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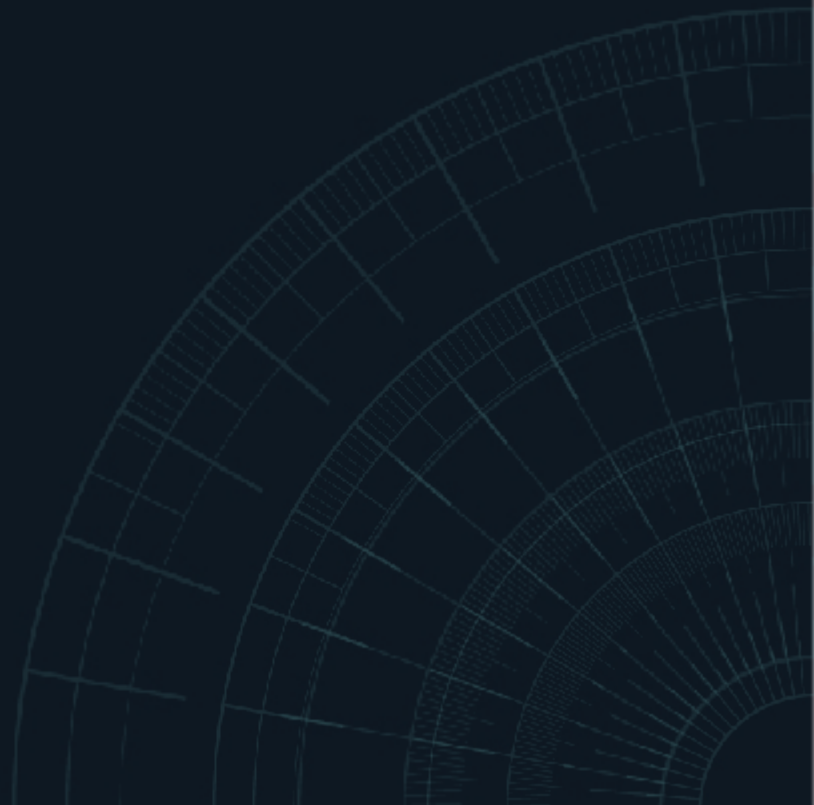


ATOZ

Samantha Hauw

Partner | samantha.hauw@atoz.lu

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Abuse of law in Luxembourg tax law the growing scrutiny of tax arrangements

The concept of abuse of law has long occupied a distinctive position in Luxembourg tax law. Embedded in Paragraph 6 of the Tax Adaptation Law of 16 October 1934 (*Steueranpassungsgesetz*, or "StAnpG"), this provision enables the Luxembourg tax authorities to disregard certain legal arrangements where forms and legal institutions available under private law are used in an inappropriate manner to circumvent or reduce a tax liability.

Although Luxembourg has progressively introduced and implemented a wide range of specific anti-abuse rules deriving from European and international developments, Paragraph 6 StAnpG has retained considerable practical importance. It continues to provide the tax authorities and the courts with a general instrument through which the legal structure of a transaction may be examined in light of its economic reality and the reasons underlying its implementation.

Recent case law confirms that the provision is far from merely theoretical. Luxembourg courts continue to scrutinise arrangements by reference not only to their formal legal validity but also to their chronology, the relationships between the parties, the economic consequences of the transactions and, more generally, the circumstances in which the arrangements were implemented.

The judgment of the Administrative Tribunal (the "**Tribunal**") of 13 February 2026 in case No. 48945 provides a recent illustration of this approach. Read together with the judgments of the Luxembourg Administrative Court (the "**Court**") of 25 April 2024, the decision illustrates a broader trend in Luxembourg tax litigation: the assessment of abuse of law increasingly depends on a holistic examination of the facts and on the accumulation of objective elements rather than on the identification of a single decisive operation.

At the same time, the growing importance of functional analysis and so-called "substance" analyses creates a risk of confusion between different mechanisms of Luxembourg tax law, particularly abuse of law and transfer pricing. While both mechanisms may be relevant to transactions involving related parties and may ultimately affect the taxpayer's taxable base, they address fundamentally different questions. Luxembourg tax authorities nevertheless appear to rely increasingly on both to challenge certain transactions.

