THE PATH TO A UNANIMOUSLY ACCEPTED GAAR BY EU MEMBER STATES

Ana-Maria GEAMĂNU PhD Assistant Professor,
„Athenaeum" University of Bucharest
E-mail: anamariageamanu@yahoo.com

Abstract

The purpose of this paper is to identify at the level of the EU Member States the basis for acceptance, respectively rejection of the General Anti-Abuse Rule (GAAR), as described in the Commission Recommendation of 6.12.2012 on aggressive tax planning. The different positions adopted by the EU Member States in respect of the initiative to uniform and unify tax legislations in order to fight tax avoidance are analyzed based on their tax laws' adherence to different doctrines. The results show that the majority of EU Member States presents opposition towards the adoption of the new GAAR, regardless of the doctrines they have in place, and even in the absence of a domestic GAAR. Member States' position towards the EU GAAR can be divided into three categories: Member States that committed to implement the GAAR in the form recommended by the Commission; Member States that still consider this implementation and Member States that reject the new form of the GAAR, as they claim that the one already existing in their legislation satisfies its purpose. This paper considers the coordinated efforts and the latest development in counteracting aggressive tax planning activities at the level of the EU Member States, through the proposed and at the same time much debated General Anti-Abuse Rule (GAAR). The originality of this research resides in mapping an analysis on a country-by-country basis at the level of the EU Member States that presents the main principles based on which the national General Anti-Abuse Rules are constructed, as compared to the doctrine based on which the proposed EU GAAR is constructed.

Key words: EU Member State, General Anti-Abuse Rule (GAAR), Aggressive Tax Planning, Substance over form principle, Abuse of law doctrine.

Jel Classification: H 87, K 34

INTRODUCTION

The dynamics in the economic activities propelled by the process of globalization changed the business patterns and provoked reactions on behalf of the states. In this context, international tax competition was a key issue to address since the states' level of taxation influenced both investment and capital flows. The Project "Harmful tax competition" launched by the Organization for Economic Cooperation and Development (OECD) raised a series of concerns in respect of the flow of capital and investment towards the low tax jurisdictions, while the high tax jurisdictions were faced with an erosion of their tax basis, resulting in diminished state revenues and undersupply of public goods (OECD, 1998). In their attempt to face tax competition, states diminished taxes on mobile capital while increasing the tax burden on immobile capital, such as labor.

In respond to this pressure, the OECD took action in order to regulate a series of international aspects, which resulted in the elaboration of the International Standards of Transparency and Exchange of information in tax matters. The low tax jurisdictions, known as tax havens and the preferential tax regimes were the first to be targeted and the adherence of these states to the OECD's standards created a level playing field in the area of international taxation.

Acknowledging the threat to the well functioning of its internal market, The European Union launched the "The Code of conduct for business taxation" that aimed at targeting harmful tax measures existing in the EU Member States' tax legislation. Therefore, the states had to review their tax practices in respect of a set of criteria that ensured they did not contain substantially lower levels of taxation, including no taxation, as compared to the generally practiced tax rates (The Council of the European Union, 1998). This action came to support the OECD's initiative, transposed to the internal needs of the European market.

Continuing work in the area of international tax rules' modeling, the latest OECD's project "Base Erosion, Profit Shifting (BEPS)" presents an in-dept focus on multinational companies' taxation, based on a 15-point Action Plan in order to target tax avoidance and to ensure that taxes are paid where the economic activities take place (OECD, 2013b). Project's Action 5 put an emphasis on targeting harmful tax measures (preferential regimes), by means of improving transparency and requiring substantial activity (OECD, 2015).

Taxation spectrum in "Fiscalis 2020" Action Program addresses aggressive tax planning through a number of measures that need to be considered such as a coherent Union law in the field of taxation, enhanced administrative cooperation and capacity of tax authorities (The European Parliament and The Council, 2013).

In line with these measures, in 2012 the European Commission launched a Recommendation which called for the EU Member States to adopt a General Anti-Abuse Rule (GAAR), as a strategy to fight aggressive tax planning in order to eliminate distortions in the internal market. Moreover, the new GAAR would be compatible with the limitations set by the Court of Justice of the European Union and prevent the risk of being challenged by the tax payers. Yet, the level of implementation of the proposed form of GAAR in the national tax legislations of the EU Member States is relatively low since there is considerable opposition towards its adoption (The European Commission, 2012).

