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**Tax Summit 2017**  
**THE EU ANTI-TAX-AVOIDANCE DIRECTIVE –**  
**taking a further look at the GAAR**  
**27 October 2017**

# Background and introduction

- The international tax policy environment
- EU Anti-Tax-Avoidance-Package presented the 28. January 2016:
  - Package:
    - Recommendation on Tax Treaties
    - Amended Directive on mandatory exchange of information (CbC)
    - External Strategy for Effective Taxation
    - Anti-Tax-Avoidance Directive (ATA-Directive)
  - Policy objective:
    - Effective taxation: Ensuring tax is paid where the value is created
    - Transparency: Ensuring effective access to tax information
    - Addressing the risk of double taxation
- Relation to OECD Base Erosion and Profit Shifting project (BEPS)
  - ATA-Package is the joint European Union's coordinated answer to BEPS:
    - Ensuring EU-law conformity of ATA-rules
    - Creation of a better/fairer business environment?

# Minimum Directive

- The ATA-directive is a minimum directive – de minimis approach
  - Multiple options
  - MS are obliged to ensure at least the level of protection as described in the directive
  - However, MSs cannot offer less restrictive rules
  - Consequently, MSs are allowed to apply more restrictive rules (Article 3)

## Overview of SAARs in the ATAD

- Interest limitation (EBITDA-rule) article 4
  - 30% of EBITDA
- Exit taxation (article 5)
  - Equal to the market value of the transferred assets less their value for tax purposes
  - Deferral (installments), guarantee, interest.
- CFC-taxation (Article 8)
  - Several technical options for MS - Broad scope.
- Hybrid mismatches (article 9 and ATAD II)
  - Aiming at double deductions and deduction non-inclusion.



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# Generally Applicable Anti-abuse Rule (GAAR)

## EU ATAD GAAR (Article 6)

- For the first time a real GAAR has been introduced aiming at all non-genuine arrangements ***domestically and in cross border situations.***
  - Applies to all taxpayers that are subject to corporate tax in one or more MS, including PEs in a EU MS.
- Function: “to fill in gaps which should not affect the applicability of specific anti-abuse rules”
  - From GAAR authorization to GAAR codification (De Broe & Beckers, 2017)
  - Scope and wording is not clear.
  - PPT vs. GAAR?

# GAAR (Article 6)

- Implementation
  - Legislation or doctrine (several countries will need actual implementation).
  - In tax treaties?
    - Abuse of tax treaties can frustrate the levy of corporate tax.
  - ECJ interpretation.
  - Enactment of more stringent GAAR in cross border situations may violate fundamental freedoms.
- Cumulative requirements:
  - *Arrangement or series thereof.*
  - *Having been put in place for the main purpose or one of the main purposes (subjective).*
  - *Of obtaining a tax advantage (objective).*
  - *That defeats the purpose or object of the otherwise applicable tax provision.*
  - *Non-genuine.*

# GAAR (Article 6)

- Legal effect:
  - Arrangements etc. shall be ignored for the purposes of calculating the corporate tax
  - Including WHT?
    - Left to MSs to decide - depending on the role of WHT in their jurisdiction – some discretion to determine the scope.
  - What does “ignored” mean?
    - Fully set aside, but not re-classification? – “disregard, refuse to recognize – abusive transactions must simply be left out.
    - Tax liability should be calculated in a way that is in accordance with the object and purpose of the provision that was circumvented.
    - Ignore a tax treaty? What treaty to fall back on?
    - Penalties? – MS not prevented from applying penalties.

## GAAR (Article 6)

- Arrangement or series thereof
  - Broadly defined: transaction, plan, action, operation, agreement, understanding, promise, understanding or undertaking.
  - Arrangements regarding: establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the Contracting States, and includes steps that persons may take themselves in order to establish residence.
  
- Having been put in place for the main purpose or one of the main purposes (subjective)
  - Not required that sole purpose. Not even a "dominant, principal, essential or main purpose". Instead sufficient that one of the main purposes was to obtain a tax benefit.
  - No guidance regarding main and partial purpose..
    - *"a given purpose is to be considered essential where any other purpose that is or could be attributed to the arrangement or series of arrangements appears at most negligible, in view of all the circumstances of the case."*
  - Rather low threshold - Too broad or easy to claim for tax authorities?