1. The concept of abuse of law under Luxembourg tax law

Paragraph 6 StAnpG provides, in substance, that tax liabilities may not be circumvented or reduced through the abusive use of legal forms and structuring possibilities available under private law. Where an abuse is established, taxation is determined as it would have been had the transactions, facts and economic circumstances been structured through an appropriate legal form.

The wording of Paragraph 6 of StAnpG was significantly revised as part of the transposition of the Anti-Tax Avoidance Directive ("ATAD") in 2018. While the previous provision already allowed the tax authorities

to disregard arrangements involving an abuse of legal forms and to tax the transaction according to an appropriate legal structure reflecting the economic circumstances, the revised provision introduced a more detailed framework for identifying abusive arrangements. In particular, it focuses on arrangements or series of arrangements which, having been put in place with the main purpose, or one of the main purposes, of obtaining a tax advantage contrary to the object or purpose of the applicable tax law, are considered not to be genuine in light of all relevant facts and circumstances.

The revised provision emphasises on the taxpayer's commercial rationale and the economic substance of the arrangement, while preserving the underlying principle that the choice of a tax-efficient legal structure should not, in itself, constitute an abuse.

The provision (under its historic wording and "ATAD-compliant" version) therefore operates at the intersection of private law and tax law. It does not generally challenge the validity of a transaction under civil or company law. Rather, it permits the tax authorities to look beyond the legal form where the taxpayer has used that form in a manner considered abusive for tax purposes.

Historically, Luxembourg case law have identified four cumulative conditions for establishing an abuse of law:

1. the use of a form or legal institution available under private law;
2. the achievement of a tax saving;
3. the use of an inappropriate legal route; and
4. the absence of valid non-tax reasons justifying that route.

These four cumulative conditions have been consistently considered by the judges over the years. The modification of Paragraph 6 in 2018, in accordance with parliamentary documentation, does not seem to have significantly modified the core of the conditions for establishing the abuse of law which now can be summarised as follows:

1. The use of a legal form or arrangement to carry out the transaction;
2. The obtaining of a tax advantage through that legal form or arrangement, where such advantage is contrary to the object or purpose of the applicable tax legislation; and
3. The non-genuine nature of the arrangement, assessed in light of all relevant facts and circumstances, in particular where the arrangement is not supported by valid commercial reasons reflecting economic reality.

The cumulative nature of these conditions is important. The existence of a tax advantage, for example, does not automatically establish an abuse. Similarly, the use of a complex corporate structure does not, in itself, constitute an inappropriate legal route.

The analysis is therefore necessarily contextual and facts-specific. The taxpayer's legal structure must be considered taking into account the economic circumstances in which it was established and operated.

1.1. The use of a legal forms and institutions

The first criterion is broad and functions primarily as a threshold requirement.

The taxpayer must have made use of a form or legal institution governed by private law. While implementing the 2018 version of Paragraph 6, the legislator clarified that the modified version of the law had the sole purpose of aligning with ATAD, without any change in substance. Thus, the criterion relating to the use of legal forms and institutions may be understood as referring to the use of an arrangement or a series of arrangements. These arrangements may include, among other things, the incorporation of a company, the acquisition or disposal of shares, restructuring of ownership, a financing arrangement, a distribution, a merger, a contribution, or any other restructuring.

The criterion is deliberately broad because Paragraph 6 StAnpG is concerned precisely with the use of legal forms made available by private law.

Nevertheless, the mere fact that a taxpayer has selected a particular legal structure or operation cannot establish abuse. Luxembourg tax law does not require taxpayers to adopt the simplest possible legal structure.

This is particularly relevant for corporate structures commonly encountered in Luxembourg. The incorporation of a holding company, the interposition of a company within a group or the implementation of a restructuring do not become abusive merely because the structure is implemented in a complex way or could have been realised in a more straightforward manner from a legal perspective.

The first criterion should therefore be understood less as a distinguishing factor than as the starting point for the abuse analysis.

1.2. The existence of a tax advantage contrary to the object or purpose of the applicable tax legislation

The second criterion requires the existence of a favourable tax outcome which is not aligned with the objective of the law or legislator.

