial portion of the overall supervision and administration of the group, independent discretionary authority, same country of residence as other persons entitled to the benefits of the treaty, not more than 25% of its gross income derived from the other state, this income being derived in connection with or incidental to the headquarters’ business, active trade or business in the group in five countries—the gross income generated therefrom amounting to at least 10%—, and less than 50% of the group’s gross income in the other state. Compare MOU to the Austrian-US DTC, Re Article 16 (LOB), Para. 1 (h).

⁹³ Which was the relevant US MTC by the time of the closing of the Austrian-US DTC.

⁹⁴ Compare IRS 1996, 2: “Another purpose of the Model and the Technical Explanation is to provide a basic explanation of U.S. treaty policy for all interested parties, regardless of whether they are prospective treaty partners.” This assertion is further backed by a table issued by the IRS displaying the types of tests embedded in the respective DTC’s LOB clauses (see IRS 2020), effectively revealing the quality of the Austrian-US DTC’s headquarters test as rather a peculiarity in comparison to the general US tax treaty policy (as far as it has materialized in the existing US DTCs).

For the sake of completeness, it should yet be pointed to the fact that a headquarters test has been incorporated in the recent US MTC 2016 (Article 22 paragraph 5 *leg.cit.*).

⁹⁵ Compare on the competition among countries for the (re)location of headquarters of multinational enterprises (MNEs) in their territories in general Dagan 2018, 25.

in Austria (25% for the time being,⁹⁶ 60% thereof thus equaling 15%) in the third country,⁹⁷ they are refused an exemption or reduction of withholding tax and taxed at 30% in the US.⁹⁸ This provision is not applicable in cases of interest payments related to the active conduct of trade or business carried on by the PE, royalties received as compensation for self-produced or self-developed intangible property⁹⁹, and income already taxed under the CFC regime of the US Internal Revenue Code (IRC) (Gröhs 1997, Art. 16 m.no. 18; Staringer 1997, 170-1).¹⁰⁰ Because other payments, such as dividends, are not subject to the triangular case test, this provision provides leeway to circumvent its effects through respective (re)adjustments regarding the companies' structures in relation to third jurisdictions, which could prove favorable in the case of portfolio investments (Staringer 1997, 165).

In cases when taxpayers do not meet the criteria of any of the objective tests illustrated above, Article 16 paragraph 2 of the Austrian-US DTC still provides the financial authorities in the source state with the discretionary power to nevertheless grant the treaty benefits on a case-by-case basis. The grace clause should hence be exercised taking into account "whether the establishment, acquisition, or maintenance of such person or the conduct of its operations has or had as its principal purpose the obtaining of benefits."¹⁰¹ Failing the objective tests then serves as an indicator of probable treaty or rule shopping (Gassner 1997, 177). Due to its vague character, the grace clause provides for an additional (and apparently willingly accepted) source of differing valuation of similar situations in the contracting states according to their legal traditions and their case law. Most notably, in applying the LOB clause, Austria needs to exercise discretion to safeguard the benefits provided by the EU fundamental freedoms, and generally take its obligations pursuant to EU law into account (Gassner 1997, 188-9; Kofler 2007, 525-6). The special US ties with Canada and Mexico under the United States-Mexico-Canada Agreement (USMCA) are similarly prone to influence the handling of the grace clause by the US financial authorities (MOU to the Austrian-US DTC, Re Article 16 (LOB), Para. 2, International Economic Integration¹⁰²).

⁹⁶ By the time the Austrian-US DTC came into effect, the general corporate tax rate in Austria was 34%. The altered corporate tax rate should be used as the currently relevant guideline, given the provision's wording that indicates the presence of a dynamic reference (Staringer 1997, 167).

⁹⁷ Interest or royalty income attributed, for example, to a PE in Ireland or Cyprus (both 12.5% corporate tax rate) would hence meet this criterion.

⁹⁸ These consequences seem particularly dire in comparison to similar DTCs with other European countries that encompass a maximum withholding tax rate of 15%. See for a comparative analysis Staringer 1997, 161-2.

⁹⁹ Meaning self-produced or self-developed in the permanent establishment; Staringer 1997, 169-70.

¹⁰⁰ A reverse implementation of the triangular case test for interest and royalty incomes generated in Austria was obsolete against the background of the general approach in US tax treaty policy to avoid double taxation in these situations through granting tax credits.

¹⁰¹ MOU to the Austrian-US DTC, Re Article 16 (LOB), Para. 2.

¹⁰² Although the MOU refers to the former North American Free Trade Agreement (NAFTA), it can be assumed that these statements should now be analogously applicable to the USMCA.

Beyond the LOB clause, the Austrian-US DTC contains the beneficial ownership requirements for purposes of passive income,¹⁰³ and specific anti-abuse provisions addressing unusually high interest and royalty payments between related parties,¹⁰⁴ circumvention schemes in context with capital gains from the alienation of shares in real estate companies,¹⁰⁵ and artists' and sportspersons' incomes through the interposition of conduit companies,¹⁰⁶ similar to the Austrian-German DTC. These broad parallels most certainly derive from the DTCs' common origin (i.e. the OECD MTC).¹⁰⁷ In contrast to the corresponding provision in the Austrian-German DTC, yet in accordance with Article 13 paragraph 4 of the OECD MTC, real estate companies are also covered by the scope of Article 13 paragraph 2 of the Austrian-US DTC in cases of indirect ownership of real property situated in the other contracting state. Article 13 paragraph 2 of the Austrian-US DTC can thus be considered to provide for higher protection against undesirable tax planning in these situations, compared to Article 13 paragraph 2 of the Austrian-German DTC.

In contrast to the Austrian-German DTC, the Austrian-US DTC expressly foresees a specific regime for investment funds (hence US regulated investment companies and real estate investment trusts; Article 10 paragraph 2 of the Austrian-US DTC), which excludes the application of the reduced tax rate at the source in both cases. For purposes of real estate investment trusts, the standard tax rate of 15% is moreover only applicable if the beneficial owner is an individual taxpayer that participates holding less than 10% interest in the entity (Gröhs 1997, Art. 10 m.nos. 7-9). This provision could be qualified as an anti-abuse provision¹⁰⁸ if we bear in mind that the currently relevant OECD MTC commentary recommends the inclusion of a specific rule in a DTC's dividends article if domestic tax rules might invite to the abusive claim of treaty benefits by using investment vehicles.¹⁰⁹

The MOU to the Austrian-US DTC clarifies that the presence of the LOB clause in the treaty does not prevent the contracting states from assessing other situations not already covered by a specific anti-abuse provision of the treaty, according to the substance over form approach. This agreement is unanimously understood by Austria and the US as to entitle them to apply their domestic anti-

¹⁰³ Article 10 paragraph 2, Article 11 paragraph 1 and Article 12 paragraph 1 of the Austrian-US DTC.

¹⁰⁴ Article 11 paragraph 4 and Article 12 paragraph 5 of the Austrian-US DTC.

¹⁰⁵ Article 13 paragraph 2 of the Austrian-US DTC.

¹⁰⁶ Article 17 paragraph 2 of the Austrian-US DTC.

¹⁰⁷ See accordingly, regarding the Austrian-US DTC, Ault 1997, 13: "the treaty provisions are drafted according to the corresponding provisions of the OECD model," and, regarding the Austrian-German DTC, Runge 1999, 17: "The OECD Model serves as a guideline and thereby ensures a certain uniformity" (author's translation).

¹⁰⁸ I.e. a means to disincentivize the abusive use of (certain US-based) investment funds as intermediaries.

¹⁰⁹ See OECD 2017, Art. 10 m.no. 17: "Under the domestic law of some States, it is possible to make portfolio investments in shares of companies of that State through certain collective investment vehicles established in that State which do not pay tax on their investment income. In such cases, a non-resident company that would own at least 25 per cent of the capital of such a vehicle could be able to access the lower rate provided by subparagraph a) with respect to dividends paid by that vehicle even though the vehicle did not own at least 25 per cent of the capital of any company from which it received dividends. States for which this is an issue could prevent that result by including in paragraph 2 a rule drafted along the following lines [...]: Subparagraph a) shall not apply to dividends paid by a company which is a resident of [name of the State] that is a [description of the type of collective investment vehicle to which that rule should apply]."

abuse provisions.¹¹⁰ Although the reservation clause is only incorporated in the MOU, it reflects in a similar manner like Article 28 paragraph 2 of the Austrian-German DTC a common practice in international tax treaty policy to preserve the right to apply domestic anti-abuse provisions. The statement in the MOU can hence be attributed with the same quality of legal binding and relevance for purposes of the assessment of cross-border situations between the contracting states on account of the MOU's characteristic as an integral part of the Austrian-US DTC (Lang 1997, 35).

To conclude, the Austrian-US DTC stands out as one of the very few Austrian DTCs to include a LOB clause, which can be regarded as the result of Austria's general tax treaty policy to give preference to the establishment of a dense tax treaty network over the rigorous pursuit of its own goals. If taxpayers are to pass one of the incorporated objective tests, they are basically eligible to claim all treaty benefits, while a grace clause allows the source state to nevertheless grant beneficial treatment on a case-by-case basis. The specific anti-abuse provisions of the Austrian-US DTC broadly parallel those in the Austrian-German DTC. This circumstance can most likely be explained by the fact that both DTCs are founded on the OECD MTC. The MOU to the Austrian-US DTC moreover contains a bilateral reservation to apply domestic anti-abuse provisions, which can be attributed basically the same legal quality and relevance as the comparable clause in the Austrian-German DTC.

Broad protection against tax avoidance and tax abuse through a respective preamble and a principal purpose test: The example of the Austrian-UK DTC

The Austrian-UK DTC has only recently been renegotiated, the new treaty having been signed in 2018 and applicable as of 2020.¹¹¹ The closing of a new treaty was carried by several aims: It was perceived that the former treaty of 1969 needed to be updated in light of the current "state of the art" in international tax treaty policy. In addition, the Austrian and the UK governments aimed to increase the degree of legal certainty for the taxpayers after the UK's leaving the EU, and hence embedded in their new treaty specific EU-induced

¹¹⁰ The Austrian and US financial authorities seem to share common ground in their interpretations of the MOU. For Austria, see the explanatory statements to the tax treaty in the parliamentary decision-making process, 213 BlgNR 20. GP, 82 (AT): "this provision *does not hinder any of the contracting states to apply also other anti-abuse provisions embedded in domestic law*" (author's translation, emphasis added). Similarly for the US, see IRS 1996, 63: "Article 22 and the anti-abuse provisions of domestic law complement each other, as Article 22 effectively determines whether an entity has a sufficient nexus to the Contracting State to be treated as a resident for treaty purposes, while domestic anti-abuse provisions (e.g., business purpose, substance-over-form, step transaction or conduit principles) determine whether a particular transaction should be recast in accordance with its substance." [emphasis added]. An agreement on the understanding of tax treaty provisions in unilateral documents adds weight to a corresponding interpretation (Lang 1997, 31-2). See accordingly Article 31 paragraph 3 (b) of the VCLT: "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Compare in this regard Dörr and Schmalenbach 2018, Art. 13 m.no. 79: "*No particular form* is required, so that official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions." [emphasis in original].

¹¹¹ "Convention between the Republic of Austria and the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains," issued in BGBl. III 2019/32 (in Austria).

provisions to provide for a continuously smooth flow of business relations after “Brexit.” The third objective pursued with the closing of the new Austrian–UK DTC—the alignment of the treaty provisions with recent developments regarding tax avoidance and tax abuse at the international level by implementing a corresponding preamble and PPT—then proves of particular interest for the purposes of this article (Schmidjell-Dommes 2019b, 58).

The implementation of a toolkit of anti-abuse provisions in the Austrian–UK DTC in accordance with corresponding initiatives at the OECD level equals the contemporary approach in the Austrian double tax treaty policy, which can be deduced from a comparative analysis with other recently signed DTCs, such as the Austrian–Japanese and the Austrian–Kosovan¹¹² DTCs.¹¹³ The Austrian–Kosovan DTC indeed virtually mirrors the Austrian–UK DTC concerning the types of protection measures against tax avoidance and abuse, as it equally entails a preamble emphasizing the contracting partners’ intent not to grant the treaty’s benefits in the case of abusive arrangements, and a PPT (Article 26 *leg.cit.*).¹¹⁴ The contemporary approach in Austrian tax treaty policy is paralleled in the UK: By virtue of a protocol amending the 1962 DTC, a PPT identical in wording regarding the respective clause in the Austrian–UK DTC has been introduced by way of Article 21A of the UK–Israeli DTC in 2019. An OECD-induced PPT has moreover already been implemented in 2017 through respective protocols for purposes of the UK DTCs with Switzerland,¹¹⁵ Ukraine¹¹⁶ and Uzbekistan^{117,118}. These developments yet need not to be regarded as being particularities in the Austrian and UK DTCs, but indeed seem to reflect the current *zeitgeist* in international tax policy. As particularly developed¹¹⁹ countries have developed a practice to devise their DTCs in broad accordance with the OECD MTC,¹²⁰ it thus makes perfect sense that recently (re)negotiated DTCs include two or more broad anti-abuse measures (a respective preamble, a PPT and/or an LOB clause) and thereby mimic the

¹¹² “Convention between the Republic of Austria and the Republic of Kosovo for the Elimination of Double Taxation with Respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance,” BGBl. III 2019/2 (in Austria).

¹¹³ See also Anon. 2019, 234, citing statements made by Sabine Schmidjell-Dommes during an interview: “These three new DTCs already include first [anti-]BEPS clauses which were subsequently implemented into the OECD MTC 2017. In the course of those negotiations we still had to fight for the implementation and formulation of particular [anti-]BEPS provisions. In the meantime, a broad consensus could be reached through the OECD MTC 2017.” (author’s translation).