# GAAR (Article 6)

- Of obtaining a tax advantage (objective)
  - Applicable even to minority investors.
  - Tax advantage: comparison of tax payable without the arrangement in place.
  - Obtaining a tax advantage is not per se non-genuine – taxpayer has the right to choose the most efficient structure for its commercial affairs.
  - Commission Recommendation on Aggressive Tax Planning:
    - 4.7. In determining whether an arrangement or series of arrangements has led to a tax benefit as referred to in point 4.2, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the
      - amount that the same taxpayer would owe under the same circumstances in the
      - absence of the arrangement(s). In that context, it is useful to consider whether one or more of the following situations occur:
        - (g) an amount is not included in the tax base;
        - (h) the taxpayer benefits from a deduction;
        - (i) a loss for tax purposes is incurred;
        - (j) no withholding tax is due;
        - (k) foreign tax is offset.”

# GAAR (Article 6)

- That defeats the purpose or object of the otherwise applicable tax provision.
  - Reference to domestic law and the purpose and object of the part of domestic law in question.
  - Is abuse of ATAD included?
  - Not always easy to determine (unclear or ambiguous purpose).
  
- “Non-genuine”
  - Not put into place for valid commercial reasons, which reflect economic reality
  - Designed to reflect the artificiality test of the ECJ.
  - Preamble: “GAARs should be applied to arrangements that are not genuine: **otherwise the taxpayer should have the right to choose the most efficient structure for its commercial affairs**”.
  - **Not genuine = artificial?**” Why not using the wholly artificial terminology?
  - Valid commercial reasons: concept involving more than the attainment of a purely fiscal advantage (Leur Bloem) – So far acceptable to obtain a tax advantage if the transaction was not artificial.
  - Having regard to all facts and circumstances.
    - [What are relevant facts and circumstances?](#)
      - Existence of non EU- controlling shareholders?
      - Actual authority to take decisions, financial means, commercial risk?
      - Existence of own office, equipment, merely financial control of subsidiaries?

# GAAR (Article 6)

- Possibly to be interpreted with a reference to domestic tax law on substance over form.
  - Commission Recommendation on Aggressive Tax Planning:
  - *"4.4. For the purposes of point 4.2 an arrangement or a series of arrangements is artificial where it lacks commercial substance. In determining whether the arrangement or series of arrangements is artificial, national authorities are invited to consider, whether they involve one or more of the following situations:*
    - *(a) the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;*
    - *(b) the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct;*
    - *(c) the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other;*
    - *(d) transactions concluded are circular in nature;*
    - *(e) the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows;*
    - *(f) the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.*



## GAAR (Article 6)

- Tax authorities should carry the burden of proof
  - Impression that this will be somewhat underemphasized.
  - Unfortunate that tax administrations should make such assessments on the basis of unclear notions.
  - Risk of arbitrary and varying practice among MS.

## GAAR (Article 6)

- GAAR largely similar to BEPS action 6 (Principle Purpose Test)

*"Notwithstanding the other provisions of the Convention, a benefit under this Convention shall not be granted in respect of any 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 provision of this Convention"*

- PPT applicable when determining access to tax treaty benefits

- Conflict with primary EU law?

- Concern raised and EC recommended a modified version of PPT – treaty benefits not denied if the relevant arrangement reflects a genuine economic activity.

