

Anti-avoidance measures of general nature and scope - GAAR and other rules

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Purpose and scope of the Belgian report

1. Understanding domestic GAAR - specific to direct taxes
2. No analysis of BEPS action plan or EU measures (separate report)
3. Purpose = comparison
4. No re-visiting of the premise
 - Oslo Congress 2002:
Form and substance in tax law → tax avoidance challenged by GAAR
 - Rome Congress 2010:
Tax treaties and tax avoidance: application of anti-avoidance provisions

TOC

1. GENERAL ANTI-AVOIDANCE RULES OR DOCTRINES
2. CASE LAW ON STATUTORY OR COURT-DEVELOPED GAARS
3. GAAR AND TAXPAYER'S SAFEGUARDS

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1. General Anti-Avoidance Rules or Doctrines



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1.1 General overview

- Domestic GAAR
- GAARs in Belgian DTT & MLI
- ATAD
- Domestic SAARs

1.1.1 Domestic GAAR

- Program Law of 29 March 2012
- *EUCJ: Halifax, Cadbury Schweppes, ...*
- New article 344, §1 BITC replacing GAAR of 1993

1.1.1 Domestic GAAR

Not enforceable towards the [tax] administration is the legal act, or the series of legal acts leading to the same transaction, when the administration demonstrates, by presumptions or by other means of proof [accepted in the tax code] and on the basis of objective circumstances, that tax abuse occurs.

Tax abuse occurs when the taxpayer, by means of performing a legal act or a series of legal acts, realizes one of the following transactions:

1. a transaction whereby the taxpayer places himself contrary to the purpose of a provision of the [BITC], or the decrees adopted in execution thereof, outside the scope of such provision; or
2. a transaction whereby a tax advantage offered by the present Code, or the decrees adopted in execution thereof, is claimed while obtaining this advantage would be contrary to the purpose of this provision, and where the essential goal is the obtaining of this advantage.

The taxpayer must prove that the choice for his legal act or series of legal acts is justified by other reasons than the avoidance of income taxes.

If the taxpayer does not provide proof to the contrary, then the taxable base and the calculation of the tax will be restored in such a way that the transaction will be subject to taxation in accordance with the purpose of the law as if the tax abuse had not taken place

1.1.2 Treaty GAAR & MLI

- No tradition of GAARs in DTT (rare exceptions)
- Traditional view: “DTT cannot prevent application of domestic anti-avoidance provision”
- Reluctancy to combat abuse via interpretation of DTT provisions

1.1.2 Treaty GAAR & MLI

- June 2007 Belgian Model Tax Convention
- June 2010 :
Notwithstanding the other provisions of the Convention, the benefits of the Convention shall not apply if income is paid or derived in connection with an artificial arrangement.
- Negotiated in most recent treaties (MoF 24/1/2017: Macedonia, Moldova, Oman, Qatar, Poland, Taiwan, Uruguay)
- MLI: 7 June 2017

1.1.2 Treaty GAAR & MLI

- PPT:
Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted 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 the Covered Tax Agreement.
- Low watermark vs. simplified LOB and LOB
- Potential impact ≈100 treaties, but not with NL and Germany
- Signed (67) – Awaiting ratification

1.1.3 ATAD

- **Art. 6 – to be transposed by 31/12/2018:**
 1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
 3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

1.1.4 Domestic SAARs

- **Typical SAARs: specific avoidance – specific remedy**
 - Transfer pricing
 - CFC-like (Cayman tax and 344, §2 BITC)
 - Disallowance of expenses
 - Thin capitalization
- **SAARs working as GAARs for specific provisions**
 - Parent-subsidiary Directive; Merger directive; ...