A tax advantage may consist of an immediate reduction in tax, a deferral of taxation, the preservation of an existing tax benefit, the utilisation of tax losses or the application of a tax regime that would not otherwise have been available. The avoidance or reduction of the tax burden is determined by comparing the tax liability arising from the legal arrangement employed with the tax liability that would have been payable had the non-genuine legal arrangement been disregarded. Therefore, the fact that the operation has been realised in compliance with the conditions of the tax law does not establish that there is no tax advantage.

However, although the existence of a tax advantage is necessary, it is not sufficient.

This reflects a fundamental principle of Luxembourg tax law: where several legally available routes lead to substantially the same economic result, the taxpayer is not necessarily required to select the route resulting in the highest tax burden. Therefore, tax efficiency does not automatically trigger an abuse.

The distinction is particularly important in corporate structuring. A taxpayer may deliberately select a structure because it is more tax-efficient while also having legitimate commercial reasons for choosing that structure. The existence of a tax motive therefore does not necessarily establish an abuse of law.

The critical issue is whether the tax advantage is aligned with the objective of the law and forms part of an economically coherent transaction or whether the legal structure was selected principally, or exclusively, as a means of achieving the tax result.

This distinction has also become relevant in litigation concerning the generation and utilisation of carried-forward tax losses. In such cases, the courts may examine not only the formal availability of the losses but also the circumstances in which they arose, the subsequent changes affecting the company and the overall sequence of transactions.

The tax saving therefore constitutes a necessary element of the analysis, but the decisive questions arise under the third criterion.

1.3. The core of the analysis: the non-genuine nature of the arrangement

The third criterion is arguably at the heart of the abuse of law analysis.

Historically, the courts assessed whether the transaction was performed mainly for "non-tax reasons".

This third criterion of abuse of law, relating to the existence of a "non-genuine" legal route, corresponds, in substance, to the former criterion concerning the absence of valid non-tax reasons. It requires that the various reasons underlying the choice of a particular legal route be weighed against each other. The legislator expressly indicated that, through the 2018 version of the Paragraph 6 StAnpG, it intended to maintain the jurisprudence of the Court according to which it is not sufficient for the taxpayer merely to invoke economic reasons for those reasons to necessarily be regarded as valid. Rather, those reasons must be capable of being considered "genuine" and must, in themselves, provide a sufficient economic benefit beyond the mere tax benefit obtained.

It is, indeed, well-established jurisprudence that, while the tax authorities invoking an abuse of law must, in principle, prove that the elements constitutive of the abuse are present, this burden of proof cannot have the effect of requiring the tax authorities to demonstrate that an economic justification for the chosen legal route is impossible. Accordingly, the tax authorities must make plausible the absence of an economic justification underlying the chosen legal route. Following this assessment, the taxpayer, which initiated the challenged operation, must detail the economic considerations which, in their view, justify that route.

The question is then, having regard to the economic facts and circumstances, whether the legal route chosen (and related tax consequences) is supported by genuine economic, commercial or organisational considerations.

The tax authorities must therefore demonstrate more than the mere existence of a tax advantage and a legally available structure. They must establish why the chosen legal route is non-genuine in light of the economic reality of the transaction.

Given that mere economic reasons might not suffice for the qualification of "genuine", the assessment requires a holistic examination of the facts. Relevant circumstances may include the chronology of the transactions, the relationships between the parties, the ownership structure, the actual activities of the

companies involved, the assets held, the commercial consequences of the transaction, the changes occurring before and after implementation, and the overall economic rationale advanced by the taxpayer.

For this purpose, the chronology of operations can be particularly significant. Transactions that appear harmless when viewed individually may raise questions when considered as a sequence of related events. For example, the acquisition of a company followed shortly by a substantial change in its business activity may require a different analysis from a change in activity undertaken independently over a longer period as part of an established business strategy.

The taxpayer must therefore be able to explain why the chosen structure was commercially rational independently of the tax result. Depending on the circumstances, legitimate non-tax reasons may include centralising an activity within a dedicated entity, protecting an investment, obtaining external or intra-group financing, preparing a business for a future sale, separating different business lines or responding to specific commercial circumstances.

The existence of such reasons does not mean that the taxpayer must prove that taxation played no role whatsoever in the decision but rather show that the overall transaction was driven mainly by non-tax circumstances.

