

Conference organized by:

Institute for Austrian and International Tax Law Vienna

In cooperation with

Doctoral Program for International Business Taxation

WU Global Tax Policy Center

General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS Tax World?

RUST CONFERENCE 2014

QUESTIONNAIRE

GUIDELINES ON ISSUES TO BE COVERED
IN THE 20-PAGE CONTRIBUTION

General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS Tax World?

1. GAARs – an emerging trend in the tax landscape and in the political debate of many countries

- Do GAARs exist in your country? When and why were they introduced? Are they considered to have been introduced? Have the GAARs been developed by the courts or by the legislator or have they been developed by the courts and later codified by the legislator? If the courts were the “creator” of a GAAR: Did the judgments contain a legal basis for this?
- Which schemes were the reason to initiate a debate about the introduction of GAARs or to introduce GAARs? Describe the concept of “avoidance” as meant by the GAARs in your country. What is the methodological background?
- Who contributed to the public debate before GAARs were introduced? What was the input of different stakeholders and how did they influence the outcome?
- Is the introduction or the application of GAARs influenced by the current political debate on the EU, the OECD level or by the international debate in general? If so, in which way?
- Did the BEPS Report have any influence on the introduction of a GAAR? Did it change the judicial approach towards tax avoidance cases? Did your country change an existing GAAR due to the BEPS Report?
- What is the relevance of GAARs in the context of other measures to avoid double non-taxation in your country? Are they considered to be the key element of the measures currently being considered? Or just one element of them or not considered at all?
- If the introduction of GAARs is being considered: What are the pros and cons mentioned in the political debate in your country? Which alternatives have been discussed?
- Has it been considered to introduce GAARs retroactively? Or were they in fact introduced in this way?
- Is there anything similar to GAARs in other areas of the law? If so, in which areas? How does the debate in these other areas of the law influence the tax debate? In those areas of law where there is nothing similar to GAARs: How are citizens’ attempts to circumvent the law dealt with? Why and to what extent is tax law different in this respect?

2. Requirements for the application of GAARs

- Describe the requirements for the application of GAARs in your country (if GAARs have been implemented or at least considered)!
- In which areas of tax law are GAARs applicable? (Only in direct tax? Also, or only in VAT? What about other transaction taxes? In tax law general? What about other levies which are not considered to be taxes?)

- Are there subjective elements? Does the intention of the taxpayer matter? To what extent (essential, main or sole purpose or something in between)? In case there is such an essential, sole, main or other purpose test: How is this test applied? How are different purposes for a planning decision distinguished from one another? How are the relevant ones determined? What is the experience? How is the taxpayer's intention assessed? (Provide examples from court judgments, rulings, practical cases or discussion in the literature).
- Are there other criteria? Which ones? Does the appropriateness of a structure matter? How is this determined? Is how often a certain tax planning scheme is applied relevant? Does the object and purpose of the law (i.e. of the rule which may have been circumvented) come into play in order to determine the appropriateness of the structure?
- Are GAARs also applicable in situations where advantages were created by the legislator on purpose? Are there cases decided by the courts? Can you give other practical examples? If GAARs are not applicable in such situations: Where is the borderline drawn between advantages which have been granted on purpose and others which could be covered under a GAAR?
- How are double non-taxation and the application of GAARs related? Can the tax situation in another country (which might lead to double non-taxation) be relevant for the application of GAARs? Does double non-taxation indicate that a GAAR should be applied? Give examples. Are there situations of double non-taxation which are not covered under a GAAR?
- How often are the GAARs applied in practice? Are there any statistics?
- Is the GAAR in your country in line with constitutional requirements (rule of law, legal certainty, etc.)? Is there case law or an academic discussion? What is your view?
- Are there any rules about disclosing certain structures which could be covered under the GAARs?
- Is there any rebuttable presumption for the application of a GAAR? Is the onus on the taxpayer or the taxing authority to bear the burden of proof?
- Provide practical examples of situations in which the GAARs are or might be applied in your country.

