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# The Introduction of the Concept "financial instrument" in EU Tax Law: A Shift in the Separation of Powers Between the EU and its Member States?

## Introduction

In *Poverty Law and Legal Activism: Lives that Slide out of View*, Geary paints an intriguing picture of the lawyer as an ethical actor in the center of both critical and liberal thinking. One interesting topic that is highlighted, is that of how Michelman and Edelman advocated for a reinterpretation of the 14th amendment to include notions of self-respect, by discussing it in the context of moral philosophy.[1] This illustrates how a shift in the context of which a concept is discussed can open up for a corresponding shift in its meaning.

This article will highlight a similar shift in context and, possibly, meaning of a national concept when it is introduced in EU law. The discussion will be linked to the tension between the European Court of Justice (ECJ) and the national sovereignty of the member states in the field of direct taxation. In the article, I aim to show that fundamental questions of

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[1] Adam Geary, *Poverty Law and Legal Activism: Lives That Slide Out of View* (2018), 72–73.

power are hidden behind technical and seemingly neutral rule solutions that deal with complexities in international tax law.[2] More precisely, the aim is to contribute with a Swedish perspective of whether the introduction of the term "*financial instrument*" in the context of EU tax law, may affect the separation of powers between the EU and its member states.

## The Topic: Relevance and Background

In the wake of the financial crisis in 2008, there has been an increased international focus on the prevention of so-called base erosion and profit shifting (BEPS).[3] A joint international tax coordination project has been initiated by the European Union (EU) and the Organization for Economic Cooperation and Development (OECD). One of the project's outcomes is the development of rules that prevent so-called "*hybrid mismatches*". A hybrid mismatch can be described as double non-taxation of income, which stems from discrepancies in different countries' tax laws. For example, this could be the case if a payment is deductible in the payer jurisdiction and not taxed in the jurisdiction of the recipient.[4]

Within the EU, hybrid mismatch rules were adopted in 2016 through the Anti-Tax Avoidance Directive (ATAD).[5] The rules target several hybrid mismatch situations: One of them is when the mismatch stems from

[2] For an enlightening discussion on this issue in the field of contract law, see Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', *European Review of Private Law/Revue Européenne de Droit Privé/Europäische Zeitschrift Für Privatrecht*, 10/1 (2002), 7–28.

[3] BEPS is described by the OECD as referring to "*tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments such as interest or royalties.*", http://www.oecd.org/tax/beps/about/#mission-impact (retrieved 19 August 2019). See also Robert Dover and others, *Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union Part II: Evaluation of the European Added Value of the Recommendations in the ECON Legislative Own-Initiative Draft Report on Bringing Transparency, Coordi*, 2015, 5.

[4] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report*, OECD/G20 B (Paris, 2015).

[5] *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*; The directive was amended in 2017. The scope was extended to include hybrid mismatches involving third countries (i.e. non-EU countries). Certain hybrid mismatch arrangements not covered by ATAD were also included; *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries* (2017).

payments under "*financial instruments*". As it is both extensive and complex, it is not possible to give an exhaustive account of the rule in this article. In a nutshell, the financial instrument rule applies when there is a difference in the classification of income between at least two jurisdictions due to the character of a payment or a financial instrument (the "*hybrid*" element), which has resulted in double non-taxation (the "*mismatch*"). In these situations, the main rule is that the payer jurisdiction should deny deduction of the payment. If the payer jurisdiction does not have hybrid mismatch rules, the payee jurisdiction should include the income in the tax base.

In other words, by targeting the result – the double non-taxation outcome – the difficult task of interpreting complex terms and conditions of a specific contract (i.e. the financial instrument) is seemingly avoided. Instead, it has been left to the member states to decide the more detailed meaning of the term financial instrument.

## Direct Taxation in EU Law: The Separation of Powers Between EU and Its Member States

Within the EU, direct taxation is a matter of national sovereignty. Directives may, however, be issued to harmonize specific areas of direct taxation.[6] These harmonized areas of tax law fall within the Union's shared conferred competences. Provided that the national rules fulfill the purpose of the directive, the member states are free to implement the directives to fit into their national legal systems.[7] This separation of powers is designed to manage two conflicting fundamental principles in EU law: harmonization and sovereignty.[8]

[6] Article 115 of the Treaty on the Functioning of the European Union (TFEU). A requirement is that the principles of proportionality and subsidiarity are complied with.