In practice, business decisions frequently have multiple motivations, and restructuring may simultaneously facilitate commercial objectives and generate a tax advantage. The relevant distinction is therefore between a transaction that is commercially and economically coherent, notwithstanding its tax efficiency, and a structure for which the tax outcome is effectively the only meaningful explanation.

In order to make this assessment, the courts increasingly appear to examine the transaction as a whole rather than treating each legal step as an isolated event.

If the evidence suggests that the taxpayer had no meaningful reason to implement the structure other than obtaining the tax result, the arrangement may become significantly more vulnerable to an abuse of law challenge.

Conversely, where the taxpayer can demonstrate that the structure formed part of a broader commercial strategy that existed independently of the tax result, this may weigh against a finding of abuse.

2. The April 2024 landmark decisions

The Court's judgments of 25 April 2024 in cases No. 48917C and 49336C provide crucial insights into how Luxembourg courts assess the abuse of law notably in the context of loss carry-forward.

A notable aspect of these decisions is that, despite the factual similarities (both involving the use of tax losses) the Court reached divergent conclusions: in one instance, it ruled in favour of the taxpayer, while in the other, it upheld the abuse of law.

In case No. 48917C, the Court found no abuse of law. The case involved a taxpayer, a Luxembourg company, that had realised losses in the early 2000s, remained inactive for several years after terminating its loss-making business, and later sought to use those losses to offset some taxable profits deriving

from a fully taxable profit realised by the company.

In this case, the Court rejected the abuse-of-law argument primarily because there had been no change of shareholder. This fact was not disputed by any of the parties. The Court recalled that, under the rules on loss carry-forward, there is no requirement for an "economic" identity between the entity that incurred the losses and the one seeking to use them, it is sufficient that it is the same legal person. The Court explicitly stated that *"a taxpayer who incurred losses in the context of a specific activity must be entitled to terminate that activity and dispose of the assets linked to such activity, and to orientate its business towards another activity which it considers more likely to generate positive income."* The Court's reasoning was thus that the absence of a shareholder change and the legal continuity of the entity were decisive in rejecting the abuse of law.

In contrast, case No. 49336C involved a scenario also involving tax losses carried forward by the taxpayer, a Luxembourg company, but with a specific pattern. This case builds directly on a Court's earlier decision in case No. 35978C dated 2016, rendered for the same taxpayer. In the 2016 case, the Court found an abuse of law in connection with the use of tax losses and denied their utilisation.

In 2016, the finding of abuse of law in case No. 35978C was based on the Court's assessment that the company's tax losses were being used in circumstances that were inconsistent with the purpose of the loss carry-forward regime. The company had ceased its previous activity, had become essentially dormant and no longer had significant assets or the infrastructure necessary to conduct its former business.

Its shares were subsequently transferred to new shareholders, after which the company resumed activity and generated profits against which the substantial pre-existing tax losses were offset.

The Court considered that the restructuring was principally aimed at preserving and exploiting the accumulated tax losses rather than pursuing a genuine economic objective. In particular, the acquisition of the company was regarded as being motivated by the availability of its tax losses, and the taxpayer was unable to demonstrate sufficient genuine economic reasons for the structure beyond the tax benefit obtained.

The Court therefore considered that the chosen legal route produced a tax advantage that could not reasonably be regarded as intended by the legislature and constituted an abuse of law under Paragraph 6 of the StAnpG.

The 2024 decision, in case No. 49336C, subsequently clarified the effect of that decision. It held that the losses were not merely suspended or "frozen" as a result of the finding of abuse of law in 2016. Their unavailability was definitive. This was so even though the taxpayer later resumed a business activity that, if it had been carried out in compliance with the applicable rules in 2016, would have allowed the taxpayer to utilise the losses.

The Court's analysis highlights that the use of losses carried forward may be refused if the criteria for abuse of law are met, particularly where the facts suggest that the losses were acquired or used in a manner inconsistent with the object and purpose of the relevant tax provisions.

Among the circumstances considered by the Court in the above-mentioned cases are the existence of a

significant economic asset within the company, the transfer of the shares to new shareholders, the subsequent change in the company's activity, the relationship between the new activity and activities already carried out by the new shareholders elsewhere, and the profitability of the new activity.

The importance of the decisions lies not necessarily in any one of these elements considered individually, but in their combination.