1.2 The tax avoidance scheme, arrangement or transaction

- Domestic GAAR
- MLI
- ATAD

1.2.1 The tax avoidance scheme, arrangement or transaction

- Target = tax abuse
- Tax abuse =
 - Transaction
 - Objective element
 - Subjective element
- the taxpayer realizes a transaction by performing a legal act or a series of legal acts

1.2.1 The tax avoidance scheme, arrangement or transaction

- Legal act
 - = realized willingly with a view to generate legal csq
(agreement, creation of company, ...)
 - ≠ fact or situation that may or may not have legal csq
(person's birth/decease, delocalization of activities ><
transfer of seat, ...)

1.2.1 The tax avoidance scheme, arrangement or transaction

- “series of legal acts that lead to the same transaction”
 - No time limit (>1 fiscal year)
 - Single **intent** unifying all the constitutive legal acts
 - From the beginning
 - Indivisible (no other meaning than pursuit of tax advantage)
- Realized by the taxpayer

1.2.2 The tax avoidance scheme in PPT & ATAD

- PPT : “*any arrangement or transaction [...] that resulted directly or indirectly in that benefit*”
- ATAD : “*an arrangement or a series of arrangements*” whereby “*an arrangement may comprise more than one step or part*”
→ who realizes the arrangement? (BE GAAR: the taxpayer)

1.3 The tax benefit, gain or advantage

- Domestic GAAR
- MLI
- ATAD

1.3.1 The tax advantage in 344, §1 BITC

- Objective element
- Advantage =
 - Taxpayer avoids taxation by placing himself outside the scope of provision of BITC or decree
 - Taxpayer obtains tax exemption/reduction by applying provision of BITC or decree
- Contrary to purpose of the provision

1.3.1 The tax advantage in 344, §1 BITC

- **BITC or decree ><**
 - stock option plans, ...
 - VAT, registration tax, ...
 - DTT
- **Codification of *Fraus legis* (?)**
 - Similar wording in preparatory works
 - (taxpayer has come so close to a situation that is taxable, that in light of the object and purpose of the concerned tax provision, his/her situation should also be taxable)
 - >< wildcard to replace the actual set of facts and to determine scope of tax provisions ?

1.3.1 The tax advantage in 344, §1 BITC

Constitutional Court (30/10/13)

- Means of proof to factually establish taxable amount
- Does not affect the legally established taxable amount or tax rate
- Sufficient safeguards for principle of legality:
 - *Contrary to* versus *strange to* the purpose of the provision
 - Purpose of provisions should be sufficiently clear (*interpretatio cessat in claris / in dubio contra fiscum*) and sufficiently precise (>< **MoF**: collecting public funds)

1.3.2 The tax advantage in PPT & ATAD

PPT

“a benefit under the Covered Tax Agreement [...] **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 the Covered Tax Agreement”

ATAD:

“For the purposes of calculating the corporate tax liability [...] a tax advantage that defeats the object or purpose of the applicable tax law”

1.4 Taxpayer's purpose or intent

- Domestic GAAR
- GAARs in Belgian DTT & MLI
- ATAD

1.4.1 Taxpayer's purpose or intent in 344, §1 BITC

Subjective element – poorly drafted:

1. a transaction whereby the taxpayer places himself contrary to the purpose of a provision of the [BITC], or the decrees adopted in execution thereof, outside the scope of such provision; or

*2. a transaction whereby a tax advantage offered by the present Code, or the decrees adopted in execution thereof, is claimed while obtaining this advantage would be contrary to the purpose of this provision, and **where the essential goal is the obtaining of this advantage.***

→ Applies to both types of advantage

1.4.1 Taxpayer's purpose or intent in 344, §1 BITC

Essential of exclusive purpose test?

Tax abuse occurs when the taxpayer, by means of performing the legal act or the series of legal acts, realizes one of the following transactions:

1. a transaction whereby the taxpayer places himself contrary to the purpose of a provision of the [BITC], or the decrees adopted in execution thereof, outside the scope of such provision; or
2. a transaction whereby a tax advantage offered by the present Code, or the decrees adopted in execution thereof, is claimed while obtaining this advantage would be contrary to the purpose of this provision, and where **the essential goal** is the obtaining of this advantage.