This paper aims at analyzing at the level of each EU Member State the doctrines based on which the national General Anti-Abuse Rules are constructed and find the basis of disagreement in relation to the proposed EU GAAR. There have been analyzed the underlying assumptions and patterns of constructing the national anti-abuse rules and then compared to those of the new GAAR as designed by the European Commission.

The results of the analysis present a set of interesting aspects which link respectively, unlink domestic legislation on GAAR to the proposed EU GAAR. The majority of the EU Member States already have in their legislation a domestic GAAR, the two main doctrines based on which they are created being the Substance over form doctrine and the Abuse of law doctrine. The delay in the implementation of the Commission Recommendation on the EU GAAR comes from the lack of added value, as considered by 18 EU Member States, while 4 EU Member States are still undecided on its implementation. The refuse of implementation is formulated also by 6 EU Member States that currently do not have a domestic GAAR in their legislation. Although the new EU GAAR is funded on the Substance over form principle, which already forms the basis of many EU domestic GAARs, and in addition it cannot be challenged in the court by the tax payers, its adoption seems to be a long term process.

The first section of this paper presents the literature review in the area of tax planning and tax avoidance, aspects which created the need for more supervision in the new global economic context. The second section presents the methodology of this research, where the pattern of the proposed EU GAAR is presented and a country-by-country analysis of the domestic GAARs presents the main doctrines based on which they are constructed. The results are presented in the third section of the paper, where a distinction is made in the approach towards the proposed EU GAAR by the EU Member States that do not have a domestic GAAR as compared to those that have one. This part is followed by the fourth section that emphasis on the summary and conclusions.

1. LITERATURE REVIEW

Taxation is an important aspect to be considered both in corporate and personal decisions. According to the OECD, taxation is one of the main components of profitability and as a consequence it has the potential to influence the decision-maker on the location and the mean of investment (OECD, 2013a).

Taxation has received the attribute of a motivating element in corporate decisions (Lanis and Richardson, 2012). Analyzed as a key financial factor, taxation influences the strategy decisions (Glaister and Frecknall Hughes, 2008). Aspects related to financial options, organizational forms, restructuring decisions, payout policies, etc are strongly influenced by taxes, as well (Desai and Dharmapala, 2006).

Taxation represents a cost for the company like any other and the managers, under a fiduciary duty, strive to run the business in the most cost effective manner. Therefore, the tax code must be constructed in a way that takes into account the companies' drive to diminish tax impact, as part of their normal course of business (ACCA, 2014).

Tax planning may be referred to as comprising of all activities designed to produce a tax benefit (Wahab and Holland, 2012). Since tax is seen as a cost factor for the company, managers will try to minimize it to the extent it is legally and socially acceptable (Garbarino, 2011). The academic literature also considers the cost associated to tax planning activities. Therefore, tax planning may increase the after tax profits by reducing the level of tax, yet this strategy involves actual and potential costs that may diminish the benefits it provides (Wahab and Holland, 2012; Garbarino, 2011). The actual costs are incurred in the form of fees or salaries paid to tax consultants or costs related to a restructuring process, while the potential costs may be reputational costs or they may arise in cases where the tax strategy is challenged by the tax administration (Wahab and Holland, 2012). Since tax planning may be considered a long-term investment, the entire benefit can be measured in time (Rego and Wilson, 2012).

Corporate tax strategies may be aggressive or responsible. Aggressive corporate tax strategies are defined as a corporate effort to minimize tax liability by all the possible legal means. On the other hand, responsible corporate tax strategies are those that comply with the intention of the law and do not try to exploit all legal possibilities to diminish the tax liability (Hardeck and Hertl, 2014).

A key concept of this paper is the aggressive tax planning. According to the European Commission, aggressive tax planning is a practice of reducing tax liability by strict lawful means but which contradicts the spirit of law. This strategy uses the technicalities of a tax system or a mismatch between two systems in order to diminish the tax burden (The European Commission, 2012). The same definition applies to the concept of "tax avoidance" (Kirchler et al., 2003).