¹¹⁴ The absence of a subject-to-tax clause, and the PPT’s scope covering only items of income can be named as deviations from the comparable clause in the Austrian–UK DTC. In contrast to the Austrian–UK and Austrian–Kosovan DTCs, the Austrian–Japanese DTC includes both a LOB clause and a PPT clause (Article 22 *leg.cit.*). The Austrian–Japanese DTC has thus been devised in broad accordance with the OECD recommendations conveyed in BEPS Action 6 and the MLI, respectively (Schmidjell-Dommes 2019a, 16).

¹¹⁵ Compare Article 27A of the Swiss–UK DTC.

¹¹⁶ Compare Article 23 of the Ukrainian–UK DTC.

¹¹⁷ Compare Article 23 of the Uzbek–UK DTC.

¹¹⁸ The relevant documents are accessible via the HM Revenue & Customs’ webpage; see HM Revenue & Customs 2014.

¹¹⁹ For purposes of this article, developed countries are defined in negative terms as all countries which are not considered as developing countries (see in this regard already *fn.* 48).

¹²⁰ Compare Thuronyi, Brooks and Kolozs 2016, 102: “The OECD model has exercised a dominant influence on the formation of income tax treaties.”

recommendations of the currently relevant OECD MTC (version 2017, as of writing).¹²¹

The Austrian–UK DTC was hence signed with the intent of “eliminat[ing] double taxation [...] without creating opportunities for non- or reduced taxation through evasion or avoidance (including treaty-shopping arrangements aimed at obtaining relief provided in this Convention for the indirect benefit of residents of third States” (preamble of the Austrian–UK DTC). All provisions of the DTC thus ought to be read and interpreted in light of this purpose.¹²² The PPT (Article 27 of the Austrian–UK DTC) more precisely demands the refusal or the withdrawal of treaty benefits related to “an item of income or capital if it is reasonable to conclude, given all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction resulting directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.” As the preamble’s and PPT’s phrasings precisely mirror the recommendations in the OECD MTC 2017, as well as Article 6 paragraph 1 and Article 7 paragraph 1 of the MLI, both the explanatory statement to the MLI¹²³ and the OECD MTC commentary can be viably considered as relevant supplemental guidelines for interpretation purposes. The use of these documents in the course of the interpretation of the Austrian–UK DTC would then be basically capable of paving the way for a harmonized interpretation and application of the DTC’s anti-abuse provisions in both Austria and the UK.¹²⁴

In addition to these general measures, the Austrian–UK DTC embodies several specific anti-abuse provisions in the allocative rules. The beneficial ownership requirement,¹²⁵ the specific rules on the limited granting of benefits to interest and license payments between related parties¹²⁶ and the anti-abuse provision to counteract the interposition of conduit companies for purposes of the re-allocation of income of artists and sportspersons¹²⁷ virtually mirror the

¹²¹ On the implementation of a preamble expressing the protection against tax evasion and tax abuse as an auxiliary objective, see OECD MTC commentary, Art. 1 m.no. 7. The LOB clause and the PPT are both included in Article 29 of the OECD MTC.

¹²² See in this regard Article 31 paragraphs 1 and 2 of the VCLT: “A treaty *shall be interpreted* in good faith in accordance with the ordinary meaning to be *given to the terms of the treaty in their context* and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble and annexes*” [emphasis added]. The additional value of the implementation of a respective preamble could yet be called into question if we assume that contracting states fundamentally close DTCs under the (unwritten) prerequisite that these benefits should not be granted in the presence of abusive or tax-avoiding plans (Lang 2018b, 62-3; see also De Broe and Luts 2015, 127-8 with further references).

¹²³ OECD 2016.

¹²⁴ The author however submits that an interpretation in light of the OECD documents may yet lead to differing results in the respective countries. These differences could stem from, inter alia, diverging understandings regarding the meaning of specific words or phrasings, or a differing significance of certain interpretation methods (e.g. a formalistic vs. a purposive approach). This assertion can probably be best illustrated by pointing to the diverse and often conflicting views regarding the “proper” interpretation of the MLI’s PPT in academic scholarship. Compare, e.g., De Broe and Luts 2015; Weber 2017; De Pietro 2020; Danon et al. 2021.

¹²⁵ Article 10 paragraph 2, Article 11 paragraph 1 and Article 12 paragraph 1 of the Austrian–UK DTC.

¹²⁶ Article 11 paragraph 5 and Article 12 paragraph 4 of the Austrian–UK DTC.

¹²⁷ Article 16 paragraph 2 of the Austrian–UK DTC.

respective provisions in the Austrian-German and Austrian-US DTCs. Their identical design can (again) be explained by the fact that all these three DTCs, as practically all DTCs between developed countries, are fundamentally based upon the OECD model (Thuronyi, Brooks and Kolozs 2016, 102).

The specific clause addressing real estate companies in the Austrian-UK DTC (Article 13 paragraph 2 *leg.cit.*) is yet comparatively narrowed and hence applies only to the alienation of shares when there is no substantial and regular trading on a stock exchange or comparable interests. While stock companies are thus excluded from its scope of application, Article 13 paragraph 2 of the Austrian-UK DTC allows for tax planning to a higher degree, if we compare the legal situation for real estate stock companies under the Austrian-UK DTC with similar arrangements covered by the Austrian-German and Austrian-US DTCs. Although neither the protocol to the Austrian-UK DTC nor the legal materials accompanying the implementation in Austria¹²⁸ provide for an explanation, it can be assumed that the exemption of stock companies is borne out of the fact that due to their characteristics¹²⁹ it appears rather unlikely that they are specifically installed for purposes of tax avoidance in the source state.¹³⁰

In contrast to Article 13 paragraph 2 of the Austrian-German DTC, but identical to Article 13 paragraph 2 of the Austrian-US DTC, Article 13 paragraph 2 of the Austrian-UK DTC applies to real estate companies whose assets' value derives either directly or indirectly in excess of 50% from immovable property located in the other contracting state. If we bear in mind that the new Austrian-UK DTC was negotiated against the background of increasing international efforts to combat tax avoidance and tax abuse, it appears remarkable that the real estate companies' clause in the Austrian-UK DTC does not entail a 365-day observation period, as suggested in both Article 13 paragraph 4 of the OECD MTC and Article 9 paragraph 1 of the MLI. The day of transaction hence ought to be considered the solely decisive point of time for the valuation of the presence of a real estate company according to Article 13 paragraph 2 of the Austrian-UK DTC. In this context, this provision thus appears similarly susceptible to potential circumvention schemes as its equivalents in the Austrian-German and Austrian-US DTCs.¹³¹ When we compare the Austrian-UK DTC with other tax treaties recently signed by Austria, it can be found that a 365-day observation period was solely included in Article 13 paragraph 2 of the Austrian-Japanese DTC, whereas Article 13 paragraph 4 of the Austrian-Kosovan DTC broadly reflects the respective provision in the Austrian-UK DTC. When we moreover contextualize the legal design in the Austrian-UK DTC with Austria's approach in the MLI's ratification

¹²⁸ ErIRV 326 BlgNR 26. GP, 3 (AT).

¹²⁹ Most importantly, the numerous requirements that corporations must meet to have their shares listed on a stock exchange and the typically large number of shareholders.

¹³⁰ Compare the statements in context with the public company test in the OECD MTC's LOB clause: OECD 2017, Art. 29 m.no. 15. See moreover, concerning the reasoning given for the public company test for the purposes of the Austrian-US DTC's LOB clause, Subsection 2.3.

¹³¹ See Subsections 2.2 and 2.3.

process, we can perceive that Austria issued a reservation pursuant to Article 9 paragraph 6 (a) of the MLI¹³² and thereby expressed its aim to have the real estate companies' clause of the MLI not applied for purposes of its covered tax agreements¹³³ (Lang and Zöhrer 2019, 231). Against this background, it can be assumed that the absence of a 365-day observation period in Article 13 paragraph 2 of the Austrian–UK DTC reflects the general Austrian tax treaty policy,¹³⁴ while its implementation in the Austrian–Japanese DTC might rather be traced back to a respective insistence from the Japanese side. This deviation from a common pattern in Austrian tax treaty policy thus depicts another practical case of one of the main motives underlying Austria's tax treaty policy as a small, export-oriented economy, which rather prioritizes the establishment of a broad tax treaty network over the enforcement of its own policy interests.¹³⁵

An equivalent to the specific rule for relevant investment vehicles¹³⁶ in the treaty's dividends article which allows for a higher tax rate at the source of 15%¹³⁷ (Article 10 paragraph 2 (a) (ii) of the Austrian–UK DTC) can only be found in the Austrian–US DTC for the purposes of US regulated investment companies and real estate investment trusts.¹³⁸ It can hence be equally regarded as carrying the characteristics of an anti-abuse provision for the reasons described above.¹³⁹ In contrast to the comparable rule in the Austrian–US DTC, Article 10 paragraph 2 (a) (ii) however addresses both Austrian- and UK-based investment structures. While similar clauses can be found, *inter alia*, in the UK–Belarussian,¹⁴⁰ the UK–Bulgarian,¹⁴¹ and the UK–Indian¹⁴² DTCs,¹⁴³ the Austrian MTC or other Austrian DTCs usually do not include a comparable rule.¹⁴⁴ These findings lead to the conclusion that this provision was presumably implemented upon the insistence of the UK delegation, in a similar way as to what was indicated regarding the 365-day observation period in the real estate

¹³² See Permanent Representation of Austria to the OECD 2017, 14.

¹³³ As the MLI was predominantly carried by the aim to bring as many countries (and their respective double tax treaties) as possible together under the umbrella of its legal framework, the MLI provides for a significant amount of flexibility. *Inter alia*, the signatory states can decide for each of their tax treaties whether the MLI should be basically applicable to them (CTAs), and for those included, which options of the provisions forming the minimum standard (Articles 6, 7, 16 and 17 of the MLI), and which additional provisions they intend to supplement/replace the respective clauses in the covered tax treaties (OECD 2016, m.no.14). See moreover Section 3.

¹³⁴ Compare Lang and Zöhrer 2019, 232, who assume in a general context that the approach taken by Austria (or other countries) in the MLI ratification process is likely to reflect its broader tax treaty policy pursued.

¹³⁵ See already above, Subsections 2.2 and 2.3.

¹³⁶ The definition of relevant investment vehicles, for purposes of the DTC, refers to the corresponding legal entities in the national laws. This provision thus encompasses real estate investment funds in light of the Austrian Real Estate Investment Fund Act (BGBl. I 2003/80), other real estate investment trusts according to Section 12 of the UK Corporation Tax Act 2010 and property authorized investment funds according to Part 4A of the Authorised Investment Funds Regulations 2006 (SI 2006/964).

¹³⁷ Compared to the standard 10% (Article 10 paragraph 2 (a) (i) of the Austrian–UK DTC).

¹³⁸ See Subsection 2.3. and (for a comparative analysis) Section 3.

¹³⁹ See Subsection 2.3.

¹⁴⁰ Art. 10 Para. 2 (i) *leg.cit.* (signed in 2017).

¹⁴¹ Art. 10 Para. 2 (ii) *leg.cit.* (signed in 2015).

¹⁴² Art. 11 Para. 2 (i) *leg.cit.* (signed in 1993, amended by the 2013 protocol, by which the respective rule was implemented).

¹⁴³ Whereas some other UK DTCs entail comparable provisions regarding pensions schemes; see, e.g., Article 10 paragraph 3 (b) of the Japanese–UK DTC and Article 10 paragraph 2 (b) of the German–UK DTC.

¹⁴⁴ I.e. beyond the Austrian–UK and the Austrian–US DTCs which are described in this article.

companies' clause of the Austrian-Japanese DTC. Article 10 paragraph 2 (a) (ii) of the Austrian-UK DTC can hence be considered another manifestation of the common pattern in Austrian tax treaty policy to put primary focus on the establishment of a tight-knit tax treaty network, at the expense of the coherence of the treaties' technical designs.

Another particularity of the Austrian-UK DTC in comparison with the Austrian-German and Austrian-US DTCs can be identified in Article 21 paragraph 5 of the Austrian-UK DTC. This rule encompasses limitations to the treatment of certain streams of income as other income¹⁴⁵ for purposes of Article 21 of the Austrian-UK DTC in the case of arrangements between related parties which do not meet the ALS. This specific anti-abuse rule hence embodies similar characteristics compared to Article 11 paragraph 5 and Article 12 paragraph 4 of the Austrian-UK DTC for purposes of interest and royalty payments. It can be observed that Article 21 paragraph 5 of the Austrian-UK DTC is mirrored in Article 21 paragraph 3 of the Austrian-Japanese DTC. Moreover, other recently signed DTCs of both the UK¹⁴⁶ and Japan¹⁴⁷ with other developed countries¹⁴⁸ contain a similar clause. From these findings, it can be deduced that the implementation of such rules in their tax treaties with Austria mirror a consistent pattern in the contemporary¹⁴⁹ tax treaty policies of both the UK and Japan (despite the absence of a similar clause in Article 21 of the OECD MTC), while they can be considered particularities in the Austrian tax treaty network against the background that these treaties indeed seem to be the only ones containing this type of anti-abuse provision.

When we finally compare the Austrian-UK DTC with the other example DTCs regarding the implementation of a reservation clause which expressly allows for the application of national anti-abuse provisions within the scope of the respective treaty, we can perceive that paragraph 7 (b) of the protocol to the Austrian-UK DTC includes a respective joint agreement of the contracting states (Schmidjell-Dommes 2019b, 62). The Austrian-UK DTC hence equals the standards established in Article 28 paragraph 2 of the Austrian-German DTC and the MOU of the Austrian-US DTC. Corresponding reservations regarding the likelihood of differing treatment of similar situations in Austria and the UK due

¹⁴⁵ The provision on other income could be traditionally attributed the function of a gap-filler clause in DTCs, as it covers types of income and income of sources, respectively, not covered by any of the other clauses (OECD 2017, Art. 21 m.no. 1).

¹⁴⁶ Compare Article 17 paragraph 3 of the UK-Israeli DTC.