[7] This structure of the power division reflects the conflict between the EU as an entity and as a union of free states. Pursuant to article 288 of the Treaty of the European Union (TEU), directives are only binding with regard to the result to be achieved, except in situations when they have direct effect.

[8] It also relates to the tension between the EU as an entity and as an international institution, see Julie Dickson and Pavlos Eleftheriadis, 'Introduction: The Puzzles of European Union Law', *Philosophical Foundations of European Union Law*, 2013, 9; Jan Klabbers, International Law (2017), 329–331.

In the field of direct taxation, it is arguably particularly important to balance protective measures, such as the hybrid mismatch rules, with national sovereignty, as taxation of income is closely connected to the idea of the nation-state. The harmonization of direct taxes is typically justified by the objective of realizing the internal market. This was also the case in the adoption of the ATAD.[9] As the realization of the internal market demands neutral taxation of cross-border payments, the principle of neutrality is important – although its meaning is somewhat unclear.[10]

A consequence of the separation of powers in EU tax law is that the financial instrument rule will only function as long as the member states strive towards harmonization. This requires that the member states have a homogenous view of different economic objectives. Such objectives are, for instance, to *improve the resilience of the internal market* and to achieve *neutral taxation of cross-border payments*.[11] However, allowing economic objectives to govern the harmonization raises several interpretative questions, since member states are likely to view such concepts differently. For example, the meaning of neutrality will always be unclear in the EU tax law context. What each member state considers to fall within its tax base varies and thus, the neutrality concept diverges between member states.[12]

[9] *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, section 16 of the preamble*.

[10] On the different principles of neutrality in international taxation, see Kristina Ståhl, *Aktiebeskattning Och Fria Kapitalrörelser* (1996), 87–127; Martin Berglund, *Avräkningsmetoden: En Skatterättslig Studie Om Undvikande Av Internationell Dubbelbeskattning* (2013), 89–100; Linus Jacobsson, *Permanent Establishment Though Related Persons: A Study on the Treatment of Related Persons under Article 5 of the OECD Model Tax Convention* (2018), 59–73.

[11] The objective of the directive is to "improve the resilience of the internal market as a whole against hybrid mismatches". This is achieved through "neutralising" hybrid mismatches, see *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, section 5 and 27 of the preamble*.

[12] A parallel can be drawn to a similar discussion in the private law context. Also within private law, the neutrality concept will always be unclear. What each member state considers to be within the leeway of the economy varies in a liberal market economy. Consequently, the neutrality concept will also vary between member states. Only in a complete planned or market economy, the concepts will have a harmonizing effect in specific cases. The issues concerning harmonization of abstract objectives in EU law are complex and will, for reasons of space, not be addressed further in this article. For an detailed analysis of these questions in the context of the harmonization of EU Contract law through the

Disputes will arise if a sovereign state insists on its sovereignty when facing the call for harmonization.

In case of a dispute, the ECJ is the exclusive interpreter of the financial instrument rule.[13] Considering both the complexity of the rule and the inbuilt conflict in the separation of powers within EU tax law, it seems like it will not be long until cases on its interpretation will be in front of the court.[14] A central criterion of the rule is the use of a "*financial instrument*". As the final interpreter, the ECJ will have to determine how this term should be understood. Or put differently: Even though the hybrid mismatch rules were originally designed within the OECD to sidestep the task of interpreting and classifying complex contracts on the international level, the separation of powers within the EU results in that the ECJ will not be able to escape this issue.

## To Say What A Financial Instrument Is: The Interpretative Method of the ECJ

In each specific case, the interpretation of the term financial instrument also means the interpretation of a specific contract – which is something that cannot be generalized.[15] An interesting question is how the ECJ will act when faced with the challenge of determining if one of these complex contracts should be classified as a financial instrument. The methods of interpretation by the ECJ were laid out in *C-283/81 CILFIT*, namely

PECL, see Thomas Wilhelmsson, 'International Lex Mercatoria and Local Consumer Law : An Impossible Combination ?', *8 Unif. L. Rev. n.S.*, 141–153 (2003).

[13] Article 19 of the Treaty of the European Union (TEU).

[14] Due to the recent adoption of the ATAD, there are no cases as of today on the interpretation of the hybrid mismatch rules.