- Definition of tax abuse ≠ scope of GAAR
- Scope of GAAR = tax abuse + no counter-proof

1.4.1 Taxpayer's purpose or intent in 344, §1 BITC

→ Exclusive purpose test

>< essential purpose: weighing of motives

Except 'insignificant' motives

- non-tax motives are so general that they are not specific to the transaction concerned
- non-tax motives are specific to the transaction but they are of such low importance that no reasonable person would enter into the transaction for this non-fiscal motive

See also 'wholly artificial arrangements'

1.4.1 Taxpayer's purpose or intent in 344, §1 BITC

Burden of proof for tax administration

- Includes subjective element, but not exclusivity
- By presumptions or by other means of proof
- And “objective circumstances” ≠ tautology

Poiaras Maduro in *Halifax*: “[the subjective element] is subjective only in so far as it aims at ascertaining the purpose of the activities in question. That purpose – which must not be confused with the subjective intention of the participants in those activities – is to be objectively determined [...]”

→ circumstances that would be relevant to any other party in the same situation regardless of specific motives of an individual taxpayer

→ No soul searching

E.g.: artificial arrangement, letterbox subsidiary, links between operators, ...

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1.4.2 Taxpayer's purpose or intent in PPT & ATAD

PPT

“reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes”

→ ‘base erosion’

ATAD

“put into place for the main purpose or one of the main purposes of obtaining [advantage]”

“which are not genuine having regard to all relevant facts and circumstances”

Non-genuine = “not put into place for valid commercial reasons which reflect economic reality”

- Corporate tax ↔ commercial/economic
- ↔ “wholly artificial arrangement” / ECJ
- → ‘base erosion’ vs abuse ?!

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1.5 Consequences of the GAAR application

- Domestic GAAR
- GAARs in Belgian DTT & MLI
- ATAD

1.5.1 Consequences of the application of 344, §1

Not enforceable towards the [tax] administration is the legal act, or the series of legal acts leading to the same transaction, when the administration demonstrates, by presumptions or by other means of proof [accepted in the tax code] and on the basis of objective circumstances, that tax abuse occurs.

Tax abuse occurs when the taxpayer, by means of performing the legal act or the series of legal acts, realizes one of the following transactions:

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*a transaction whereby a tax advantage offered by the present Code, or the decrees adopted in execution thereof, is claimed while obtaining this advantage would be contrary to the purpose of this provision, and where **the essential goal** is the obtaining of this advantage.*

[...]

*If the taxpayer does not provide proof to the contrary, then the taxable base and the calculation of the tax **will be restored** in such a way that the transaction will be subject to taxation in accordance with the purpose of the law as if the tax abuse had not taken place.*

1.5.1 Consequences of the application of 344, §1

- Condition unenforceability ≠ condition restoration → ?
- How to restore?
 - Redefine/recharacterize the legal acts (incl. potential elimination of acts)
 - Respect the transaction
 - *“the facts are the facts”* (De Broe and Bossuyt)
 - Constitutional Court (30/10/13): only a means of proof (vs hybrid character)
- Recharacterization has no absolute character: no impact on legal situation, VAT, other taxes

1.5.1 Consequences of the application of 344, §1

Recharacterization for all parties involved or not?

- Circ. 3/2012: case by case
- Additional taxation only for the taxpayer who realized the tax abuse
- For other taxpayers proportional application is necessary – corresponding adjustment: levy taxes in accordance with the object and purpose of the circumvented tax provision ≠ double taxation, arbitrariness, ...

1.5.1 Consequences of the application of 344, §1

Penalties and other consequences

- Circular letter 3/2012: tax abuse ≠ infringement of a provision of the BITC
 - The original 3y assessment period must be respected (extension for fraud is not available)
 - No penal consequences
 - A reassessment will follow. As with any reassessment a tax increase may be imposed (= criticized).