¹⁴⁷ Compare Article 20 paragraph 3 of the Japanese-German DTC, as well as Articles 21 paragraphs 3 of the Japanese-Belgian, Japanese-Croatian, Japanese-Latvian, Japanese-Lithuanian and Japanese-Danish DTCs.

¹⁴⁸ To name a few examples, similar provisions cannot be found in the UK-Ukrainian or the UK-Uzbek DTCs, and the Japanese-Argentinean or the Japanese-Chilean DTCs, respectively. The assignment of these jurisdictions as developing countries is again based on the respective enumeration provided by the OECD (fn. 48).

¹⁴⁹ As both Austria and Germany agreed on the implementation of such a clause regarding other income in their respective tax treaties with Japan, although this provision is not included in their joint DTC, it could be assumed, with regard to the fact that the signing of the Austrian-German DTC dates back around 20 years ago, that the inclusion of a limited attribution of the status as other income to payments between related parties in the DTCs between developed countries is rather a new phenomenon and an expression of altered tax treaty policies, respectively.

to differences in their national taxation systems can be made as for purposes of the Austrian–German and Austrian–US DTCs.¹⁵⁰

In conclusion, the technical design of the Austrian–UK DTC deviates from both the Austrian–German and the Austrian–US DTCs in the sense that this treaty entails both a preamble and a PPT as general means to address undesirable tax planning schemes. These particularities in comparison with the other example DTCs is most likely explainable by the fact that the Austrian–UK DTC has only recently been renegotiated and thus reflects the current “state of the art” regarding anti-abuse provisions in tax treaties. The Austrian–UK DTC yet broadly shares common ground with the Austrian–German and the Austrian–US DTCs regarding the toolkit of specific anti-abuse provisions and the implementation of a respective reservation clause. This notwithstanding, the Austrian–UK DTC contains additional specific anti-abuse provisions paralleled in neither the Austrian–German nor the Austrian–US DTCs which presumably stem from the UK’s insistence on their implementation.

The relevance of equality for the assessment of potentially abusive cross-border situations in double tax treaty law – an analysis against the background of the Austrian and international tax treaty policies and their socio-political implications

Assessing the relevant rules in the Austrian DTCs with Germany, the US and the UK illustrates the high level of diversity regarding both the number and concrete technical design of anti-abuse provisions in these three Austrian treaties. Although these measures are each carried by the objective of preventing the granting of the respective DTCs’ benefits in inappropriate circumstances, it is deconstructed in the following whether, and to what extent, these differences are prone to lead to diverging results in the assessment of similar situations within the scope of these treaties when comparing isolated legal valuations at the treaty level (i.e. excluding possible effects from the application of EU or domestic tax laws). The findings deduced from this analysis are then placed in a context with the main objective pursued with the closing of tax treaties, which is the flourish of bilateral economic relationships, and the broader framework in tax treaty policy, most notably the importance of the specific characteristics of the respective domestic tax systems as well as the bargaining power of the respective contracting partners. These considerations are then rounded up by a discussion of their socio-political implications.

Against this background, it can be found first and foremost that the anti-abuse provisions of the three example DTCs share some commonalities. The same levels of protection against aggressive tax planning structures within the scopes of these treaties are established regarding the beneficial ownership requirement

¹⁵⁰ See Subsections 2.2 and 2.3.

for purposes of dividend, interest and royalty payments,¹⁵¹ the limited applicability of the allocation rules for interest and royalty payments between related parties in the case of transactions that are not at arm's length,¹⁵² and the specific rule concerning the use of conduit companies to circumvent taxation in the source state by artists and sportspersons.¹⁵³ These parallels stem from the fact that all of the three example DTCs, like most DTCs signed between developed countries, are predominantly devised in accordance with the OECD MTC, which is fundamentally characteristic of each of the respective contracting states' tax treaty policies.¹⁵⁴ These treaty clauses should thus be basically interpreted unanimously in all contracting states in light of the OECD MTC and the respective commentary (Lang 1994, 22),¹⁵⁵ which basically provides for an increased likelihood of harmonized application in the respective contracting states as well as for purposes of the different DTCs.¹⁵⁶ All contracting states have moreover agreed on the possibility of applying national anti-abuse provisions to situations covered by the scope of the respective treaties.

Beyond that, there remain significant divergences between the three example DTCs regarding both the counteracting of specific abusive practices (realized through SAARs) and the establishment of broader legal barriers against tax avoidance and abuse (realized through GAARs), as elaborated below.

Article 11 paragraph 2 of the Austrian–German DTC is not paralleled by similar provisions in the Austrian–US or Austrian–UK DTCs, which both encompass taxation of interest payments exclusively in the residence state in their respective Articles 11 paragraphs 1. In this context, it can be found that hybrid financial instruments within the meaning of Article 11 paragraph 2 of the Austrian–German DTC do not necessarily trigger the application of the PPT in the Austrian–UK DTC, as the use of a particular hybrid financial instrument could indeed be chosen for other principal reasons than obtaining a certain benefit granted by this DTC.¹⁵⁷ Similarly, the benefits of Article 11 paragraph 1 of the Austrian–US DTC cannot be refused to entities against the background of the LOB clause, which only functions as a “gatekeeper” (by way of an extended residency test), but does not prove an effective means to counteract individual abusive

¹⁵¹ Article 10 paragraph 2, Article 11 paragraph 2, Article 12 paragraph 3 of the OECD MTC.

¹⁵² Article 11 paragraph 6 and Article 12 paragraph 4 of the OECD MTC.

¹⁵³ Article 17 paragraph 2 of the OECD MTC.

¹⁵⁴ See the respective references in Subsections 2.2-2.4.

¹⁵⁵ In the same vein, Thuronyi, Brooks and Kolozs 2016, 102: “It would be desirable for double tax treaties to be interpreted commonly by the courts of both treaty partners and for common terms and rules found in different treaties to be interpreted in the same manner by all courts. To some extent the OECD Commentary is a vehicle to achieve that common interpretation.” This view is shared, among others, by the Austrian supreme court in tax matters (“Verwaltungsgerichtshof”). Compare from the settled case-law, e.g., Verwaltungsgerichtshof [VwGH] [Administrative Court] of 31 July 1996, 92/13/0172 (AT).

¹⁵⁶ The author however submits that the OECD MTC's wording and the respective statements in the OECD MTC commentary may yet lead to divergent interpretation results in different countries. Among other things, different legal traditions regarding the interpretation of norms (most notably, the relevance attributed to the OECD MTC commentary), but also plain fiscal and/or political interests (i.e. which way of interpretation serves them best) can be named as possible reasons for the occurrence of this phenomenon.

¹⁵⁷ To name an example, silent partnerships particularly appeal to investors who wish to participate in a company without their engagement being publicly known. Such an argument might prove hard to dismiss for financial authorities.

transactions.¹⁵⁸ The abusive use of hybrid financial instruments thus cannot be counteracted based on provisions in the Austrian-US DTC itself, but would indeed rely on the applicability (and effective application) of domestic anti-abuse provisions. By contrast, a transaction closed for legitimate reasons would face the same dire consequences as abusive arrangements under Article 11 paragraph 2 of the Austrian-German DTC.¹⁵⁹

Similar considerations could be applied to the explicit provision for dividends from investment vehicles in Article 10 paragraph 2 (a)(ii) of the Austrian-UK DTC, which is partially paralleled in the Austrian-US DTC for purposes of US regulated investment companies and real estate investment trusts (Article 10 paragraph 2 of the Austrian-US DTC). Moreover, all payments from investment funds are treated identically as dividends under the dividend definition in Article 10 paragraph 3 of the Austrian-German DTC and underlie a 15% tax at source pursuant to Article 10 paragraph 2 (b) of the Austrian-German DTC. A certain leeway for respective tax planning structures thus appears to be exclusively left for purposes of Austrian investment funds in cross-border situations between USA and Austria.

The distinct design of Article 13 paragraph 2 of the Austrian-German DTC virtually invites taxpayers to circumvent its applicability by either interposing a corporation to hold the real estate company's shares while only trading the parent company's shares, or by arranging affairs in the final balance sheets to the effect that the 50% value threshold is not exceeded (Staringer 1999, 107). By contrast, both the Austrian-US and Austrian-UK DTCs moreover include the indirect alienation of shares in real estate companies, which allows for effective counteraction against the first of the mentioned types of tax planning schemes. Beyond that, the relevant values for purposes of the respective Articles 13 paragraphs 2 of these two treaties are the fair values.¹⁶⁰ It can be generally

¹⁵⁸ In a similar vein (in the context of the OECD MTC's PPT), Danon et al. 2021, 495: "the fact that a company satisfies an active business test (LOB) does not exclude the application of the PPT to an artificial conduit arrangement entered into by that company."

¹⁵⁹ These findings ought to be illustrated by the following example: Taxpayer A, resident of country X, participates in the business of taxpayer B, resident of country Y, as silent partner. Depending on the facts of the case, it is assessed that the agreement on the silent partnership is to be regarded 1) as an abusive arrangement, 2) as an arrangement put in practice for legitimate reasons. When we now replace "country X" with Austria and "country Y" with Germany, the US and the UK (or *vice versa*), respectively, it can be found for purposes of the Austrian-German DTC that the source state (e.g. Germany) is granted an unlimited right of taxation at the source no matter whether the specific arrangement between taxpayers A and B encompasses a form of tax avoidance or tax abuse (i.e. in cases 1) and 2)). (This provision hence effectively excels at rendering certain forms of financing generally unattractive compared to others, while falling short of precisely addressing undesirable transactions.) Under the scope of the Austrian-US DTC, the treaty benefits under Article 11 basically are to be awarded to taxpayer A in both (hence even abusive) cases. This result is borne out of the fact that, first, the Austrian-US DTC does not contain a provision similar to Article 11 paragraph 2 of the Austrian-German DTC, and, second, the treaty's LOB clause is not capable of capturing this individual arrangement. Due to the lack of a PPT or another type of treaty GAAR in the Austrian-US DTC, it depends on the legal situation in the domestic tax laws of the contracting states whether abusive arrangements in such situations are addressed. In contrast, the broad scope of the PPT in Article 27 of the Austrian-UK DTC allows the contracting states to refuse or withdraw the benefits of Article 11 (most notably, no taxation at the source) in the case of tax avoidance or tax abuse even in the absence of a provision similar to Article 11 paragraph 2 of the Austrian-German DTC.

¹⁶⁰ The Austrian financial authorities basically hold the view that the relationship of the fair values are to be regarded as the relevant guideline for purposes of the identification of a real estate company within the meaning of Article 13 paragraph 4 of the OECD MTC, and corresponding DTC provisions (the only exception being the Austrian-German DTC,

assumed that the relationship between the fair values are harder to influence compared to the values in a balance sheet, rendering these provisions less susceptible to tax avoidance or abuse. The absence of a 365-day observation period yet preserves a certain leeway to avoid taxation in the source state, under Articles 13 paragraphs 2 of all the three example DTCs.¹⁶¹

The limited applicability of the allocation rule for other income in an arrangement between related parties that does not meet the ALS (Article 21 paragraph 5 of the Austrian–UK DTC) additionally provides broader protection against undesirable tax planning schemes at the treaty level, compared to similar situations under the Austrian–German and Austrian–US DTCs. Cross-border arrangements between related parties resident in Austria and Germany or the US could accordingly be devised to qualify as other income¹⁶² in order to realize the exclusive allocation of the right of taxation to the residence state. The lack of a rule comparable to Article 21 paragraph 5 of the Austrian–UK DTC thus effectively allows taxpayers to choose the subjectively preferable tax regime in such situations.

Finally, the absence of a treaty GAAR in the Austrian–German DTC, such as the PPT in the Austrian–UK DTC, would basically allow a wider array of abusive tax

given the explicit relevance of the book values stipulated in the respective protocol). See Austrian Ministry of Finance [BMF] of 9 Feb. 1998, EAS 1224 (AT); of 19 April 2010, EAS 3146 (AT); and of 18 May 2011, EAS 3214 (AT). The legal situation in the US apparently matches with the Austrian financial authorities' opinion; compare Section 897 (c) (2) of the IRC.

¹⁶¹ These findings ought to be illustrated by the following example: Taxpayer A, a resident of country X, holds 100% of the shares in the corporation X Ltd, whose assets consist to the amount of 60% of immovable property (on the basis of both the book and the fair values) located in country Y during the financial year prior to the alienation of shares. In the course of the transaction negotiations, A's tax lawyer advises them to arrange the division of book values in "their" corporation in a way to reduce the book value share of the immovable property to below 50% (for example, by making investments in other assets earlier than previously scheduled). After these arrangements (undertaken in December X1), the book value share of the immovable property has been indeed reduced to (for example) 45% and is accordingly reflected in the financial statement X1. The shares are then surrendered to an investor in June X2. At the time of alienation, the fair value share of the immovable property yet amounts to 1) 55%, or 2) 50%. When we now replace "country X" with Austria and "country Y" with Germany, the US and the UK (or *vice versa*), respectively, it can be found first and foremost that Article 13 paragraph 2 of the Austrian–German DTC would be applicable neither in case 1) or 2) because the book values of the last financial balance sheet are used as the basis for valuation. The situation described in this example memorably depicts this particular provision's high level of susceptibility to tax planning structures. The comparable provisions in the Austrian–US and the Austrian–UK DTCs are then prone to provide for a higher protection against undesirable tax planning schemes in cases such as 1) due to their reliance on the relationship of the fair values at the time of alienation of shares. However, in cases such as 2) they fall equally short of their principal objective. Such (rather more sophisticated) arrangements were only captured if these two treaties included a 365-day observation period as recommended in Article 13 paragraph 4 of the OECD MTC.

Irrespective of the conclusions drawn in the aforementioned example, the author is yet of the opinion that the 365-day observation period foreseen in Article 13 paragraph 4 of the OECD MTC still proves to be a rather weak defense measure against undesirable arrangements because it effectively only demands for more careful tax planning to ensure that the observation period will have expired by the date of transaction. Indeed, this seems to have been the reason behind Austria's reservation regarding the implementation of Article 9 of the MLI in its CTAs; compare Schmidjell-Dommes 2017, 38.