[15] The importance of contextualization in the interpretation of contract terms and conditions can be illustrated by statements made by judges in British case law. As was said by Buckley L.J in *Cave v Horsell*: "*There are few words, if indeed there be any, which hear a meaning so exact as the reader can disregard the surrounding circumstances and the context in which the word is employed*". Similarly, in Philips and *Strattan v Doctrinal Insurance Ltd*, Steyn J said, "*Words and phrases in contractual documents do not usually have one immutable meaning. Often there is more than one meaning available for selection. One cannot then simply turn to a dictionary for an answer, in choosing the appropriate meaning, the contextual scene is usually of paramount importance*.", see Sir Kim Lewison, *The Interpretation of Contracts*, 5th edition (2011), 251–252. This issue has been also highlighted by, for example, Joel Samuelsson, *Tolkningslärans gåta* (2011), 154–157.

literal, contextual and teleological interpretation.[16] Considering the term financial instrument in the ATAD, article 2 of the directive states that term means:

> "…any instrument to the extent that it gives rise to a financing or equity return that is taxed under the rules for taxing debt, equity or derivates under the laws of either the payee or payer jurisdiction and includes a hybrid transfer."[17]

The definition gives the impression that the term financial instrument should be regarded as an autonomous concept within EU law, whose meaning can be positively defined. However, the scope of the term is broad – it covers "*any instrument*", which, in simple words, means that "*any contract*" could potentially be a financial instrument.[18] Moreover, the contract should be taxed as debt, equity or derivatives in either the payer or payee jurisdiction, which means that the perception of the concept will vary depending on the laws of the countries involved in the transaction. This criterion is difficult to reconcile with the idea of a common understanding of the concept within the EU. The terms "*financing or equity return*" are not elaborated in the directive. Instead, the preamble of the directive refers to the explanations and examples of the OECD re-

[16] Case 283/81 CILFIT. For a comprehensive description of the interpretative methods used by the ECJ, see Koen Lenaerts and Jose A. Gutierrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, *Columbia Journal of European Law*, 2014.

[17] Although the wording indicates that a hybrid transfer has to be included for a contract to qualify as a financial instrument, this does not seem to be the case. Instead, the hybrid transfer criterion extends the scope of the hybrid financial instrument rule to include arrangements that involve the transfer of a financial instrument, cf. the definition of a "*hybrid transfer*" in article 2 ATAD and OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 26*.

[18] It can be noted the broad definition opens up for the ECJ to make statements about general civil law concepts, which have diverging meanings in the different legal traditions of the member states. Such a development would be problematic, as the meaning of general civil law concepts are outside the competence of the EU. A comparison can be made with the interpretations of the court in case *C-168/00 Simone Leitner*. In the context of interpreting the provisions of the Package travel Directive 90/314/EEC, the court made general statements about the concept of damages in tort law. This has been discussed in, for example, Vernon Palmer (ed.) The Recovery of *Non-Pecuniary Loss in European Contract Law* (2015), 358–380.

port on hybrid mismatches, BEPS Action 2.[19] Interestingly, the position in BEPS Action 2 is that the terms are intended to be in line with those used in "*internationally and generally recognized accounting standards*".[20]

Considering these different criteria, their degree of generality opens up for a set of interpretative possibilities and attendant arguments.[21] This issue has already received some attention from the OECD, as it is highlighted in BEPS Action 2 that there will be difficulties in determining the demarcation of financial instruments and contracts that are not intended to fall within the scope of the rule, such as sales contracts and contracts for the assumption of non-financial risk.[22] In addition, the interpretative challenge of the ECJ is not reduced, but increased, when the concept is put in the context of the multiple purposes of the ATAD. Two objectives of the directive are to prevent BEPS and to achieve neutral taxation of cross-border payments.[23] An immediate question of interpretation is what neutral taxation means in this context, as there are several neutrality principles in international taxation, which generally cannot be met simultaneously.[24]

Faced by these different interpretative possibilities, the court may turn to other sources in EU primary and secondary law. Apart from the ATAD, there is no legislation within the field of taxation that includes the term

[19] *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, section 28 of the preable*. Under BEPS Action 2, a financing return means a return that is economically equivalent to interest or when the arrangement is calculated by reference to the time value of money provided under the arrangement. An equity return is described as an entitlement to profits or eligibility to participate in the distribution of any person, see OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report*, 122.

[20] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 35*.

[21] Cf. Pierre Schlag, 'On Textualist and Purposivist Interpretation (Challenges and Problems)', in *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, ed. by Tamara Perišin and Siniša Rodin (2018), 23.