As tax consequences are a motivating factor in many corporate decisions, managerial actions designed solely to minimize corporate tax through aggressive tax planning are becoming more of a common feature of the present corporate global environment (Lanis and Richardson, 2012; Desai and Dharmapala 2009).

A differentiation must be made between tax avoidance and tax evasion, where the distinction arises in terms of the "letter of law" and the "spirit of law" (Hasseldine and Morris, 2013). Although tax avoidance and tax evasion imply reducing the tax burdern, tax evasion is an illegal activity, while tax avoidance is legal (Freire-Serén and Martí, 2013).

Since the onset of recession in 2008, tax avoidance has entered public attention, being considered socially unacceptable. Tax planning and tax avoidance are no longer seen as technical issues performed by accounting firms but they are seen as immoral activities (Frank Mueller, 2015).

Corporate tax avoidance is an important point on the international political agenda in the context of the states' public finances being strongly affected by the recent global financial crisis. The media on tax related affairs of prominent multinational companies has created hostility from civil society and non-governmental organizations and has increased pressure on policy makers to take action (Jones and Temouri, 2016).

2. METHODOLOGY

This research paper considers the Commission Recommendation of 6.12.2012 on aggressive tax planning, where a General Anti-Abuse Rule (GAAR) was proposed to be adopted by all EU Member States, yet it faced resistance on different reasons.

The discussion papers presented by the Group of Experts called "Platform for tax good governance, aggressive tax planning and double taxation", reveal three different positions of EU Member States in respect of the proposed GAAR: Member States that committed to implement the GAAR in the form recommended by the Commission; Member States that still consider this implementation and Member States that reject the new form of a GAAR, as they claim that the one already existing in their legislation satisfies its purpose.

In this context, this paper aims at analyzing the States' position in respect of the proposed GAAR in accordance with the doctrines based on which the national GAARs are created as compared to the EU GAAR, in order to identify similarities and differences.

2.1. General Anti-Abuse Rules (GAARs)

Countries have adopted a variety of anti-abuse strategies to ensure the fair payment of taxes by taxpayers. These strategies' objective is to prevent, identify and respond to aggressive tax planning. Prevention strategies try to discourage taxpayers from engaging in aggressive tax planning; Identification strategies aim to ensure the timely, targeted and complete information detection; while Response strategies counter inappropriate tax behavior and influence future tax behavior. Therefore, the anti-abuse rules are policy measures aimed at prohibiting taxpayers from engaging in certain forms of aggressive tax planning (OECD, 2013a).

The most relevant anti-abuse rules found in domestic tax systems are:

- General anti-abuse rules or doctrines;
- Controlled foreign company rules;
- Thin capitalization and other rules limiting interest deductions;
- Anti-hybrid rules;
- Anti-base erosion rules (OECD, 2013a).

2.2. The EU General Anti-Abuse Rule (GAAR)

Within this paper the accent is placed on the General Anti-Abuse Rules or doctrines. There are analyzed the EU GAAR and the domestic GAARs existing in each EU Member State.

The Commission's Recommendation comes in the context of a rapidly changing international business environment where tax planning structures present a high degree of complexity, while national tax laws cannot keep pace with these accelerated changes. In this scenario, the specific anti-abuse rules become inefficient to respond to the new aggressive tax planning structures. A solution brought by the Commission to address this problem was the adoption by all EU Member States of a common General Anti-Abuse rule, which could also avoid the complexity of many different ones (The European Commission, 2012).

The adoption of the EU GAAR would involve the inclusion of a special clause in the domestic tax laws of the EU Member States, concerning the treatment of artificial arrangements by tax authorities.

Therefore, an artificial arrangement or series of arrangements created for the main purpose of avoiding taxation and obtaining a tax benefit has to be ignored. National authorities need to treat these arrangements for tax purposes considering their economic substance. It is considered that an arrangement or a series of arrangements is artificial where it lacks commercial substance (The European Commission, 2012).

2.3. Domestic General Anti-Abuse Rules (GAARs)

The domestic tax laws of EU Member States present forms of anti-avoidance rules, based on different principles. Yet, the European Commission considers that the existence of a single EU GAAR adopted unanimously by all Member States would lead to a better and effective respond to aggressive tax planning in the internal market.