1.5.1 Consequences of the application of 344, §1

Impact on DTT application

- BE: monistic → dominance of international law
- Different possibilities:
 - DTT expressly allows application of domestic GAAR → GAAR can be applied even if outcome is inconsistent with normal application of the DTT
 - DTT silent on domestic GAAR:
 - OECD MC Commentary 2003 / BE admin. commentary >< *pacta sunt servanda* ?

1.5.1 Consequences of the application of 344, §1

(DTT silent on domestic GAAR:)

- DTT: BE has power to tax (before *and* after recharacterization): increased taxation due to GAAR is permissible
- BE does not have the power to tax under DTT, but claims it after recharacterization under GAAR:
 - Recharacterization >< autonomous definition in DTT → infringement of DTT
 - No autonomous definition (art. 3(2) OECD MC), may be permitted (subject to contextual analysis)

1.5.1 Consequences of the application of 344, §1

Impact on EU freedoms

- EUCJ case law was inspiration for art. 344, §1 BITC
- *Cadbury Schweppes*: restriction on freedom arising from domestic anti-avoidance rule [CFC] may be justified on the ground of prevention of “wholly artificial arrangements” if proportionate in relation to that objective

→ check case-by-case

1.5.2 Consequences of application PPT and ATAD

PPT

“a benefit under the Covered Tax Agreement shall not be granted”

ATAD

“For the purposes of calculating the corporate tax liability, a Member State shall ignore”

and

“[ignored →] tax liability shall be calculated in accordance with national law”

1.6.1 Conflicts between domestic and treaty GAAR

- No direct conflict: art. 344, §1 BITC ≠ abuse of DTT provisions
- Effect of 344, §1 BITC may interfere with DTT (see possibilities in 1.5.1) and DTT GAAR:
 - DTT GAAR takes precedence = what contracting states wanted
 - MLI (PPT) expected to reduce impact of (or potential conflicts with) BE GAAR (directly or indirectly via impact on contextual analysis)

1.6.2 Conflicts between domestic GAAR and SAAR

BE GAAR = *ultimum remedium* (Circ. 3/2012) after methods of interpretation, technical provisions, SAARs and Sham

SAARs prevail over GAARs:

- more detailed quantitative (e.g. debt/EQ ratio) or temporal criteria (e.g. 1 year holding period)
- = purpose of SAAR-provision
- E.g. 1y + 1d holding period: GAAR cannot apply ↔ objective element

GAARs can complement SAARs (when targeted situation is circumvented and SAAR is in applicable)

2. CASE LAW ON STATUTORY OR COURT-DEVELOPED GAARs



3. GAAR AND TAXPAYER'S SAFEGUARDS



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3. GAAR AND TAXPAYER'S SAFEGUARDS

- Constitutional safeguard (principle of legality and security) – see above
- GAAR (aligns taxation with spirit of the law) ≠ 'substance over form' (= taxation in accordance with economic substance as opposed to legal form) >< principle of legality
- EU freedoms – see above

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3. GAAR AND TAXPAYER'S SAFEGUARDS

- Allocation of burden of proof between taxpayers and tax administration?
 - Proof of objective and subjective element by tax administration (see slides on subjective element)
 - Counterproof by taxpayer ↔ exclusive purpose test
 - Motives for the legal act(s)
 - Other non-insignificant motives prevail
 - Not only economic/financial motives but also subjective/personal/...
 - Avoidance of taxes outside BITC (VAT, Registration tax, ...)?

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3. GAAR AND TAXPAYER'S SAFEGUARDS

- If a GAAR is applied, is there the right to a “corresponding adjustment”? See 1.5.1
- Is there a formal procedure to be observed (due process) when a GAAR is applied? No
- Possibility of an advance tax ruling
 - Art. 344, §1 BITC = procedural/evidentiary rule → incompetent
 - Ruling on the non-tax motives (subjective element)
 - MoF: This supposes a prior analysis of the objective element by the ruling commission → full competence in practice
 - Regionalized matters with regional tax administration (FL property tax, ...)

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