The cases illustrate how the tax authorities and courts may construct an abuse of law argument through a series of interconnected elements. The existence of a tax advantage alone would not necessarily have been sufficient. Nor would the share transfer, considered in isolation, automatically establish abuse. The significance arose from the overall sequence and the factual context in which the transactions occurred.

These cases therefore reinforced a broader lesson for taxpayers: the legal documentation of an individual transaction or its legal validity may not be sufficient if the surrounding circumstances suggest that the transaction formed part of a broader arrangement designed to obtain a tax result.

3. The 2026 judgment in case No. 48945

The tax authorities are relying more systematically on the concept of abuse of law to challenge certain transactions. The Tribunal's judgment of 13 February 2026 in case No. 48945 provides a more recent illustration of this jurisprudential direction as well as guidelines with respect to the interpretation of the "new" Paragraph 6 of the StAnpG, compliant with ATAD.

The case involved a series of transactions concerning the transfer of participations within a corporate group. The taxpayer relied on economic considerations to explain the transactions. The Tribunal nevertheless examined the broader factual circumstances surrounding the arrangements, including the relationships between the companies and the circumstances in which the relevant transactions were implemented.

The case involved a Luxembourg company (the "**Acquiring Company**") belonging to a fiscal unity. In 2017, the Acquiring Company realised a capital gain from the disposal of real estate. Under Article 54 of the Luxembourg income tax law ("**LITL**"), it sought to defer taxation of that gain by reinvesting the proceeds in fixed assets.

In 2019, it acquired shares in three sister companies from its parent company. The Acquiring Company treated those shareholdings as replacement assets for the purposes of the Article 54 of the LITL rollover.

The tax authorities challenged the application of Article 54 of the LITL on three grounds:

- the acquired participations did not qualify as eligible reinvestment assets;
- the arrangement constituted an abuse of law; and
- the valuation of the acquired shares was not at arm's length.

On the abuse of law, the tax authorities' argument was essentially that the transaction generated a tax deferral without the economic circumstances that Article 54 of the LITL was intended to address.

The Tribunal ruled that two elements of the abuse of law test were present. First, the transaction used genuine legal arrangements. Second, the “Article 54” regime resulted in a reduction or deferral of the tax burden and observed that benefiting from such tax advantage was one of the principal objectives of the Acquiring Company. The Tribunal also considered that the purpose of Article 54 of the LITL was not simply to permit taxpayers to defer tax whenever they reinvested in any fixed asset. Rather, the regime was intended to facilitate the replacement of an asset that had become unsuitable for the business with an asset better adapted to the business’s needs.

However, the Tribunal ultimately rejected the abuse of law argument of the tax authorities. The decisive point was the third element of the abuse of law test: whether the legal arrangement was non-genuine, i.e. whether it lacked valid commercial or economic reasons reflecting economic reality.

The taxpayer was able to provide detailed commercial explanations for the restructuring put in place. In particular, the acquisition of the participations allowed the Acquiring Company to continue operating as a central purchasing entity for the relevant operating companies while also holding significant interests in them. The Tribunal therefore considered that the transaction had genuine economic substance and valid commercial reasons. Consequently, the tax authorities could not deny the benefit of Article 54 of the LITL on the basis of abuse of law.

In the case discussed, the Tribunal did not consider the existence of a tax advantage sufficient to establish abuse of law. The Tribunal acknowledged that the transaction provided a tax benefit and that the arrangement did not fully correspond to the objective and purpose of Article 54 of the LITL. Nevertheless, the taxpayer demonstrated genuine economic reasons for the restructuring. The arrangement was therefore not considered artificial or abusive.

This case is particularly relevant as it shows the increasingly systematic reliance by the Luxembourg tax authorities on the abuse of law doctrine. That said, although the authorities may challenge transactions where a tax advantage appears to conflict with the purpose of a tax provision, the existence of a tax advantage does not, on its own, establish an abuse of law. The taxpayer’s ability to demonstrate genuine commercial reasons and economic substance remains decisive.

The decision is therefore significant because it confirms the continuing relevance of the factual and contextual approach to abuse of law.

A share transfer that is legally valid under company law does not become immune from scrutiny merely because all corporate formalities have been respected. The relevant tax question remains why the structure was chosen and whether the legal route selected was appropriate in light of the underlying economic circumstances.