A Group of Experts called, "Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation" was created in order to coordinate the process of introducing into the European domestic tax laws, the proposed GAAR as recommended by the Commission.

Yet, a Discussion Paper on GAAR, from October 2014, presents Member States as having a rather cautious stance as regards the adoption of a new GAAR or to review their domestic GAARs according to the template presented in the Commission Recommendation.

The objective of this paper is to analyze the domestic GAAR of each EU Member State and to identify whether the principles on which they are constructed differ from the proposed EU GAAR.

In this respect we have constructed Table 1. The first column of the table presents the EU Member States; the second column identifies the existence of a domestic GAAR in each state; the third column presents the main principles/ doctrines on which the domestic GAAR is constructed and the fourth column states the position of each EU Member State towards the adoption in its own tax legislation of the EU GAAR as presented in the Commission Recommendation.

The Discussion Paper on GAAR, from October 2014, presents Member States grouped on three categories, according to their position towards the EU GAAR.

- The first group of Member States supports Commission Recommendation on GAAR (Indicated as [1] in Table 1);
- The second group of Member States is undecided on the implementation of the Commission Recommendation (Indicated as [2] in Table 1);
- The third group of Member States does not see the added value of introducing or revising their GAAR (Indicated as [3] in Table 1).

Table 1. EU Member States' domestic GAARs and doctrines

EU Member State	Existence of a domestic GAAR	The principles/ doctrines of the domestic GAAR	Position in respect of EU GAAR
Austria	Yes	- Substance over form - Abuse of law	[3]
Belgium	Yes	- Abuse of law	[3]
Bulgaria	Yes	- Substance over form -Arm's length	[3]
Croatia	Yes	- Substance over form	[1]
Cyprus	Yes	- Sham transaction	[3]
Czech Republic	Yes	- Substance over form - Abuse of law	[3]
Denmark	No	- Abuse of law	[2]
Estonia	Yes	- Substance over form	[3]
Finland	No	- Substance over form	[2]
France	Yes	- Abuse of law	[3]
Germany	Yes	- Abuse of law	[3]
Greece	Yes	- Substance over form	[1]
Hungary	Yes	- Substance over form - Abuse of law	[3]
Ireland	Yes	- Substance over form	[3]
Italy	Yes	- Substance over form - Abuse of law	[1]
Latvia	No	- Abuse of law	[3]
Lithuania	Yes	- Substance over form	[3]
Luxembourg	No	- Abuse of law	[2]
Malta	Yes	- Abuse of law	[3]
The Netherlands	No	- Substance over form - Abuse of law	[3]
Poland	No	- Abuse of law	[1]
Portugal	Yes	- Substance over form	[3]
Romania	Yes	- Substance over form	[1]
Slovakia	Yes	- Substance over form	[1]
Slovenia	Yes	- Substance over form	[2]
Spain	Yes	- Substance over form - Abuse of law	[3]
Sweden	Yes	- Substance over form	[3]
United Kingdom	Yes	- Abuse of law - Ramsay principle	[3]

Source: Deloitte, 2016; Ernst and Young, 2015; ICLG, 2016; The European Commission, 2014.

The EU Member States' domestic GAARs are based on different principles, as presented in Table 1: *Substance over form principle, Abuse of Law doctrine, Arm's length principle or Sham transactions doctrine*. In contrast, the Commission Recommendation shapes the EU GAAR based on the *Substance over form principle*.

In tax matters, the application of *the Substance over form doctrine* means that the true economic substance of a transaction will prevail over its formal appearance. In cases of abuse, tax authorities have the power to levy tax in order to bring the transaction in line with its economic substance (Deloitte, 2016).

An abuse of law (tax abuse) will exist where the taxpayer engages in transactions that allows it to avoid tax or claim a tax benefit that is contrary to the intent of law (Deloitte, 2016).

The arm's length principle states that where a transaction has been concluded for the purpose of tax avoidance, the taxable basis shall be determined without taking into consideration the said transaction, but instead, the taxable basis that would have been achieved considering a transaction at arm's length prices which was aimed at achieving the same economic result, without leading to tax avoidance (ICLG, 2016).