[22] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 36*.

[23] Cf. *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, section 5 and 13 of the preamble*.

[24] Ståhl, Berglund and Jacobsson, *supra* n. 9.

"*financial instrument*". The concept is, however, used in the MiFID[25], the Directive 88/361 on Free movement of Capital[26], and in the standards of the IAS regulation[27]. In the MiFID, the concept is explained in the annex by an extensive list of different contract types. As all the contracts are derivate contracts[28], the meaning of the concept seems to be narrower for the purpose of MiFID, compared to how it is understood in the ATAD. Similarly, the annex of Directive 88/361 provides a non-exhaustive list of examples of different financial instruments. Although case law on the concept exists, the term financial instrument is generally only mentioned in the periphery of questions about the interpretation of other criteria or legal questions.[29] In respect of the term financial instrument, these cases may practically be considered *in casu* decisions.

Compared to both the MiFID and the Directive 88/361, the ATAD seems to put a stronger emphasis on function over form in the classification of contracts as financial instruments. Indeed, it seems like only the IAS regulation provides a detailed, function-based approach to the

[25] For the purpose of this article, "MiFID" refers to both, 'Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealin' (MiFID I); and 'Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (Recast)' (MiFID II). Compared to the MiFID I, additional types of financial instruments have been included in the MiFID II. Pursuant to article 4, financial instruments are the instruments that are specified in Section C of Annex I.

[26] Although the directive is no longer in effect, the nomenclature in Annex I of the directive has been applied regularly by the ECJ, see, for example, *C-452/04 Fidium Finanz; C-222/97 Trummer and Mayer; C-376/03 D.; Case C-265/04 Bouanich*.

[27] *Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards*. The regulation was amended in 2008; *Regulation (EC) No 297/2008 of the European Parliament and of the Council of 11 March 2008 Amending Regulation (EC) No 1606/2002 on the Application of International Accounting Standards, as Regards the Implementing Powers Conferred on the Commission*.

[28] Although there is no definition of what a derivate contract is, it has been described as a contract which can be used for hedging or speculative purposes because a future price, rate or value of the underlying asset is fixed beforehand, cf. the Opinion of the Advocate General in C-312/14.

[29] See, for example, Case *C-208/18 Jana Petruchová v FIBO Group Holdings Limited, Case C-658/15 Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM)*, Case *C-312/14 Banif Plus Bank Zrt. V Márton Lantos, Mártonné Lantos*, and Case *C-648/15 Austria v Germany*.

interpretation of the term financial instrument – although for financial accounting purposes. Pursuant to the IAS regulation, listed companies must prepare their consolidated financial statements in accordance with the IFRS[30] standards.[31] One of these standards, IAS 32 Financial Instruments: Presentation, establishes principles for presenting financial instruments as liabilities or equity, as well as for offsetting financial assets and financial liabilities.

But, to return to the main theme, the question remains: How will the ECJ approach the task of interpreting a specific contract to decide if it should be classified as a financial instrument for tax purposes?[32] Although it is not possible to make an exhaustive analysis of all the likely (and unlikely) different interpretative approaches, an attempt at a preliminary hypothesis will be made. Out of the many possibilities, *one* approach is to interpret the concept in line with that of financial accounting standards. An immediate objection against such an approach may be that financial accounting law is a separate area of law with rules that have distinctly different underlying goals and purposes from those of tax law.[33] Nonetheless, there are also several reasons that speak for this interpretative outcome; four of which will be highlighted here. First, this interpretation would be in agreement with the explanations under BEPS Action 2.[34] Second, the court seems to have drawn inspiration from financial ac-

[30] International Financial Reporting Standards.

[31] Article 4 of Regulation (EC) No 1606/2002. The regulation requires all listed companies to prepare their consolidated financial statements in accordance with a single set of international standards. These are the IFRS, previously known as IAS (international accounting standards). Every time a new standard is endorsed at EU level, the Commission publishes an amending regulation which is directly applicable in all EU countries.

[32] Apart from being technically challenging, the task creates a tension between, on the one hand, the judicial role of the ECJ in the interpretation of the term financial instrument for tax law purposes, and on the other hand, a fundamental principle in EU private law: that the interpretation should do justice to the individual contractual agreements (i.e. the will of the parties). For an in-depth comparative analysis of the interpretation of contracts in English, German and French private law, see Mark Van Hoecke, Deep level Comparative law (2002), 17–27. Van Hoecke concludes that the same competing theories and concepts, including the will theory, are at large found in all three legal systems.