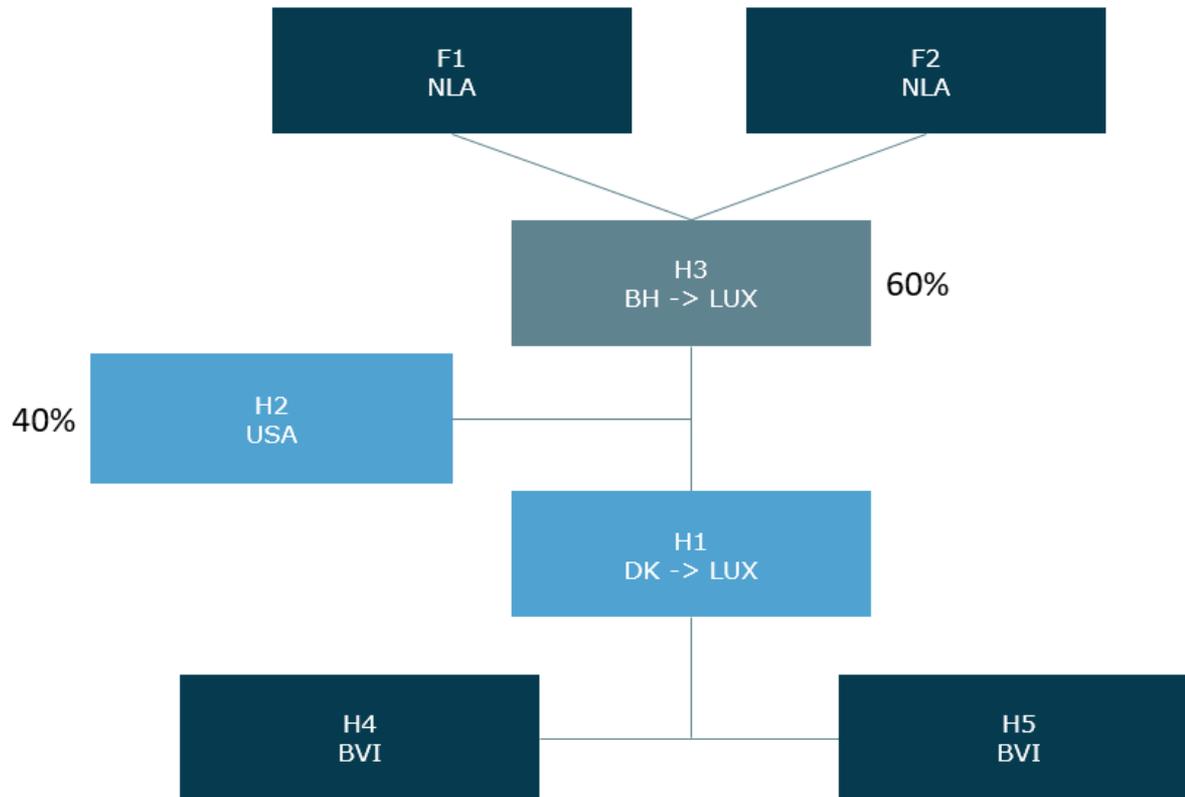
- Caveat may represent an important safe harbor for EU holding companies (Silvestri, 2017)

## Danish ruling on the 2014 PSD GAAR

Binding ruling on the interpretation of § 3 of the Tax Assessment Act.

- The Danish Tax Board did not confirm that foreign shareholders of a Danish ApS were subject to Danish WHT on dividends arising in the context of a transfer of the company to Luxembourg.

# Danish ruling on the 2014 PSD GAAR



## GAAR (Article 6)

- No general examples available – only examples from the PSD and tax treaties.
- Practical scenarios:
  - Dividend stripping arrangements.
  - Classic conduit/flow through structure – Are holding companies genuine?
    - Establishing a company in a certain jurisdiction in order to benefit from a more favorable tax regime should not by itself be considered as an abusive practice if the company carries on an actual business and it does not represent a wholly artificial arrangement.
    - However, post BEPS and ATAD holding companies are less attractive.
  - Determining the location of production facilities?
  - Determining the location of Joint venture entities?
  - Application of beneficial provisions through increase of ownership/shares. E.g. increase from 9% to 10% or from 24% to 25%, new share classes etc.
  - Mismatches not covered by other SAARs? (e.g. tax credit, timing mismatches etc.)

# Final Remarks

- GAARs have be subject to severe criticism in legal commentary and from industry
  - Benefit consultants
  - “detrimental to legal culture” – ignores object and purpose
- Different implementation is a risk
  - Need for a corresponding adjustment or more effective dispute resolution mechanisms.
- Does the ATA-Directive fit its policy objective?
  - “Over BEPS-ification”?
  - More than Aggressive Tax Planning is being targeted.
- Amendments needed broadly across MSs
- MNE’s tax strategy.
  - Review of existing structures etc.
  - How difficult will it be to pass the artificiality test? Reliance on “non-genuine” requirement?
  - Holding company structures – substance requirements in addition to beneficial ownership requirements
    - Often presented as a standard solution - Adds tax risk to the structure
    - Options regarding holding structures
      - Mixed function companies.
      - Multi purpose vehicles.
      - Ensure real economic business.
      - Performing substantive economic functions, using real assets and assuming real risks



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