For the sake of completeness, it should be pointed out in this context that the US has implemented a national-level five-year observation period in Section 897 (c) (1) (A) (ii) of the IRC through the Foreign Investment in Real Property Tax Act 1980 (FIRPTA). The Austrian–US DTC does not yet expressly refer to the national regulation, and it is not clear from the accessible legal materials whether the Austrian delegation agreed on its applicability for situations falling under the scope of the Austrian–US DTC at the time of signature.

¹⁶² For example, income derived from the letting of movable property can be considered other income for purposes of Article 21 of the OECD MTC if the income is not generated in a business. Compare Bundesfinanzhof [BFH] [Federal Fiscal Court] of 25 May 2011, I R 95/10 (DE).

planning, providing that DTC provisions are not fundamentally assigned with the meaning that their benefits are inextricably intertwined with the (unwritten) premise that they not be claimed in inappropriate circumstances (Duff 2010, 80; Lang 2018b, 62-3).¹⁶³ The assessment of possibly abusive tax planning schemes not addressed by one of the SAARs in the Austrian–German DTC is thus transferred to the national level (Article 28 paragraph 2 of the Austrian–German DTC). As illustrated above against the background of the respective settled case laws,¹⁶⁴ the differing views in both countries concerning the applicability of national anti-abuse provisions within the scope of their DTCs are likely to effectively cause diverging legal valuations in the contracting states. By contrast, both the preamble and the PPT in the Austrian–UK DTC are fundamentally prone to contribute to the establishment of a level playing field already at the treaty level. Due to their specific design in light of the recent developments materializing in the OECD BEPS project,¹⁶⁵ they could indeed provide for a rather harmonized legal valuation in the contracting states by virtue of an interpretation pursuant to the relevant OECD documents.¹⁶⁶ The LOB clause of the Austrian–US DTC is, by contrast, predominantly carried by the intent to establish a higher level of legal certainty by way of precisely defining situations in which the benefits can or cannot be granted (Schuch and Toifl 1997, 154). The aim to create a solid legal environment for planning business activities through a detailed and exhaustive description of acceptable structures yet renders these rules indeed a script for tax planning (Staringer 2014, 172).¹⁶⁷ In this context, it should moreover be called into mind that all LOB clauses only work as an extension to the assessment of the resident status, which is why the LOB clause in the Austrian–US DTC is by definition not capable of providing for the same level of protection against singular abusive transactions (in comparison to the PPT in the Austrian–UK DTC).¹⁶⁸

The implementation of reservation clauses in the protocol and MOU, respectively, to the Austrian–UK and Austrian–US DTCs moreover contribute to the fragmentation of applicable abuse concepts if we consider the remarkable differences regarding the respective domestic anti-abuse regimes, which most notably can be explained by:

- First, the fundamental differences of their legal families: Austria has implemented a civil law system, whereas both the US and the UK are considered common law countries. These structural characteristics fundamentally translate into the dominant role of statutory anti-abuse

¹⁶³ Pioneering in this field Vogel 1985, who argued for the existence of an unwritten anti-abuse principle in international tax law.

¹⁶⁴ See Subsection 2.2.

¹⁶⁵ See already Subsection 2.4.

¹⁶⁶ This notwithstanding, the same disclaimer as in context with other articles devised in accordance with the OECD MTC (see above fn. 155) applies.

¹⁶⁷ Beyond that, it could be fundamentally called into question whether the Austrian–US DTC's LOB clause is indeed capable of reaching its objective, given the large number of vague expressions in the legal text as illustrated in Subsection 2.3. Compare in this sense Avery Jones 1996, 65: "Detail and certainty do not necessarily go together."

¹⁶⁸ See in detail Subsection 2.4.

provisions in Austria¹⁶⁹ compared to the higher significance of the stare decisis doctrine¹⁷⁰ in the US and the UK (Thuronyi, Brooks and Kolozs 2016, 127-9). The particular importance of judge-made principles (i.e. economic substance, business purpose, step transaction, sham transaction and substance over form doctrines) in the US case law should moreover be stressed in this context (Thuronyi, Brooks and Kolozs 2016, 138-47; Bammens and De Broe 2010, 52-9). These developments are to some degree paralleled in the UK case law (Thuronyi, Brooks and Kolozs 2016, 147-57). In contrast to the US, the UK has however introduced a statutory GAAR as of 2013 (Freedman 2013, 332-8; Thuronyi, Brooks and Kolozs 2016, 157).

- Second, the existence of peculiarities in their domestic statutory laws, such as the US base erosion and anti-abuse tax ("BEAT"), which can be described (in a nutshell) as an alternative minimum tax on deductible payments from US-based taxpayers to a related foreign party.¹⁷¹

Against this background, a preliminary conclusion can be drawn that the remarkable differences in the respective articles might¹⁷² lead to significant divergences regarding the assessment of the relevant cross-border situations with Germany, the UK and the US for Austrian residents (and *vice versa*). Depending on the individual facts of the case, these manifestations of differing treatment are hence capable of either advantaging or disadvantaging a taxpayer, if we compare the results from the assessments under these treaties: Whereas, on one hand, they might thus result in an (possibly perceived as) "unfair" granting or withdrawal/refusal of tax benefits in some situations, they could, on the other, be capable of sowing the seeds for undesirable tax planning structures in another international context. Seen in this light, the structural and technical differences between anti-abuse provisions within the scope of different DTCs could be basically regarded as potentially producing a noticeable amount of inequality.

Such an assertion should yet raise the subsequent question whether these identified types of differing treatment indeed ought to be considered to translate into unjustifiable differentiations between taxpayers that operate in different foreign countries as far as their cross-border relations are differently treated

¹⁶⁹ Most notably reflected by the constant reference to the statutory rules describing the economic approach and the recharacterization of abusive arrangements in light of the effectively intended economic result (Articles 21 and 22 of the Austrian Federal Fiscal Act (BAO)) in the settled VwGH case law (fn. 81), instead of, e.g., arguing exclusively by referring to an unwritten anti-abuse principle or relying solely on a teleological interpretation of the applicable norm.

¹⁷⁰ The stare decisis doctrine, or doctrine of precedent, is described in *Black's Law Dictionary* as the doctrine "under which a court must follow earlier judicial decisions when the same points arise again in litigation" (Garner 2019, 1696).

¹⁷¹ Although, as of writing, the BEAT has apparently not yet been mimicked in other jurisdictions (Avi-Yonah 2019, 28-9), it remains to be seen whether, and to what extent, the on-going discussions on the introduction of a global minimum tax ("GloBE") might translate into a comprehensive introduction of similar domestic measures (in the case of the EU Member States, most likely pursuant to a respective EU directive). A positive result in the negotiations would accordingly impact the above-mentioned findings.

¹⁷² For completeness' sake, it should be mentioned that the factual realization of these theoretically divergent results critically depends on the effective enforcement of these rules. See in more detail Section 5 (at the end).

pursuant to the relevant provisions of different DTCs. In this context, it seems indispensable to point first and foremost to the relevance of the preliminary assessment as to whether two situations can and should be seen as comparable. The author submits that this test, albeit a necessary prerequisite for further elaborations concerning the relevance of equality at the tax treaty level, raises questions which are indeed difficult to answer (in a satisfactory way) in practice,¹⁷³ and a thorough elaboration would go beyond the aim of this article. This notwithstanding, the author argues that the assertion of comparable situations should be critically called into question, as taxpayers can be considered to underlie (to some extent) different tax regimes in each of the applicable DTCs.

To flesh out this assumption, we should take a closer look at the objectives of DTCs, as well as the reasons for the closing of DTCs in our assessment. It can hence be found that DTCs have for decades predominantly served the purpose of coordinating the allocation of taxing rights in cross-border situations to the effect that, among other things, juridical double taxation is eliminated, legal certainty is increased, administrative burdens are eased. All these efforts should then ideally translate into a flourishing of economic relations between the respective contracting states (Dagan 2018, 118-9; Arnold 2019, 152-4). Before the kick-off of treaty negotiations, countries thus have to first consider whether, and under which circumstances, it would make sense for them to close treaties with which countries.¹⁷⁴ During the negotiation stage, each delegation of the prospective contracting states would then most likely take the specific design of the opponent's taxation system as well as the particularities of the cross-border trade and investment flows between the two countries into consideration for purposes of the bargain on the technical details of a respective DTC. Most notably, the interplay of their combined domestic tax laws as well as the political and economic environment¹⁷⁵ are likely to shape the officials' opinion regarding the inclusion and particular legal design of anti-abuse provisions, as on account of the circumstances described above, some types of abusive or tax-avoidant schemes are possibly more likely to occur in a specific bilateral context than in others.

¹⁷³ Most importantly, we are confronted with similar difficulties as to what concerns the concept of equality. We would thus need to define a harmonized and broadly accepted standard of what ought to be seen as "comparable," as we need to bear in mind that identical situations (from a legal perspective) may virtually not occur in the context of specific provisions (for example, anti-abuse provisions containing a substance or reasonableness test).

¹⁷⁴ Compare OECD 2015c, m.no. 15.3: "two States that consider entering into a tax treaty should evaluate the extent to which the risk of double taxation actually exists in cross-border situations involving their residents." In a similar vein, Waris 2019, 123: "Tax treaties between two countries are only of value after there is enough business between the two countries." In the specific context of developing countries, see moreover Dagan 2018, 118: "there are good reasons why developing countries should be hesitant to sign tax treaties or, at the very minimum, be extremely wary about them." In the specific context of EU Member States, the existing CJEU case law could indeed render it attractive (depending on the concrete circumstances of the cross-border trade flow between the respective countries) not to close DTCs or TIEAs with third countries. This assertion stems from the fact that the CJEU has explicitly allowed the Member States to use automatically applicable and irrebuttable anti-abuse provisions for these situations in case of the absence of effective means to exchange the relevant information. Compare Case C-135/17 *X* EU:C:2019:136, paras. 85-6 and 94.

¹⁷⁵ For example, the existence of citizenship-by-investment programs. Compare, e.g., Langenmayr and Zyska 2021.

Against this background, it appears accurate to generally refer to DTCs as customized agreements (Arnold 2019, 144), which further allows for the preliminary conclusion that applying a strict bilateral perspective in the context of DTCs seems appropriate and indeed indicated. Recurring to the bilateral dimension of DTCs, it thus becomes clear that DTCs are (and should be) only expected to be applied in a way which realizes equality among taxpayers under the same DTC, but not to further establish a level playing field across the scope of different bilateral tax treaties, on account of the absence of comparable situations.¹⁷⁶

The conclusion drawn above holds moreover true when we further consider the impact of the MLI, where applicable,¹⁷⁷ on the example DTCs. This finding is borne out of the fact that the MLI has been intentionally devised in a way that the parties to the MLI declare in their position papers which of their DTCs should be covered by this convention (the MLI refers to these treaties as the “covered tax agreements,” or “CTA”).¹⁷⁸ In case only one of the respective contracting partners encompasses their bilateral agreement in its list of CTAs, the MLI is hence not applicable to situations falling under its scope. Beyond that, the MLI is only able to gain relevance insofar as the respective contracting partners have opted for the same types of alternative sets of provisions (OECD 2017, m.no. 14; Avi-Yonah 2019, 137-8).¹⁷⁹ In this regard, it can be basically assumed that signatories are most likely to choose those options which provide for congruency with their tax treaty policy.¹⁸⁰ All these factors point towards a conclusion that the MLI has been devised in a way to safeguard the bilateral character of the signatories’ treaties.¹⁸¹

Although these characteristics are basically prone to translate into further fragmentations concerning the applicable abuse concepts in the global tax treaty

¹⁷⁶ Compare Kemmeren 2012, 172: “Each regular DTC provision is part of the reciprocal rights and obligations of the DTC as whole. Each provision is an integral part of a bilateral DTC. In general, a DTC only applies to residents of one of the two contracting States. The ultimate tax position of residents of the contracting States is determined by the taxpayers’ individual circumstances and the double tax convention as whole in conjunction with the domestic tax law systems of the contracting States. Some DTC provisions may be more beneficial than others. Whether that is the case, does not only depend on these rules, but also on the taxpayers’ individual circumstances. If we already want to compare DTCs, we have to take into account the complete DTCs and not only separate provisions. Otherwise we compare situations, which are by their nature non-comparable.”

¹⁷⁷ Whereas the MLI applies to both the Austrian-German and the Austrian-UK DTCs, the US have not (yet) committed themselves to the MLI (OECD 2021; the author relied for purposes of this assessment on the version as of June 8, 2021).

¹⁷⁸ The MLI is hence not drafted to operate on a stand-alone basis, but requires the existence of tax treaties as prerequisites; Panayi 2018, 154-5.

¹⁷⁹ For example, concerning Article 7 of the MLI, whether their DTCs should be bolstered by either a PPT, or a combination of a simplified LOB clause and a PPT. It hence appears quite accurate to refer to the MLI as “multilateralism à la carte” (Panayi 2018, 155):

¹⁸⁰ To name an example: Austria declared a reservation regarding Article 9 of the MLI, which would have added a 365-day observation period to the real estate companies’ clauses in the CTAs. This rule is paralleled in Article 13 paragraph 4 of the OECD MTC and Austria has up until now basically refused to adopt it in its DTCs. Compare generally, regarding the Austrian position, Jirousek, Zöhrer and Dziwinski 2017, 395; Lang and Zöhrer 2019, 226-7.

This assertion is further backed against the background that both Austria and the UK opted for the inclusion of a PPT in the context of Article 7 of the MLI (OECD 2021), which is identical to the PPT implemented in their common DTC.