[33] This and other arguments against using financial accounting rules in the interpretation of tax law concepts will be discussed further in Section 5.

[34] Supra n. 18.

counting standards in previous cases on indirect taxation.[35] Third, the financial accounting standards are detailed and harmonized EU rules. An interpretation in line with the rules would thus, be a step towards the realization of the internal market, which is an important policy objective of the ECJ. Fourth, and perhaps most important from a practical perspective, none of the other legal sources have an approach on how to classify financial instruments that works for the purposes of the hybrid financial instrument rule.

Based on these reasons, a hypothesis is that the ECJ, under the cover of traditional legal reasonings, will (at least to some extent) use the IFRS standards to determine what kind of contracts that should be considered financial instruments.[36] In such a case, specific questions of tax law would be resolved by financial accounting standards. A follow-up question is how this approach would affect the division of powers between the EU and Sweden?

## Financial Instruments in a Swedish Context: A Question of What or When?

When defining taxable income, two questions generally have to be answered: *What* should be taxed, and *when*? For Swedish tax purposes, there is a long tradition of only allowing a link between tax and accounting in respect of the latter question (*when?*), as the first question (*what*?) has generally been considered an exclusive tax question.[37]

[35] See, for example, *C-209/14 NLB Leasing; C-118/11 Eon Aset Menidjmunt*. In the cases, the classification for financial accounting standards under the IAS regulation has been taken into consideration in the assessment of the VAT consequences of a particular act for tax purposes. This trend has been described by, for example, Mikael Ek, *Leveranser och unionsinterna förvärv i mervärdesskatterätten* (2019), 172–179.

[36] It should be underlined that there are, of course, other interpretative possibilities for the ECJ.

[37] The link between tax and accounting in respect of the latter question (*when?*) is regulated in ch. 14 s 2 of the Swedish Income Tax Act (1999:1229) (ITA). The relationship between tax and accounting has been discussed by, for example, Mattias Dahlberg, *Ränta Eller Kapitalvinst*, 124–126; Jan Bjuvberg, *Redovisningens betydelse för beskattningen* (2006), 191–262. Also from an international perspective, it is unusual to classify the financial instrument according to its characterization for financial accounting purposes; Jakob Bundgaard, *Hybrid Financial Instruments in International Tax Law* (2016), 62.

Although financial accounting rules can be attributed the advantage of reflecting the "*genuine financial reality*" of transactions,[38] there are several reasons against linking the first question (*what*?) with accounting standards. One of the reasons against a link that is that tax and accounting have diverging underlying goals.[39] These different goals and purposes mean that diverging considerations have been taken into account in the design of the rules. For example, accounting rules are known for having the valuation of an asset at "*fair value*" or at market value. Put in the context of taxation, this approach could, for example, result in companies being taxed before having made a profit for tax purposes. Another issue is that tax rules are devised for mass administration. Accounting rules are, on the other hand, designed to classify a specific contract based on its individual components, which is ill-suited for the instrumental administration within tax accounting.[40]

The adoption of the ATAD means that the term financial instrument is being implemented in Swedish tax law through the hybrid mismatch rules. In Swedish tax law, the concept has historically been used as a collective term for a number of different securities and similar assets. However, the concept has, with few exceptions,[41] been removed and replaced with the terms share, claim, security and asset.[42] Compared with the financial instrument term in the ATAD, the Swedish approach can be described as more form-based. In the classification of financial instruments not defined under Swedish tax rules, the position of the Swedish

[38] See, for example, Jan Bjuvberg, *Skattemässig behandling av "tvingande" konvertibler – en rättsfallskommentar*, SvSkT 2014:2, 160.

[39] For example, financial accounting rules are designed for the stakeholders of the company, which generally means that companies have incitements to demonstrate high equity and profit, whereas debt and costs should be low. For tax purposes, the incitements are the opposite, as low taxable income results in lower taxes.

[40] Cf. Dahlberg, *Ränta eller kapitalvinst*, 123–141. For a detailed analysis of pros and cons of linking the tax law classification with the "fair value" valuation in financial accounting law, see also Jan Bjuvberg, *Redovisningens betydelse för beskattningen* (2006), 89–105.