3. Legal Consequences of applying GAARs

- What is the legal consequence if the GAARs in your country are applied? In case the actual fact pattern is replaced by the "appropriate" one: How is this fiction determined?
- How far does the fiction reach? In case e.g. in a specific fact pattern an alienation of a participation to a family member is not accepted under a GAAR: Is the former shareholder also the relevant one for the purpose of other taxes (e.g. inheritance tax, etc.)? Or if the application of a GAAR leads to the assumption that certain passive income is not allocated to the subsidiary but to the parent company or the individual shareholder: Does this mean that the subsidiary does not distribute taxable dividends to the parent company or the individual shareholder either? When do these fictions end?
- Provide other examples which illustrate how far these fictions reach and when tax assessment has to return to the real fact pattern?
- Is the application of GAARs excluded from the scope of rulings? Or are there specific rulings procedures for GAARs? If so, what is the governance structure? Is there a board that decides? How is the board or the authority composed?

4. GAARs and SAARs (Special Anti-Avoidance Rules)

- What is the relation between GAARs and SAARs? What is the policy approach in your country: Does the legislator favor having one GAAR or many SAARs or does it combine the approaches? What is the underlying concept? Describe the debate!
- In which areas have SAARs been introduced? Describe their scope! (Has your country introduced, e.g., CFC rules, thin cap rules?)
- What is the relation between GAARS and SAARs when it comes to the application of the law? Do GAARs and SAARs have to be applied next to each other? Do SAARs prevail over GAARs? Is there room for the application of a GAAR in an area of tax law where SAARs are applicable?
- Give practical examples of the relation between GAARs and SAARs!
- In case there are SAARs in tax treaties (e.g. LoB rules, subject-to-tax clauses, look-through approaches for artiste companies according to Art. 17 (2) OECDMC and for real estate investment companies according to Art. 13 (4) OECDMC, etc.): what is their relation to domestic GAARs?

5. GAARs and tax treaties

- What is the relation between GAARs and tax treaties? Is it possible to apply GAARs at the tax treaty level?
- What is the relevance of the statements in the OECD Commentary in this respect?
- If the result of the application of a GAAR is that certain items of income are allocated to a different taxpayer: How do treaties deal with this? In case the application of a GAAR leads to the result that income is allocated to a different taxpayer than under the domestic law of the other contracting state (where no GAAR is applied): How are these allocation conflicts solved? Does the OECD Partnership Report (which deals with allocation conflicts in the context of partnerships) provide guidance? What is your view and the view of the courts in your country? Provide practical examples!
- In respect of other legal consequences of the application of GAARs (in addition to allocating income to other taxpayers): How do treaties deal with this? Provide practical examples!

6. GAARS and European Union law requirements (the Freedoms, directives)

- Are there situations in which GAARs are applied differently in domestic and in cross-border situations, or where the application of GAARs could lead to a worse treatment of cross-border situations? Give examples!
- In case European Union law (including EEA agreements and free movement agreements and other agreements between the EU and third countries) is relevant for your country: Are there any limits to applying domestic GAARs under the Freedoms? Does the answer depend on whether the GAAR is applied in relation to an EU Member State, an EEA state or another third country? What is your view? Is there a discussion on this in your country?
- Has the discussion on the introduction or application of GAARs in your country been influenced by European Union law arguments? Are there voices arguing that national GAARs may only be maintained if their wording is in line with the terminology used by the ECJ?

- Does the concept of the GAAR which your country has introduced or is considering introducing differ from the concept(s) on abuse developed by the case law of the ECJ in the tax area? In which way?
- In which areas of the tax law of your country do you see an obligation to implement the case law of the ECJ on abuse? Does this case law only have impact on the application of GAARs in cross-border situations or also in mere domestic settings?
- What is the impact of the various anti-abuse provisions in tax directives on the tax system of your country? Have they been implemented and if so how have they been implemented? Distinguish between the different directives! What is the role of GAARs in this context?