¹⁸¹ In the same vein, Grinberg 2016, 1194: “[the MLI] is structured to [make the world’s existing bilateral tax treaties consistent with BEPS treaty-based recommendations] without abandoning the basic bilateral structure of tax treaties, and without changing which parts of the international tax architecture are within and outside the tax treaty architecture.”

network (Lang and Zöhrer 2019, 233), it should be emphasized that the MLI can nevertheless be regarded as a milestone in the evolution of international tax relations in the sense that it is capable of implementing coherent abuse concepts in a large number of DTCs among which many have until its entry into force not been bolstered by comparable measures (Grinberg 2016, 1194-5).¹⁸² For purposes of the three example DTCs of this article, the MLI could thus have noticeable impact on the interpretation and application of the Austrian–German DTC, which, as discussed above, contains neither an explicit reference in the preamble regarding a possibly auxiliary objective to prevent tax evasion or tax avoidance, nor encompasses a self-standing GAAR comparable to the MLI’s PPT. Beyond that, the applicability of the MLI’s PPT to both the Austrian–German and the Austrian–UK DTCs¹⁸³ is prone to streamline the abuse concepts of these two bilateral tax treaties for all situations not covered by more specific means.¹⁸⁴

As this article is, among other things, carried by the intent to further pursue a socio-political approach, the assessment of the manifestation of equality at the treaty level is rounded up by a comparison of the degree of differentiation among the abuse concepts in the tax treaty networks from the Austrian perspective. These findings then form the basis for the evaluation of related political and societal issues which could be addressed in future research.

When we hence contextualize the myriad of different types of anti-abuse provisions in Austrian DTCs with the general patterns in the contracting partners’ tax treaty networks that we identified in the comparative analyses undertaken in Subsections 2.2-2.4, it can be deduced that their mere existence in a treaty, as well as their specific design vary among Austrian DTCs comparatively to a higher degree. In the author’s opinion, this finding is most likely to stem from the fact that the Austrian tax treaty policy has been predominantly shaped for decades by the idea to give the expansion of Austria’s tax treaty network a high priority in order to provide for an encouraging and favorable legal framework¹⁸⁵ and economic environment, respectively, for both foreign investors and foreign investments. This approach might be regarded as a necessity for countries with the characteristics of Austria, hence small economies which, due to the absence of a meaningful domestic market, highly

¹⁸² Compare Panayi 2018, 154: “a multilateral instrument would increase consistency and help ensure the continued reliability of the international tax treaty network, providing additional certainty for businesses.”

¹⁸³ Albeit that the MLI’s PPT, in the specific legal context of the Austrian–UK DTC, principally translates into a redundant replication of the treaty’s PPT.

¹⁸⁴ In this author’s opinion, it makes sense to introduce identical GAARs to all DTCs. This assertion stems from the fact that counteracting arrangements for which purposes granting the treaty benefits would go against the respective provision’s objective and purpose can be generally assumed as accepted and legitimate actions by the national authorities. Although such a goal could fundamentally be already achieved by way of a teleological interpretation (at least to some degree), it could be reasonable to introduce such treaty GAARs if we bear in mind the diverse types of legal theories, doctrines and principles prevalent in different national legal systems (to name an example, the relevance and dominance of a rather formalistic/legal or a rather purposive/economic approach can indeed make a significant difference). Beyond that, the author basically supports the idea of negotiating SAARs in a particular bilateral context on account of the importance of the interplay between the concrete domestic taxation systems for their purposes.

¹⁸⁵ Most importantly, legal certainty and a reduced tax burden, both of which are basically prone to translate into an increase in (inbound and outbound) foreign investment according to respective empirical studies. Bammens and De Broe 2010, 53; Avi-Yonah 2019, 51.

depend on cross-border business activities and investments, and accordingly aim to boost the exports of its businesses' goods and services as well as the (re-)location of headquarters in their territories.¹⁸⁶ It might then not come as a surprise that Austria has apparently been willing to sign a large number of tax treaties even if it means accepting the fragmentation of rules in Austrian DTCs to a certain degree (depending on the policies pursued by the contracting states¹⁸⁷). Beyond considerations on a country's tax treaty policy which is by definition guided by self-defined goals and hence deliberate choices (Dagan 2018, 13), we yet have to moreover bear in mind factors that Austria (and other economies) are most likely not able to influence: On account of its characteristics described above, Austria's political and economic powers in treaty negotiations are significantly limited. It might hence not be feasible to insist (too strongly) on certain of their own policy goals without running the risk of jeopardizing the closing of a treaty as a whole (Jirousek 2010, 17-8). This effect might be best illustrated by contrasting the Austrian and the US tax treaty policies: While the US can be considered the most powerful country in the world from both a political and an economic perspective as of writing (Grinberg 2016, 1145), they have excelled at shaping their tax treaties according to their interests over decades. Regarding the topic of this article, they have particularly secured the implementation of detailed LOB clauses in each of their DTCs since the 1980s (Ault 1997, 21; Avi-Yonah 2019, 145), even in their DTCs with other politically and economically puissant countries such as Germany and the UK, currently ranked the 4th and 6th largest economies per GDP^{188, 189}

Against this background, the comparatively high level of divergence regarding both the existence and the concrete design of anti-abuse provisions in Austrian DTCs seems well explainable and hence makes sense.¹⁹⁰ It can be assumed that the aforementioned considerations are analogously relevant for other countries

¹⁸⁶ Compare Jirousek 1998, 127: "Particularly small countries, such as Austria, with heavily limited domestic markets are dependent on well-functioning international economic relationships; hence, they need to particularly make an effort to keep their tax treaty network attractive. Because this is the only way they can maintain and enhance the international competitiveness of their location and thereby make a necessary contribution to secure jobs in internationally operating business branches." (author's translation).

¹⁸⁷ It yet appears quite likely that due to the increasing level of multilateralism and standard setting at the OECD level, respectively, the different approaches in the tax treaty policies of countries across the globe will more and more align over time.

¹⁸⁸ See accordingly the figures on the GDP (current US\$) for 2019 provided in World Bank (undated).

¹⁸⁹ See in this regard, on the implementation of a detailed LOB clause into the US-German DTC, Debatin and Endres 1990, Art. 28 m.no. 3: "Apparently, the US, as the negotiation partner, insisted on the implementation of their ideas as reflected in their treaty model in this convention. Evidently, the US is predominantly interested in counteracting the possibility that parties from third countries could be granted reliefs from US taxation at source via German companies, which they would have not been eligible to under their domestic tax law. [...] Regarding the Federal Republic's matters, these worries are by far not paralleled to the same extent, as the achievable tax advantage from the use of American companies as intermediaries to gain protection from a taxation in Germany under the treaty is limited. [...] These reflections show that this clause, by and large, reflects a *unilateral US interest*" [emphasis added] (author's translation). Compare moreover in general terms Ruiz Almendral 2010, 486: "A DTA is not celebrated on equal footing but rather reflects the economic position of each country, thus creating differences between the different DTAs signed by the same country."

¹⁹⁰ For a similar conclusion, see Ruiz Almendral 2013, 152: "Asymmetry and even discrimination is the basis of International Tax Law on some instances, as it reflects the asymmetry of the economic and political powers of different countries."

with similar characteristics, whereas tax treaties would presumably reflect rather coherent abuse concepts with increasing levels of political and economic power.

As disparities regarding the level of harmonization of the anti-abuse provisions in a country's DTCs translate into increasing levels of both perceived and effective different treatment of similar situations in the international context, chances are that these developments are, at least to some extent, mirrored by simultaneously decreasing levels of tax compliance and higher susceptibility to tax evasion and tax avoidance among taxpayers.¹⁹¹ In this sense, higher levels of differing abuse concepts in a country's treaty network can be also considered problematic from a political and societal perspective.¹⁹² As a detailed evaluation of potential measures to address these issues go beyond the scope of this article,¹⁹³ the author basically resorts to stressing the important role of transparency in any norm-making process. In this context, it should be particularly pointed out that the legal materials accompanying the implementation process are usually not prone to add any value for interpretative purposes, as they broadly replicate the wording of the respective treaty rules. Against this background, academic scholars and tax practitioners—or the broader public in general—are in many cases not able to comprehend the reasons behind certain deviations from the model articles in the OECD MTC in only some of the bilateral treaties in effect.¹⁹⁴ This lack of information might lead taxpayers to develop the perception that these differences in existing Austrian DTCs are “unfair” or “unjust.” This is why the author basically supports the idea of issuing (more detailed) explanations concerning the negotiation process and the reasons behind the legal design of the individual tax treaties particularly in the legal materials, and other forms of increased inclusion of the general public in the tax treaty process.

¹⁹¹ The author's assumption is based on the results of related empirical studies conducted in the fields of behavioral psychology, sociology and anthropology cited in Section 1. The author however submits that, to her knowledge, specific studies on the impact of the level of divergence in the abuse concepts in a country's DTC network have not yet been carried out. It can yet be expected that taxpayers are not likely to adapt their views and their according behavior depending on the legal quality of the respective source (i.e. domestic law or treaty law), or the type of provision causing this differing tax treatment (i.e. substantive rules or anti-abuse provisions).

¹⁹² Compare Ozai 2020, 79: “Besides for the other problems with bilateral tax treaties, [...] bilateralism is also problematic for leaving weaker states susceptible to power imbalances and resulting in a non-universal regime.” It can be assumed that these tendencies do not only appear among politically and economically comparatively more or less powerful developed countries, but in particular in negotiations between developed and developing countries. In a similar vein, Dagan 2018, 113-8; Waris 2019, 123-4.

¹⁹³ This notwithstanding, the author expressly welcomes future research in this field.

¹⁹⁴ See for representative examples Subsection 2.2-2.4. Compare, by contrast, the situation in the US, where the Treasury Department provides for extensive technical explanations for each of the DTCs; Grinberg 2016, 1183-4.

The relevance of equality for the assessment of possibly abusive cross-border situations in EU tax law – the impact on differing abuse concepts in the Member States’ double tax conventions

Article 2 of the Treaty on the European Union (TEU)¹⁹⁵ expressly recognizes the promotion of equality and justice within the EU as one of its core principles. Effective or perceived differing tax treatment in cross-border situations can thus be reasonably identified as a matter which also entails a European dimension.¹⁹⁶ Moreover, we need to bear in mind that even though the competence of legislation in direct tax matters remains fundamentally with the EU Member States, national lawmakers must nevertheless devise national tax laws, including double tax treaties (Terra and Wattel 2019, 267), in accordance with the requirements of EU law (Panayi 2020, 126; Haslehner 2020, m.no. 2.64).¹⁹⁷ Due to the only punctual harmonization of direct taxation at the EU level,¹⁹⁸ the fundamental freedoms have been of paramount importance on account of the CJEU case law’s effect of negative integration (Pistone 2007, 71; Ruiz Almendral 2010, 484). They have thus proven to be an efficient means to levelling the playing field and safeguarding a non-discriminatory application for many areas of domestic tax law.

Based on this fundamental assessment, differing tax treatment of cross-border situations on the basis of different anti-abuse provisions within the scope of different DTCs is principally prone to raise concerns about the conformity of these DTC provisions with the fundamental freedoms both in intra-EU and third-country situations, thus for all the example DTCs discussed in this paper. This finding stems from the fact that the freedom of movement of capital is also applicable in relation to third countries,¹⁹⁹ and some of the most common aggressive tax planning schemes are realized through financial transactions, such as interest and licence payments.²⁰⁰

¹⁹⁵ Consolidated version of the Treaty on the European Union, OJ C 326 of 26 Oct. 2020.

¹⁹⁶ Compare Vanistendael 2020, 142: “The common provisions of the TEU clearly indicate what the major objectives are of the European Union. The overarching values of the Union are enumerated in Article 2 TEU, with emphasis on nondiscrimination and equality.”

¹⁹⁷ See also, e.g., Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* EU:C:2001:134, para. 37; Case C-324/00 *Lankhorst-Hohorst* EU:C:2002:749, para. 26; Case C-105/07 *Lammers & Van Cleeff* EU:C:2008:24, para. 12.

¹⁹⁸ Namely, regarding substantive law, the Merger Directive (Council Directive 2009/133/EC of 19 Oct. 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310 of 25 Oct. 2009), the Parent-Subsidiary Directive (Council Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345 of 29 Dec. 2011), the Interest-Royalties Directive (fn. 55), and the ATAD (fn. 9).

¹⁹⁹ Expressly acknowledged for the first time in Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* EU:C:1995:451. Beyond that, the EU’s fundamental freedoms are paralleled in relation to countries of the European Economic Area (i.e. Norway, Liechtenstein and Iceland). Overseas territories and third countries with which an association agreement has been signed moreover enjoy broader freedom rights compared to other third-country jurisdictions. These particularities are not further assessed in the following because the CJEU’s generalistic approach, which is discussed in more detail in the following, translates into an unanimous legal valuation of different treatments for all cross-border situations. See in detail Terra and Wattel 2019, 199-205.

²⁰⁰ See also Subsection 2.2 (after fn. 55).

The arguments presented above speak in favor of an inclusion of the EU legal layer in the valuation of differing anti-abuse provisions in a Member State's DTCs from an equality perspective. In a first step, it is assessed whether the EU fundamental freedoms are capable of compensating possibly undesirable effects arising from differences among the constituent Member States' DTCs by obliging the Member States to assess abusive arrangements uniformly on the basis of a most-favored nation treatment.