[41] It can be noted that the term is used in ch. 17 ITA for the valuation of stocks.

[42] Swe: "*delägarrätt*", "*fordringsrätt*", "*värdepapper*" and "*tillgång*". One of the reasons for removing the term financial instrument from the ITA seems to have been to avoid confusion with how the term is used the Swedish Act on trade on trading in financial instruments (1991:980). For a comprehensive description of how the term financial instrument has been used in Swedish tax law, see Mattias Dahlberg, *Ränta eller kapitalvinst* (2011), 139–140.

Supreme Court has been that financing accounting rules can be used as a "*starting point*" in the assessment. Still, the final tax law classification can differ from the treatment under financial accounting rules and each contract should be assessed on a case by case basis.[43] Nonetheless, there has been some debate in legal doctrine about whether the Swedish Supreme Court has not in fact used financial accounting rules to determine the tax law classification in a case concerning a specific type of convertible bonds.[44] This illuminates the short step that is required to bridge the "gap" between tax and accounting in the classification of financial instruments for Swedish tax purposes.

What then, could the introduction of the term financial instrument through the ATAD entail? One obvious answer to this question is that it calls for an EU law understanding of the concept, with the ECJ as its exclusive interpreter. The broad, function-based approach used to define the term in the ATAD creates an opportunity for the court to make general judicial comments about how a wide range of different contract types should generally be interpreted. A less obvious answer is that the ECJ, in its interpretation of the technical term "*financial instrument*", could force a bridging between tax and accounting in the classification of

[43] The demarcation between tax and accounting in the classification of income for tax purposes has been tried in a number of cases. For example, in HFD 2014 ref. 10, which concerned deduction rights for convertible bonds, it was stated that financial accounting rules which are in line with GAAP can be used as a starting point in the tax law classification. It was, however, emphasized that the taxation should be conducted on a case to case basis. In RÅ 2004 ref. 83 and RÅ 2007 ref. 70, deduction rights were granted for employee stock option expenses even if the tax law valuation did not follow the valuation for accounting purposes. In RÅ 2000 ref. 64, which concerned dividends from a subsidiary to its parent company, the court stated that a starting point in the tax law assessment is that an expense for financial accounting purposes should also be treated as an expense for tax purposes.

[44] This question has been discussed in relation to the Court's ruling in HFD 2014 ref. 10, cf. Jan Bjuvberg, *Skattemässig behandling av "tvingande" konvertibler – en rättsfallskommentar*, Svensk Skattetidning (2014), 153–168. In the article, Bjuvberg argues that the court used financial accounting rules to determine the classification of the financial instrument. The interpretation is, however, refuted by Ulf Tiveus, Tvingande konvertibel – eget eller främmande kapital?, Skattenytt (2014), 274–285. Tiveus argues that although financial accounting rules were used as a starting point in the Court's assessment, the final tax law classification was not determined by financial accounting rules.

certain income (i.e. the question of *what*?), also in situations where there are specific national Swedish tax rules.[45]

Since control over one's own tax base is essential to retain national sovereignty, this would also mean that power is shifted from the national sovereign to the EU. Put differently, the interpretative approach by the ECJ may lead to that the Swedish national development of law will be steered towards interpretations that satisfy the realization of the internal market, also in areas of tax law that are not within the competence of the EU.

## Conclusion

Will the introduction of the term financial instrument in the context of EU law affect the separation of powers between the ECJ and its member states in the field of direct taxation? Although the question cannot be answered with certainty, a hypothesis is that the ECJ – faced by the task of interpreting the technically complex term financial instrument – will choose the interpretative alternative most in line with its policy objective of realizing the internal market, under the cover of traditional legal reasonings. Such an interpretation of the concept can affect other areas of law outside the ECJ's competence. For Swedish tax purposes, it may be the final step towards the creation of a direct link between tax and accounting in the classification of contracts. Put differently, ECJ may, through its interpretation of the term financial instrument in the context of the ATAD, steer the development of law outside its competence towards the realization of the internal market. In the field of direct taxation, this would entail a shift in power from the member states to the EU.

[45] A step in this direction can already be noted in the recent Swedish proposal to implement the hybrid mismatch rules. In the proposal, legislator made the principal statement on that general accounting standards should "*determine*" the classification of financial instruments; *Genomförande av regler i EU:s direktiv mot skatteundandraganden för att neutralisera effekterna av hybrida missmatchningar* (2019), 43.