7. GAARS and recent European developments (CCCTB, recommendation of the Commission)

- The CCCTB draft directive contains a GAAR (whose wording has been suggested by the European Parliament to be changed). What is your view: Do you see a need for a GAAR in the CCCTB context?
- Do you think the GAAR of the CCCTB draft is drafted appropriately? What is the relation of the GAAR to the various SAARs contained in the CCCTB draft? What is the relation of this GAAR to the case law of the ECJ? Do you foresee any practical application problems if the CCCTB GAAR becomes law? Will it be necessary to specifically implement this GAAR in your country or will it be sufficient to apply the existing GAAR (if any exists)?
- The EU Commission has recommended the introduction of a very specific GAAR in the EU Member States (recommendation of December 6, 2012): What is your opinion? Do you approve of this recommendation? In which respect does it deviate from the case law of the ECJ (if at all)? Is it properly phrased? What is the impact of this recommendation in your country? To what extent does the wording of your country's GAAR differ from the one suggested by the Commission? Are there any attempts to harmonize your country's GAAR with the GAAR recommended by the Commission?
- The EU Commission's Recommendation was made in light of the discussion about aggressive tax planning: What is "aggressive tax planning"? Is it possible to find a suitable definition for this term at all?
- Do you see a trend towards a harmonized global GAAR? Would such harmonization make sense? What would such a GAAR have to look like in order to fit in all possible legal systems?
- Did or will the Commission's proposed measures to close loopholes in the Parent-Subsidiary Directive have any influence on GAARs (beyond the scope of the directive)?

8. Alternatives to GAARs

- Compare potential or actual GAARs with possible policy alternatives. Does the concept of substance over form play a role in your country's tax system? How does it relate to existing GAARs in your country, or how would it relate if your country followed a recommendation to introduce a GAAR?
- Point out the difference between substance over form approaches and GAARs: In what way do they differ? Can you give practical examples which would only be covered by one approach but not another? Do substance over form approaches support or replace GAARs?
- GAARS usually try to cover situations which are in line with the letter of the law but which are not in line with the spirit of the law: Is more emphasis on purposive

interpretation an alternative to GAARs? What is the role of purposive interpretation in your country's tax system? Can purposive interpretation prevail over an interpretation according to the letter of the law in your legal culture? Are there situations which cannot be covered by purposive interpretation but only by GAARs? Give examples!

- GAARs often are seen as an attempt to correct imperfections of the tax system. Can the introduction of GAARs been avoided by a more careful drafting process? What is your view?
- GAARs are often criticized for creating uncertainty. What is your view? Are more precise SAARs an alternative? Or is it possible to provide certainty by improving GAARs?

Some practical Guidelines

Paper length: 20 pages

Format: preferably "MS Word"

Bibliographic reference and quoting: please follow the attached guidelines.

Deadline for delivery of the report: 30 April 2014

Please let us also have **a short CV** (3-5 lines) for the "List of Contributors" in the book, and a list of abbreviations, in due time. Please make sure that **graphics and charts** for the final version are black-and-white or **greyscale only** (no color graphics allowed for the book!) and please also email them as separate files in xlsx, docx, pptx, jpg or tif format. Resolution of pictures should be **at least 300 DPI** to ensure good quality for printing.

The national reports will be placed for download on a password-protected conference website, so that the conference participants can be well prepared for the discussion.

On the basis of the national reports, we will identify the most relevant topics, and select speakers who will present selected issues in a three-minute input statement to encourage the public debate.

After the conference there will be a short period of time given for including the findings of the conference in the paper. We will organize linguistic editing.

If you have questions or doubts, please do not hesitate to contact us. We will be happy to help you.

We wish you a very fruitful writing process!

Sincerely

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