Beginning with its findings in the *D*.²⁰¹ case the CJEU has developed a line of argumentation which can now be considered settled case-law and according to which taxpayers subject to different DTCs do not find themselves in a comparable situation (Bammens 2012, 833-50; Lang 2018a, 397-400; Marchgraber 2018, 123-9). Most notably, DTCs are characterized by the trade-off between the contracting partners and hence a compilation of reciprocal rights and obligations, which is why a provision in a DTC "cannot not be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance."²⁰²

Although the cases decided by the CJEU for the time being have been centered around the analogous application of provisions granting tax treaty benefits, the respective findings should be viable *mutatis mutandis* for purposes of anti-abuse provisions in the Member States' DTCs. In context with anti-abuse provisions included in the allocation rules and method articles, such as Article 17 paragraph 2 of the OECD MTC, it appears rather obvious that they are inextricably linked to the allocation of taxation rights between the contracting partners and thus cannot be reasonably separated from the remainder of the respective article or treaty. Beyond that, it can be principally assumed that the respective contracting partners would have not agreed on the implementation of beneficial rules in the treaty had they not equally be given the opportunity to refuse them in the case of abusive claims, for example by applying a PPT (Weber 2005, 443; Panayi 2018, 224). The aforementioned considerations are backed by the CJEU's apparently formalistic approach which exclusively refers to the legal quality as a provision embedded in a DTC (Weber 2005, 440; Lang 2018a, 400; Terra and Wattel 2019, 719).²⁰³ In conclusion, the fundamental freedoms, as they are interpreted in the settled CJEU case law, are not capable of compensating differing treatment of similar, possibly abusive cross-border

²⁰¹ Case C-376/03 *D*. EU:C:2005:424.

²⁰² Case C-376/03 *D*. EU:C:2005:424, paras. 59-63. Particularly remarkable, albeit unfortunately not discussed in the CJEU's decision, appears one of the arguments forwarded by the UK government in the proceedings: the assumption of comparability would "entail a risk of tax evasion if a taxpayer invokes the least rigorous of the anti-fraud provisions included by a Member State in its agreements with others" (as cited in Case C-376/03 *D*. [2005] EU:C:2005:424, Opinion of AG Ruiz-Jarabo Colomer, para. 102).

In the same vein, see Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* EU:C:2006:773, paras. 75-93; Case C-194/06 *Orange European Smallcap Fund* EU:C:2008:289, paras. 50-64; Case C-176/15 *Riskin and Timmermans* EU:C:2016:488, paras. 31-5 (the latter differing from previous cases insofar as it concerned a case where residents of a EU Member State claimed to be granted the beneficial treatment of a Member State's DTC with a third country).

²⁰³ Which, in its generality, is not supported by the author against the background of the explanation provided by the CJEU. Most notably, a reference to the inextricable linkage of treaty provisions sits rather uncomfortably with non-discrimination clauses, as discussed in the *D*. case.

situations due to differing DTC provisions by way of a most-favored nation treatment.

For purposes of intra-EU DTCs, both the Parent-Subsidiary Directive and the Interest-Royalties Directive provide for harmonizing measures to achieve the elimination of economic²⁰⁴ or juridical²⁰⁵ double taxation in the context of dividend, interest and royalty payments between related companies within the EU's territory.²⁰⁶ Whereas the directives' anti-abuse provisions²⁰⁷ and the EU principle of prohibition of abuse²⁰⁸ set unified standards for the valuation of possibly abusive arrangements within the scope of these two corporate tax directives, their application yet only translates into the prevention or removal of the directive's principal overriding effect in case of a norm conflict with diverging national tax law both at the domestic and treaty level (i.e. any kind of taxation at source at the recipient's level). For purposes of the topic of this article, a preliminary conclusion can thus be drawn that the anti-abuse provisions in the Parent-Subsidiary Directive and the Interest-Royalties Directives cannot overcome different treatment on the basis of diverging abuse concepts in the Member States' DTCs.

The ATAD's GAAR however incorporates a reverse thrust and obliges the Member States to refuse or withdraw advantages stemming from both EU and national tax laws in case of non-genuineness of an arrangement or a series of arrangements (Kuzniacki 2020, m.no. 6.6). As the Member States' tax treaty laws are considered part of their national tax laws from the EU perspective, the Member States' obligation to adopt the ATAD's GAAR in their national tax laws is thus prone to translate into a partial harmonization of the abuse concepts relevant for DTC purposes, albeit basically only in the field of corporate taxation (de la Feria 2020a, 146).²⁰⁹ If the Member States yet decided to adopt the ATAD's GAAR in a broad manner in order to address all kinds of taxable events,²¹⁰ the

²⁰⁴ In case of the former.

²⁰⁵ In case of the latter.

²⁰⁶ In this sense, e.g., Case C-194/06 *Orange European Smallcap Fund* EU:C:2008:289, para. 32.

²⁰⁷ Most notably, the GAARs implemented in Article 1 paragraphs 2-4 of the Parent-Subsidiary Directive and Article 5 of the Interest-Royalties Directive.

²⁰⁸ Hereafter the EU anti-abuse principle. The EU anti-abuse principle was first acknowledged in the field of direct taxation in Case C-321/05 *Kofoed* EU:C:2007:408, para. 38, for purposes of harmonized law (i.e. the Merger Directive). The CJEU then expressly confirmed the fundamental relevance of the EU anti-abuse principle as general principle of EU law (in the rank of primary law) in Joined Cases C-115/16, C-118/16, C-119/16 und C-299/16 *N Luxembourg 1 and Others* EU:C:2019:134 and Joined Cases C-116/16 and C-117/16 *T Danmark* [2019] EU:C:2019:135. Compare, e.g., de la Feria 2020a, 146; de la Feria 2020b, 181.

²⁰⁹ For a similar reasoning, see Floris de Wilde 2018, 306: "[T]he application of the ATAD's GAAR may even be considered to extend the EU Member States' tax treaty network to the extent that these involve allocating company taxation rights, possibly even in relation to third countries."

The European Commission's Communication on the "Anti-Tax Avoidance Package" implicates that the Commission intended the ATAD's GAAR to be applicable only in domestic tax law situations (European Commission 2016a, 6). Such a result would yet appear contradictory to the following statement in Recital 11 of the ATAD: "It is furthermore important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ." In the author's opinion, the Commission's apparently dissenting opinion as reflected in the Communication mentioned above may thus not be regarded as a relevant source for the interpretation of the ATAD.

²¹⁰ See for the example of the adoption of the ATAD's GAAR in Austria in detail Section 5.

respective CJEU case law²¹¹ obliges these Member States to unanimously adhere to EU standards also for situations not covered by the ATAD, which would translate into a broad harmonization of abuse concepts for purposes of the Member States' DTCs as far as the GAAR (as *lex generalis*) is applicable. In these cases, the broadening of the harmonizing effect is however indeed derived from a decision of national lawmakers and thus, following the logic of this article, realized at the national level. Abuse concepts of the MLI's PPT and the ATAD's GAAR can be reconciled and are hence uniformly applicable for purposes of the CTAs of the Member States (i.e., regarding the three example DTCs, the Austrian-German and the Austrian-UK DTCs).²¹²

Whether, and to what extent, the ATAD's GAAR effectively becomes relevant within the scope of the Member States' DTCs with third countries²¹³ (against the background of a possible treaty override and the grandfathering clause of Article 351 of the TFEU), depends on different factors, among others the respective Member State's national doctrine on the character of GAARs,²¹⁴ the national constitutional systems and tax treaty policies, and the general aptitude to reconcile the application of the ATAD's GAAR for purposes of a respective tax treaty. For purposes of our assessment, we yet do not have to further elaborate on this issue against the background that all of the three example DTCs are propped with a reservation clause which allows Austria (and moreover Germany) to apply the ATAD's GAAR to situations within the scope of the respective tax treaties.

Even if this barrier is successfully taken, it ought to be borne in mind that the ATAD's GAAR has been drafted to fulfil the function of a gap filler (Recital 11 of the ATAD). The reference to the gap-filler function of the ATAD's GAAR in a generalist manner could render it not only relevant in relation to the ATAD's SAARs (such as the ATAD's CFC rule), but also in relation to treaty SAARs. This assertion is particularly borne out of the fact that the respective contracting partners have defined of what is to be regarded as abusive or undesirable for the relevant situations through the carving-out of the SAARs' scope. Against this background, it can be argued that arranging affairs in a way not covered by the scope²¹⁵ cannot go against the respective provisions' objective and purpose, which is why these particular situations principally fail to meet one of the basic application requirements of the ATAD's GAAR. Hence, in both cases, the

²¹¹ Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* EU:C:1990:360; Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* EU:C:1997:369, para. 27; Case C-352/08 *Modehuis A. Zwijnenburg* EU:C:2010:282, para. 33.

²¹² In the same vein, Danon et al. 2021, 489.

²¹³ For purposes of intra-EU DTCs, it can be basically argued that Member States cannot successfully rely on the *pacta sunt servanda* principle underlying Article 351 of the TFEU in light of the unanimity requirement of Article 115 of the TFEU. See in more detail Geringer 2021.

²¹⁴ For example, as part of the rules set by domestic tax laws for determining which facts give rise to a tax liability. This approach is endorsed by both the Austrian financial administration and the Austrian jurisprudence. See in more detail Section 5.

²¹⁵ For example, by extending the respective transactions over a period longer than one year to ensure that the 365-day observation period of a treaty norm drafted in accordance with Article 13 paragraph 4 of the OECD MTC has expired.

shielding effect of the respective SAARs is prone to restrict a wider harmonizing effect through the ATAD's GAAR (in the field of corporate taxation).²¹⁶

In a preliminary conclusion, it can be found that neither the fundamental freedoms nor the EU corporate tax directives are capable of fully providing for direct compensation of differing abuse concepts identified at the treaty level. This result yet (again) makes sense if we bear in mind both the basic function of the fundamental freedoms and the specific role of direct taxation in the EU law system. The fundamental freedoms have been put in place to fulfil the EU's primary goal, hence the establishment and good functioning of the internal market. It is thus fundamentally not upon the fundamental freedoms to provide for broader harmonization levels by intervening in the Member States' agreements on the allocation of taxation rights as long as no discrimination of cross-border situations can be said to take place (Lyal 2016, 53). Beyond that, we need to call in mind that direct taxation has only been punctually harmonized at the EU level, in areas where the Member States have shown their unanimous consent to partially restrict their national sovereignty for the sake of tax harmonization at the EU level. Up until now, the Member States have yet not agreed to follow a uniform approach in their external relations by way of a common EU MTC (or even a common multilateral treaty).²¹⁷ Seen in this light, differing abuse concepts in the Member States' DTCs might possibly come across as an undesirable status quo promoting both tax competition and aggressive tax planning among EU Member States, which however needs to be accepted in light of the current state of integration at the EU level. In this context, it is not upon the CJEU, but rather upon the Member States' governments to enact respective legal measures in case they indeed wished to increase harmonization at the EU level (which, in the current rise of populism and nationalism in the EU's territory, appears rather doubtful to the author).

The question of a potential convergence of differing abuse concepts in the Member States' DTCs by way of a most-favored nation treatment or harmonizing effects of secondary law yet needs to be distinguished from the Member States' fundamental obligation to *apply* the respective tax treaty provisions indiscriminately and in accordance with the EU principles:

As far as concerns the exercise of the power of taxation so allocated by bilateral conventions for the avoidance of double taxation, the Member States must comply with EU rules and, more particularly, observe the principle of equal treatment.²¹⁸

It is in this context that the EU anti-abuse principle could indeed prove to be a meaningful tool in the sense that the Member States need to comply with the substantive and procedural standards reflected in the EU anti-abuse principle whenever they apply national abuse tests in a situation falling under the scope

²¹⁶ The author acknowledges that it remains to be seen whether the CJEU would follow the reasoning presented above.

²¹⁷ The first draft for a multilateral treaty between the Member States of the European Community was issued as early as 1968, this idea however has never materialized. See, e.g., Lehner 1996, 20-1.

²¹⁸ Settled case law, see, e.g., Case C-602/17 *Sauvage and Lejeune*, para. 24 (with references to earlier decisions).

of the EU fundamental freedoms.²¹⁹ In the author's opinion, this assumption holds also true for purposes of the Member States' DTC provisions, and can moreover be reconciled with the CJEU's findings in *Test Claimants in Class IV of the ACT Group Litigation*²²⁰, which, among other things, addressed the compatibility of the LOB clause in the UK–Dutch DTC with EU primary law. This assertion stems from the fact the Court was only asked to assess the UK–Dutch DTC in context with a domestic relief clause, or other DTCs, thus the arguments were related to the issue of a possible most-favored nation treatment (Panayi 2018, 226-7). However, the CJEU did not have to pronounce their opinion on the relationship between abuse concepts in the Member States' DTCs, in the same fashion as for purposes of domestic tax law, and the EU anti-abuse principle in this context. If the Court thus were indeed positive about the significance of the EU anti-abuse principle's criteria for the interpretation and application of the Member States' DTC provisions (as far as the scope of application of EU law is concerned), the abuse concepts of anti-abuse provisions in the Member States' DTCs would ultimately and indirectly be harmonized in these situations.

In this sense, the EU anti-abuse principle could hence make a significant contribution to fostering integration, and harmonizing tax assessments of EU taxpayers (to some extent). In light of the European Commission's communication to restore the Community economy amidst the COVID-19 pandemic where the Commission stressed the importance of "ensur[ing] that solidarity and fairness is at the heart of the recovery" by "step[ping] up the fight against tax fraud and other unfair practices" (European Commission 2020a, 1), the application of the EU anti-abuse principle to Member States' DTCs in the future CJEU case law in the way illustrated above could help establish or increase levels of confidence and solidarity among EU citizens, and thus play a crucial role from both a legal and a socio-political perspective. This notwithstanding, it remains to be seen whether the CJEU is indeed willing to apply the EU anti-abuse principle in such a wide-reaching manner, considering the fact that the Court has been up until now rather reluctant to involve with the Member States' external tax relations. In the author's opinion, such case law could basically be prone to urge the EU stakeholders to reassess the distribution of powers between the EU and the Member States in the field of direct taxation.²²¹

²¹⁹ Most notably, cross-border situations between EU Member States and third countries are basically not protected by the EU fundamental freedoms if the applicable national law specifically refers to investments "which enable the holder to exert a definite influence on the decisions of the company concerned and to determine its activities." This demarcation can now be considered settled CJEU case law. See, e.g., Case C-35/11 *Test Claimants in the FII Group Litigation* ECLI:EU:C:2012:707, para. 98.

²²⁰ Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* EU:C:2006:773.