4. The transfer pricing perspective

The 2026 case is particularly noteworthy as it addresses both transfer pricing and abuse of law in the context of the same transaction. This raises the question of how these two concepts interact and, more fundamentally, whether they pursue the same objective or operate according to different principles. It is therefore useful to look more closely at the respective scope of transfer pricing and abuse of law, as well as at the potential points of interaction between them.

Although both concepts may arise in the context of the same transaction, they address different concerns. Transfer pricing is primarily concerned with the economic conditions of certain transactions between related parties and whether those conditions are consistent with the arm's length principle. Abuse of law, by contrast, looks beyond the terms of the transaction and considers whether the legal arrangements chosen by the taxpayer are being used in a manner that is contrary to the purpose of the legislation, particularly where the principal rationale is to obtain a tax advantage without sufficient genuine economic justification.

The distinction between the purposes is essential, both for taxpayers structuring transactions and for the tax authorities and courts assessing them. At the same time, the two concepts may overlap in practice. A transaction may raise transfer pricing concerns because its terms do not reflect the arm's length principle, while also giving rise to questions as to whether the transaction, viewed as a whole, constitutes an abuse of law. This raises an important question as to the relationship between the two analyses: can, and if so, to what extent, a transfer pricing adjustment support, or form part of, an abuse of law finding? Conversely, can the existence of genuine economic and commercial reasons for a transaction mitigate an abuse of law concern, even where certain terms of the transaction may require adjustment under the arm's length principle?

The 2026 case provides an interesting starting point for exploring these questions. In substance, the decision suggests, as it can be expected, that non-arm's-length term may constitute evidence relevant to the assessment of whether an arrangement is artificial or lacks economic substance. This may contribute to an indicator of potential existence of an abuse of law. But a transfer pricing adjustment, in itself, does not establish an abuse of law.

From the perspective of the tax authorities, the distinction between the two concepts is also of practical significance. The authorities may seek to rely on transfer pricing rules and, where the circumstances permit, on the abuse of law doctrine, as the two approaches can lead to different outcomes. A transfer pricing adjustment generally results in an adjustment to the taxable profit to reflect arm's length conditions, whereas an abuse of law finding may have more far-reaching consequences, potentially resulting in the denial of the overall tax benefit arising from the arrangement altogether. The possibility of challenging the transaction on both grounds therefore gives the tax authorities different means of challenging a transaction, depending on the nature of the concerns identified.

This distinction may also be relevant from an enforcement perspective. Transfer pricing analyses necessarily involve a degree of judgment, particularly when selecting the appropriate methodology, identifying comparable transactions and determining an arm's length range. The resulting adjustments may therefore be more open to debate and may, in practice, be more difficult to challenge conclusively. An abuse of law analysis, by contrast, focuses on the circumstances and purpose of the arrangement as a whole and may, where the relevant conditions are met, provide the tax authorities with a more direct basis for denying the tax benefit. This may help explain why the tax authorities may consider both concepts when challenging a transaction.

Conclusion

The recent case law confirms that the concept of "abuse of law" remains an important tool in the

assessment of tax-driven arrangements by Luxembourg tax authorities and courts. Taxpayers should therefore exercise increasing caution when structuring transactions that generate, preserve or enhance a tax advantage, particularly where the legal form of the transaction may be questioned in light of its economic or commercial substance and the purpose of the applicable tax rules.

The cases discussed above also illustrate that the existence of a tax advantage does not, in itself, establish an abuse of law. Genuine commercial and economic considerations remain crucial. Taxpayers should consequently be in a position to demonstrate, contemporaneously and with appropriate supporting documentation, the rationale underlying their transactions and the reasons for the legal structure adopted.

More broadly, the interaction between the abuse of law concept and transfer pricing principles adds another layer of complexity. Taxpayers should consider not only whether the pricing of a transaction complies with the arm's length principle, but also whether the transaction as a whole could be defended if it were challenged by the Luxembourg tax authorities under the abuse-of-law provision. In this increasingly comprehensive approach to tax audits, a robust analysis of both the economic substance and the commercial rationale of a transaction is becoming essential.

Contributors

Samantha Hauw
Partner

samantha.hauw@atoz.lu