The sham transaction doctrine empowers tax authorities to disregard any transaction that is artificial or fictitious, having as main purpose avoiding tax.

3. RESULTS

Table 1 reveals a set of interesting information on the current position of EU Member States towards both their domestic GAARs and the EU GAAR, as recommended by the Commission.

In this respect, this section presents observations on the EU Member States that do not have a domestic GAAR in their legislations, respectively those that have a GAAR.

3.1. EU Member States that do not have a domestic GAAR

One observation is that six EU Member States currently do not have a GAAR in their legislations. Except for Poland that has launched a legislative initiative to introduce a GAAR according to the Commission Recommendation,

- Denmark, Finland and Luxembourg are still undecided on its implementation, while
- Latvia and the Netherlands do not see the added value of introducing the GAAR.

In terms of the doctrines applied in tax matters, the six EU Member States that do not have a GAAR in their legislations present the following status:

- Denmark, Latvia, Luxembourg and Poland apply *the abuse of law doctrine*;
- Finland applies *the substance over form concept* and
- The Netherlands adheres both to *the abuse of law doctrine* as well as the *substance over form principle.*

Comparable to the proposed EU GAAR which advances the economic substance principle, only Finland and the Netherlands' domestic GAARs are founded on the same principle.

3.2. EU Member States that have a domestic GAAR

In terms of the principles based on which the domestic GAARs are constructed, 16 out of 22 Member States apply the *Substance over form principle*. Only the legislations of seven EU Member States present the *Abuse of Law doctrine*.

All the five EU Member States that have supported the Commission Recommendation on the EU GAAR (Croatia, Greece, Italy, Romania and Slovakia) adhere to the *Substance over form principle*. The same principle is used in Slovenia, although its position towards the new EU GAAR remains uncertain.

The resistance towards the implementation of the Commission Recommendation is posed by 16 EU Member States that do not see the added value of revising their existing GAARs according to the Recommendation. Also, 10 of these EU Member States already have their domestic GAARs based on the *substance over form principle*, which is also the basis of the GAAR proposed in the Commission Recommendation.

4. SUMMARY AND CONCLUSIONS

The sophisticated tax planning schemes developed in rapidly changing business environment tend to delay tax authorities' time of response in order to detect and react to tax avoidance. In order to cope with the new threats to which the EU internal market is exposed, the Commission Recommendation on aggressive tax planning suggested a commonly accepted EU General Anti-Abuse Rule (GAAR), whose aim was on one hand to help tax authorities identify abusive tax behavior and on the other hand to be fully compatible with the limitations set by the Court of Justice of the European Union (CJEU).

Despite the Commission Recommendation on a fully compatible EU GAAR, only six EU Member States have supported the initiative, while 18 Member States do not see the added value of the proposed GAAR and four Member States are still undecided on its application.

This paper proposed an analysis of the domestic GAARs at the level of each EU Member State, which stood for a comparison basis to the proposed EU GAAR.

The domestic GAARs are based on two main doctrines, the substance over form principle and the abuse of law doctrine. Of the two, the substance over form principle prevails as a basis for GAAR in 13 EU Member States. The abuse of law doctrine applied in tax matters is used in seven EU Member States. Although the proposed EU GAAR places an accent on the substance over form principle, resistance in its acceptance comes from both the EU Member States that already apply the substance over form principle as well as from those that apply the abuse of law doctrine.

Another interesting result is that six EU Member States currently do not have in place any domestic GAAR (Denmark, Finland, Latvia, Luxembourg, the Netherlands, and Poland). In four of these states the abuse of law doctrine is applied (Denmark, Latvia, Luxembourg, Poland), the substance over form principle is used in Finland, while the Netherlands adheres to both doctrines. In this particular case, except for Poland which has supported the Commission Recommendation and the implicit adoption of the EU GAAR, Denmark, Finland and Luxembourg are still undecided on its implementation, while Latvia and the Netherlands do not see the added value of introducing the EU GAAR.

The current situation on the adoption of an EU GAAR as proposed in the Commission Recommendation provides future uncertainties on the unanimity acceptance of a final form of this measure, aimed at targeting aggressive tax planning.

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