²²¹ These findings notwithstanding, the author argues that the harmonizing effect through the obligatory interpretation of treaty-based anti-abuse provisions in light of the EU anti-abuse principle would effectively be reduced to "full-fledged" treaty GAARs and SAARs. This assumption is borne out of the fact that, in the author's opinion, other types of SAARs (e.g. drafted in (broad) accordance with Article 13 paragraph 4 or Article 17 paragraph 2 of the OECD MTC) predominantly represent allocative rules, for which purposes the Member States could particularly rely on the justification ground of the safeguarding of a balanced allocation of taxation powers. In this context, the CJEU has proven to support a far more relaxed approach, and, against this background, regarded national measures as justified that did not exclusively address wholly artificial arrangement. Compare, e.g., Case C-231/05 *Oy AA* EU:C:2007:439.

To summarize, it can be found that although the principle of equality, among others, is at the core of the European idea, its effect is limited in multiple ways in the context of differing abuse concepts in the Member States' DTCs. If we bear in mind the current state of harmonization of direct taxation at the EU level, and the distribution of powers between the EU and the Member States for the time being, this probably not fully satisfactory result²²² yet makes perfect sense: As the right of taxation in relation to other than consumption taxes,²²³ in particular direct taxes,²²⁴ is (still²²⁵) regarded as a key element of the Member States' sovereignty, further steps of harmonization ask for respective legislative measures at the EU level, in an effort to respect the current reality of distribution of powers, thus keeping in mind the remaining boundaries of the European project. It yet remains to be seen how rigorously the CJEU is willing to apply the EU anti-abuse principle for purposes of anti-abuse provisions in the Member States' DTCs.

The relevance of equality for the assessment of possibly abusive cross-border situations in domestic tax law

In a final step, the relevance and role of statutory domestic tax laws, jurisprudence and administrative practice for purposes of a harmonized treatment of possibly abusive arrangements in an international context from an equality perspective is assessed. Against the background of the aim and the methodology approach of this article, this analysis is undertaken using Austrian domestic tax law as an example, which is then contextualized with comparable legal practices in foreign tax jurisdictions.

The Austrian GAAR, incorporated in Article 22 of the Austrian Federal Fiscal Code (BAO)²²⁶, fundamentally states that the abuse of legal forms under private law cannot reduce or circumvent tax liability (Article 22 paragraph 1 of the BAO). If such an arrangement were identified, taxes should be levied in accordance with the legal structure appropriate to the character of the economic transactions, facts and circumstances (Article 22 paragraph 3 of the BAO). From the legal texts it is apparent that the Austrian abuse doctrine follows an economic/substance over form approach, which generally takes in a predominant position in the assessment in particular in the field of direct taxation in Austria.²²⁷ The Austrian GAAR's wording has been significantly

²²² Which basically depends on our perceptions and expectations of the EU project, hence whether we tend to support a more or less tight-knit community (which would then translate into corresponding limitations to the Member States' tax sovereignties).

²²³ Compare Article 113 of the TFEU.

²²⁴ This includes in particular fundamental decisions such as the introduction or abolition of particular types of taxes, decisions on the "ideal" mix of taxes, or the definition of the tax bases and tax rates.

²²⁵ In this context, it remains to be seen whether, and to what extent, current plans on the (partial) establishment of an EU tax system are to be effectively realized in the future.

²²⁶ "Bundesabgabenordnung," BGBl. 1961/194, as last amended by BGBl. I 2021/51.

²²⁷ In contrast, the assessment of situations for purposes of domestic transaction taxes, such as the real estate transaction tax ("Grunderwerbsteuer") or transaction fees ("Rechtsgeschäftsgebühren"), usually ought to be carried by a strictly

amended to ensure that the domestic GAAR meets the requirements set out by Article 6 of the ATAD. In the respective legal materials, the Austrian lawmakers yet expressed their view that the VwGH's settled case law already embodied the criteria of the EU abuse concept carved out in CJEU case law,²²⁸ which is why they attributed no substantial changes to the adoption of the ATAD's GAAR (Kirchmayr and Geringer 2020a, 49).²²⁹

Beyond the GAAR, Austrian corporate tax law has contained a domestic switch-over clause for over 20 years. Its design has also recently been subject to significant adaptations in an effort to harmonize its basic application requirements (passive income and low taxation) with the characteristics of the ATAD-induced CFC rule.²³⁰ Moreover, the anti-abuse regime in Austrian corporate tax law encompasses inter alia specific measures in relation to investment funds, which mechanism broadly equals the functioning of CFC rules,²³¹ and ATAD-based provisions in context with interest limitations (Article 12a of the KStG) and hybrid mismatches (Article 14 of the KStG).

To date, the VwGH as well as the Austrian Ministry of Finance (BMF)²³² have only had the chance to express their views on the relationship between Austrian DTCs and the former GAAR or switch-over clause, respectively. In broad accordance, both the Austria's supreme court in tax matters and the Austrian financial administration's top officials have regarded these domestic anti-abuse provisions as part of the basic domestic rules for determining which facts give rise to a tax liability,²³³ thereby reproducing the respective statements in the 2003's OECD MTC commentary.²³⁴ It thus stems from this basic finding that domestic anti-abuse provisions are not addressed, and their applicability remains therefore unaffected by the DTCs between Austria and other countries

formalistic approach, thus in accordance with the prerequisites of Austrian private law. See from the settled case law, e.g., Verwaltungsgerichtshof [VwGH] [Administrative Court] of 26 January 1995, 89/16/0186 (AT).

²²⁷ See moreover ErlRV 190 BlgNR 26. GP, 42.

²²⁸ In its more recent case law, the VwGH indeed mimicked the CJEU's wording (wholly artificial arrangements, German: "rein künstliche Gestaltungen") in its assessment of possibly abusive tax structures. See Verwaltungsgerichtshof [VwGH] [Administrative Court] of 26 June 2014, 2011/15/0080 (AT); of 27 March 2019, Ro 2018/13/0004 (AT); and of 3 April 2019, Ra 2017/15/0070 (AT).

²²⁹ See in detail ErlRV 190 BlgNR 26. GP, 42.

²³⁰ The Austrian lawmakers decided to adopt the ATAD's CFC rule in accordance with the so-called "categorical approach" (Article 7 paragraph 2(a) of the ATAD).

²³¹ Accordingly, the provisions in Articles 186 et seqq. of the Austrian Investment Fund Act ("Investmentfondsgesetz") assume the distribution of retained profits for tax purposes under certain conditions. See for an overview Kirchmayr and Geringer 2020a, 61-2 (with further references).

²³² Which provides insight into its legal opinion in areas of doubt concerning the application of tax treaty rules in abstract manner via the "express response service" ("Express-Antwort-Service," EAS). On the criteria that render requests prone to become subject of an EAS information, see fundamentally Austrian Ministry of Finance [BMF] of 27 March 1995, EAS 607 (AT).

²³³ Regarding the settled VwGH case law, see in particular Verwaltungsgerichtshof [VwGH] [Administrative Court] of 26 July 2000, 97/14/0070 (AT) (*Treaty Shopping I*); of 9 Dec. 2004, 2002/14/0074 (AT) (*Dublin Docks I*); of 10 Aug. 2005, 2001/13/0018 (AT) (*Dublin Docks II*). For examples from the relevant EAS publications, see Austrian Ministry of Finance [BMF] of 5 July 1995, EAS 644 (AT); of 4 February 1999, EAS 1410 (AT); of 5 July 1999, EAS 1485 (AT); of 22 July 2002, EAS 2101 (AT); and of 10 December 2002, EAS 2184 (AT).

²³⁴ Compare OECD 2003, Art. 1 m.no. 9.2: "These anti-avoidance rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability, they are not addressed in tax treaties and are therefore not affected by them. Thus, as a general rule, there will be no conflict between such rules and the provisions of tax conventions."

from the perspective of both the Austrian courts and financial administrations (Loukota 2000, 421-2; Kofler 2010, 106). The VwGH has moreover emphasized the particular relevance of domestic anti-abuse provisions for addressing aggressive tax planning structures in context with DTCs that do not entail treaty GAARs, reservations for the application of domestic anti-abuse provisions, or similar rules.²³⁵ The VwGH's and BMF's arguments should remain fundamentally consistent for purposes of the adapted GAAR and switch-over clause, as well as for the CFC rule.

Both the Austrian courts and the Austrian financial administration have justified their unanimous opinion, *inter alia*, by way of an interpretation of the respective DTCs in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), arguing that each DTC's objective is to avoid double taxation, not to create double non-taxation (or similar effects), which could be used for tax-avoidance purposes (Kofler 2010, 106-7; Wöhrer 2016, 73).²³⁶ If the case for the applicability of domestic anti-abuse provisions is yet to be made on the basis of the requirement to interpret treaty provisions in line with Article 31 of the VCLT, the assumption of a right (or even a necessity) to refuse or withdraw tax benefits in the case of abusive or tax-avoidant arrangements would then need to be considered universally viable for all DTCs (as each constitutes a treaty between states according to Article 1 of the VCLT). Seen in this light, the value added from a general reference to the domestic GAAR as done by both the BMF and the VwGH could be fundamentally called into question.²³⁷

The approach reflected in the Austrian administrative practice and jurisprudence appears to be widely shared among the OECD Member States (Loukota 1990, 9; Kofler 2010, 106; De Broe and Luts 2015, 123).²³⁸ In the same vein, the OECD MTC commentary expressly confirms the fundamental compatibility of the refusal or withdrawal of treaty benefits to abusive arrangements with international tax treaty law: "A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in

²³⁵ This is especially true for DTCs with countries often considered "tax havens," such as the Austrian-Swiss and Austrian-Cypriot DTCs.

²³⁶ Moreover, they referred to the opinion issued in the OECD MTC commentary, which is to be elaborated in the following paragraph.

²³⁷ The author however submits that probably in the majority of cases a purposive interpretation of the relevant provisions would suffice to counteract abusive claims. In context with complex tax planning schemes, where the boundaries of a teleological interpretation are potentially met, the introduction of domestic GAARs could yet prove invaluable to allow the national authorities to accordingly address these arrangements while safeguarding the principles of legality and legal certainty. In the same vein, Englisch 2013, 225 et seqq.; Ruiz Almendral 2013, 138-39.

²³⁸ Compare OECD 1987, m.nos. 39-40: "The large majority of OECD Member countries consider that rules of this kind [anti-abuse or substance-over-form rules, see m.no. 38] are part of the basic domestic rules set by national tax law for determining which facts give rise to a tax liability. These rules are not addressed in tax treaties and are therefore not affected by them. [...] It is the view of the wide majority that such rules, and the underlying principles, do not have to be confirmed in the text of the convention to be applicable." In the author's opinion, this circumstance could reasonably explain why other countries would most probably not interfere with the current practice of the Austrian administration and jurisprudence to apply the domestic statutory GAAR within the scope of the related DTCs.

these circumstances would be contrary to the object and purpose of the relevant provisions” (OECD 2017, Art. 1 m.no. 61).

Beyond the apparently broad agreement on what concerns the aptitude to reconcile the application of domestic GAARs in DTC situations among OECD member countries, it however ought to be borne in mind that there remain significant differences in the respective countries’ scholarly and judicial opinions. This basic assumption can be confirmed by way of comparing the Austrian approach illustrated above with the legal opinions prevailing in the other contracting states of the three example DTCs elaborated in Subsections 2.2-2.4. From the German perspective, the application of the domestic GAAR or specific anti-abuse provisions demands for an analysis of the relevant DTC in order to determine whether its rules can be considered to be exhaustive. Detailed treaty anti-abuse provisions in German DTCs are thus regarded as prevailing over corresponding domestic regulations (Drüen 2016, 300-2; Schaumburg 2017, m.no. 19.133).²³⁹ While the UK GAAR has been expressly made applicable in parallel with the UK DTCs by the letter of the law, the US case law in particular makes the case for the relevance of the *lex posterior* rule, and a refusal of the granting of benefits by way of interpretation of the respective tax treaty rules (Freedman 2016, 759-60; Menuchin/Brauner 2016, 785-8).

Stemming from these assertions, a preliminary conclusion can be drawn that it needs to be assessed on a case-by-case analysis whether the respective contracting states seem to agree on the general applicability of their domestic anti-abuse provisions even in the absence of explicit reservations in the relevant DTCs. For purposes of the three example DTCs, it can yet be found that each of them encompasses an explicit reference to the applicability of domestic anti-abuse provisions either in the DTC itself or in the respective protocol or MOU, which indisputably facilitates the indicated analysis and allows us to conclude that these domestic approaches are viably applicable (albeit with the possibly undesirable side-effect that they could lead to differing results in the assessment pursuant to the different national taxation systems).

Referring back to the research aim of this article, it can be found that equality, in the sense of a uniform assessment of possibly abusive tax planning schemes in cross-border situations, can be broadly realized at the national level (i.e. for purposes of the Austrian tax regime). This result indeed seems to be indicated if we keep to mind the requirements which are usually set out by the national constitutional systems. The principle of equality, which is incorporated in Article 7 of the Austrian Federal Constitutional Act (B-VG)²⁴⁰ and fundamentally includes the prohibition of arbitrary distinction (Thuronyi, Brooks and Kolozs

²³⁹ In this sense, regarding the German–Swiss DTC, Bundesfinanzhof [BFH] [Federal Fiscal Court] of 19 Dec. 2007, I R 21/07 (DE): “Art. 23 German–Swiss DTC as the more specific rule on the avoidance of abusive claims of convention reliefs from capital gains tax levied in Germany prevails over both Art. 50d Para. 1a EStG 1997 (old version) and Art. 50d Para. 3 EStG 1997 (new version), respectively [domestic anti-treaty shopping rules], as well as Art. 42 Para. 1 AO [domestic GAAR].” (author’s translation).

²⁴⁰ “Bundes-Verfassungsgesetz,” BGBl. I. 1930/1, as last amended by BGBl. I 2021/2.

2016, 56), proves of paramount importance for the purposes of this article. The uniform assessment of similar (possibly) abusive arrangements in comparable situations can moreover be basically considered a necessity (to some extent) from both a legal and socio-political perspective, as fairness and justice are widely thought to form the basis for a country's fundamental right to raise and collect taxes (Waris 2019, 8; Pistone et al. 2019, 40-1; Kokott, Pistone and Miller 2020, 212). Beyond these rather idealistic reasons, we should further keep to mind that it is in the states' own interest to address all forms of abusive arrangements in order to safeguard stable revenues. The pursuit of national fiscal interest would then rather automatically translate into a harmonized assessment of possibly cross-border abusive situations. In a political context, it should moreover be considered that politicians, officials and judges might be more likely to act accordingly at the national level —and possibly thereby “right the wrongs” imported from other legal layers—against the background of their fundamental (political) responsibility against the taxpayers.²⁴¹

As regards the principle of equality in the Austrian constitution, we should call to mind that DTCs first and foremost fulfil the purpose to allocate the rights of taxation between the two particular contracting states. As was already concluded above,²⁴² their specific purpose thus only asks for equal treatment of taxpayers subject to the same tax treaty, but does not imply the obligation to treat equally all taxpayers subject to different tax treaties of a particular contracting state. Due to their strict bilateral dimension, which among other things translates into the drafting of technical details against the background of the occurrence of particular phenomena in a specific bilateral situation (i.e. on account of the combined national taxation systems), possibly unfavorable treatment of certain transactions due to specific anti-abuse provisions in the applicable DTC²⁴³ could be regarded as the obvious consequence in a world where a network of more than 3,000 bilateral treaties in force is a reality.²⁴⁴ Nevertheless, these differences are reasonably explainable by objective and rational criteria, and thus, in the author's opinion, not to be considered arbitrary distinctions pursuant to the understanding of the Austrian constitution's principle of equality (Pistone et al. 2019, 41).²⁴⁵ Against this background, the

²⁴¹ These assertions are fundamentally borne out of the fact that in the author's opinion, any kind of action from politicians, officials and judges, that could be regarded as unacceptable behavior by the general public, is most likely perceived to a greater extent by the respective stakeholders if they happen at the national (rather than at the supranational or international) level. The author however submits that for several years these dynamics seems to have slowly changed (in particular since the financial crisis in the 2000s).

²⁴² See Section 3.

²⁴³ Such as the unlimited right to source taxation in context with hybrid financial instruments under Article 11 paragraph 2 of the Austrian-German DTC regardless of the taxpayers' intents.

²⁴⁴ See already Section 3.

²⁴⁵ In the same vein, Verfassungsgerichtshof [VfGH] [Constitution Court] of 8 June 1966, B43/66 (AT), where the Court elaborated on a DTC's purpose to achieve equal treatment of taxpayers subject to a particular tax treaty.

establishment of overall equality at the national level appears to have reached its boundaries.²⁴⁶

As the justification for the broad harmonizing effect at the national level can most notably be identified in the fundamental principles of national constitutional and taxation systems, it can be consequently found, first, that their specific characteristics as principles implies that values such as equality, fairness and justice need to be balanced out against other principles (such as the rule of law) or legitimate aims of tax policy (e.g. redistribution or environmental protection) (Dworkin 1977, 26-7; Avery Jones 1996, 75-6; Freedman 2010, 720; Pistone et al. 2019, 24; Waris 2019, 103). Their significance is thus necessarily limited in certain situations. Second, the exact definition and role of equality needs to be negotiated in the respective national societies in a specific national context,²⁴⁷ and indeed constantly renegotiated in the course of ever-changing political, economic and societal circumstances and perceptions (Pistone et al. 2019, 10; Waris 2019, 107).²⁴⁸

The characterization of equality as a nationally defined concept almost necessarily culminates in the assumption that equality can be exclusively achieved for each country on a stand-alone basis. It is thus upon the respective countries—against the requirements set out by the national constitutional and taxation systems—to have equal treatment materialize for comparable events taxed in their jurisdictions. Although it might appear desirable to have similar situations assessed equally in both contracting states of a particularly DTC, this idea is still confronted with the difficult question of how such a uniform understanding should be reached, and then effectively enforced in the absence of a global institution such as a “global tax court” which could decide on the interpretation of treaty provisions for the contracting states in a binding manner (Grinberg 2017, 1140).²⁴⁹ This finding should however not imply that we ought to take this result as a natural given, but consider the nature of tax law as a human-made system which can (and indeed should) be adapted according to the changes of political, economic, geographical and societal realities (Waris 2019,

²⁴⁶ The author however wishes to stress the point that the conclusion presented above should by no means be regarded as a natural given (or god-given), but indeed critically depends on the understanding of the concept of equality (taking into account that all legal norms are principally human-made).

²⁴⁷ For a comparative analysis of different approaches by the constitutional courts in different countries regarding the issue of whether, and to what extent, tax treatment should be tried against the principle of equality, see Thuronyi, Brooks and Kolozs 2016, 69-85.

²⁴⁸ This finding may be best illustrated by pointing to the fact that protagonists of the French revolution understood the concept of equality, which was also included in their famous slogan “Liberté, Égalité, Fraternité,” in the sense that it meant equality of all men, thereby excluding equality of men *and* women.

Compare moreover Waris 2019, 31: “the fiscal system must be considered in the historical, economic, socio-political, ideological, racial, ethnic, and belief systems in which it exists.”; Pistone et al. 2019, 42: “Equality of treatment in tax law has been translated into various types of bans on discrimination, although the range and depth may vary considerably between countries.”

²⁴⁹ Compare for purposes of the EU’s territory Case C-67/08 *Block* EU:C:2009:92, para. 31: “in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty.”

107). Seen in this light, the identification and significance of an international, cross-border dimension of equality is likely to be (at least partially) subject to renegotiation at the international level in the future, in particular in context with the currently on-going discussions on the establishment of a “global”²⁵⁰ standard for minimum taxation (Pistone et al. 2019, 34; Kokott, Pistone and Miller 2020, 213).

All these findings notwithstanding, we should lastly bear in mind that perceived or effective different treatment in the context of similar or indeed comparable (possibly) abusive situations do not necessarily occur on account of differences in the applicable tax laws. There are indeed several other factors which might come into play to a variable extent²⁵¹, and which are capable of critically influencing the materialization of equal treatment, inter alia the lack of access to relevant information,²⁵² restraints to the capacity of tax administration,²⁵³ divergences in judicial decisions,²⁵⁴ mock compliance²⁵⁵ and the power of lobby groups.²⁵⁶

To conclude, it can be found that equal treatment of comparable and possibly abusive arrangements is broadly realized at the national level. This result appears to be the consequence of the fundamental requirements of national constitutional and taxation systems, in particular the principle of equality, and the related ideas of fairness and tax justice. This notwithstanding, the issue of comparability of situations moreover plays a crucial role at the domestic level and leads us to conclude that differentiations in treaty SAARs cannot be considered arbitrary distinctions between taxpayers. Beyond that, we ought to call to mind that all principles are limited in their impact, as they need to be balanced out against one other, while their significance and concrete manifestation in a particular national legal system ought to be negotiated in the respective societies. Finally, it is argued that even in the hypothetical case of fully harmonized anti-abuse rules it can however be assumed that—in this case probably unjustifiable—differing treatment might occur against the background of other, non-tax factors.

²⁵⁰ Which can be basically regarded as such against the background that 130 countries and jurisdictions basically endorsed the respective approach at the OECD level; OECD 2021.

²⁵¹ Depending on the concrete political, economic and societal circumstances in a particular country and its external relations with other tax jurisdictions.

²⁵² Which could be the case for instance if either the host country has not yet closed an agreement with the source country that would allow them to request the needed information, or the flow of information proves to be ineffective in practice.

²⁵³ Most notably, on account of limited financial resources. Compare, e.g., Diniz Magalhães and Ozai 2021, 7.

²⁵⁴ Which, among other things, might occur against the background of differing perceptions of the competent judges on what ought to be considered abusive or tax-avoidant.

²⁵⁵ See in more detail using recent examples Grinberg 2016, 1176-7.

²⁵⁶ Compare Waris 2019, 12: “Well funded, well networked and/or knowledgeable lobby groups argue for exemptions and use loopholes to reduce the tax burdens of those represent, leading to special treatment and issues of evasion, avoidance and tax planning.” See on the importance of international initiatives against the background that national governments are possibly not able to act directly against certain interest groups Faulhaber 2020, 266.

Conclusion

In the 21st century the exploitation of mismatches in international and domestic tax laws has become one of the most pressing and most debated issues in the public and academic discourse. Counteracting all kinds of manifestations of tax avoidance or tax abuse not only translates into increases in tax revenues—which appears to be particularly needed in light of the unprecedented financial efforts taken during the Covid-19 pandemic—, but can moreover be considered indispensable to have traditional and fundamental justifications for the states' right of taxation materialized. Against this background, differing results from the assessment of factually similar cases of tax avoidance or tax abuse would fundamentally raise the concern of potentially unjustified (possibly even observed as arbitrary) unequal treatment. As the individuals' perception of "unfair" treatment in comparison to other taxpayers is basically prone to reduce a taxation system's acceptance in our societies and thereby favor the flourishing of future tax misbehavior, an assessment of differing anti-abuse provisions in different double tax treaties against the background of the concept of equality appears indicated to evaluate the reasons for, and hence justifiability of, possibly unequal treatment.

On the basis of an identification and depiction of the anti-abuse provisions encompassed in three Austrian DTCs, it is illustrated that both the fundamental existence and the concrete legal design of particular types of anti-abuse provisions may significantly differ within the scope of different double tax treaties. These theoretical differences in the legal texts have been shown to be also factually capable of translating into highly divergent results in tax assessments. By contextualizing these basic findings with the role and principles of the current tax treaty network, it was deduced from the strict bilateral perspective of double tax treaties that first and foremost the comparability of situations under the scopes of different DTCs should be fundamentally called into question. The author argues that this preliminary question should be answered in the negative. The particular characteristics of tax treaties as customized agreements, where the actual trade and investment flows as well as the technical details in the domestic taxation systems of the respective contracting states are taken into account, should hence allow for a conclusion that the encompassed differences make sense and can be reasonably justified. Beyond these findings from a legal perspective, it should however be borne in mind that high(er) degrees of differing abuse concepts in a country's DTCs, which are more likely to occur among countries with limited bargaining power (i.e. smaller economies with a comparably high reliance on cross-border trade and investment, developing countries), could yet translate into increased perception of "unfairness" among tax citizens (with all the consequences discussed above). In this sense, the author argues that these differences—though they might perfectly reflect the idea of equality in a tax treaty context—could yet be problematic from a political and societal perspective. In this

context, the author argues that issuing (more detailed) explanations concerning the negotiation process and the reasons behind the legal design of the individual tax treaties particularly in the legal materials, and other forms of increased inclusion of the general public in the tax treaty process, would not only provide for higher levels of transparency, but could moreover help increase the acceptance of (certain types of) differing anti-abuse provisions in a country's treaty network.

The further assessment of differing anti-abuse provisions in light of the requirements of EU law has shown that the CJEU, in a similar vein as the author has argued for the legal situation at the treaty level, fundamentally refused the assumption of comparable situations for taxpayers subject to different DTCs. Hence, no case can be made for a direct harmonization of diverging abuse concepts by way of a most-favored nation treatment. The anti-abuse provisions in the traditional corporate tax directives (Parent-Subsidiary and Interest-Royalties Directives) are generally not capable of contributing to the establishment of a uniform standard for tax treaty purposes, as they are exclusively tailored to cause the refusal or withdrawal of the benefits of these directives. Their application thus effectively translates into the prevention or nullification of the potential overriding effect of these directives. We can however perceive that both the ATAD and the EU anti-abuse principle should have a significant impact on our findings against the background that, first, the ATAD's provisions are also principally applicable in a third-country context, and, second, the relevance of the EU anti-abuse principle for interpretative purposes is prone to translate into a harmonized benchmark even beyond the ATAD's scope. The remaining situations which are covered neither by the ATAD nor the free movement of capital—hence not necessarily influenced by a potentially indirect harmonization of abuse concepts—are again reasonably explainable if we bear in mind the fundamentally limited scope of EU income and corporate tax laws on account of the Member States' principal tax sovereignty in the field of direct taxation. We can hence draw the preliminary conclusion that the capacity of the idea of equality should be regarded as accordingly limited at the EU level. With a view to future developments, it can be generally held that the introduction of an EU MTC, or even the adoption of an (intra-EU) multilateral tax treaty, would most likely increase legal certainty and administrative convenience, hence presumably encourage cross-border investments and activities, but would critically depend on the existence of a respective unanimous political will among the EU Member States (which, at this point, appears rather doubtful to the author).

Against the background of the Austrian taxation system (as the model national tax regime), it becomes apparent that a broader harmonization of the differing abuse concepts in a country's DTCs might fundamentally be achieved at the national level. It is argued in this context that this effect particularly stems from the requirements of the principle of equality established in national

constitutional systems, but moreover from less idealistic reasons such as the almost natural interest of the respective country's administration to increase its tax revenues and—when we further consider socio-political aspects—their immediate accountability towards their taxpayers. This result is however critically dependent on the concrete legal situation in a particular tax jurisdiction and might vary on account of the constitutional systems—which could, for example, expressly prohibit treaty overrides—and the national anti-abuse doctrines. Beyond that, we need to keep in mind that even domestic GAARs or unwritten anti-abuse doctrines are fundamentally not capable of correcting different standards introduced by treaty SAARs, which is yet justifiable due to the absence of comparable situations. The fundamental idea to create “perfect equality” through theoretically harmonized anti-abuse provisions moreover needs to be put into perspective with other obstacles that might arise in this context, such as the lack of access to relevant information, restraints to the capacity of tax administration, divergences in judicial decisions, mock compliance and the power of lobby groups.

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