The Return of the CC(C)TB

Art 58
General anti-abuse rule (GAAR)

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The GAAR – Art 58

"For the purposes of calculating the tax base under the rules of this Directive, a Member State shall disregard an arrangement or a series of arrangements which, having been put in place for the essential purpose of obtaining a tax advantage **that defeats the object or purpose of this Directive**, are not genuine, having regard to all relevant facts and circumstances. […]."

Finding abuse	**Arrangement Test** „[…] arrangements which […] are not genuine"	**Purpose Test** „essential purpose"	**Tax Advantage Test** „tax advantage"	**Objective Test** „defeats the object or purpose of this Directive"
Conse-quences	„disregard […] for the purposes of calculating the tax base"			

Finding abuse (i)
Subjective: The Arrangement Test

Para 1: "[…] an **arrangement or a series of arrangements** which, […] are **not genuine** […]."
Para 2: "not put in place for **valid commercial reasons** that reflect **economic reality**."

- **Arrangement or a series of arrangements**
  - Defined in ATPRec: "transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event
  - Former version of the CCCTB: "transaction(s)"
  - Broad scope
- **Non-genuineness and economic reality**
  - Not defined (despite para 2)
  - Vague terms are substituted with other vague terms
  - Examples of ATPRec to identify "artificial" arrangements:
    - Form of arrangement: unusual, offsetting or circular transactions
    - Effects of arrangement: tax benefit vs. business risk

Finding abuse (ii)
Subjective: The Purpose Test

"[...] having been put in place for the **essential purpose** [...]"

- **Essential purpose of the arrangement or the person?**
- **Essential purpose** is not the sole purpose
  - Comparison between tax objectives and other objectives
  - *Part Service*, para 62: Accrual of a tax advantage was the "*principal aim pursued [...] notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations*."
  - 51 %? 75 %? etc

Finding abuse (iii)
Subjective: The Tax Advantage Test

"[...] obtaining a **tax advantage** [...]"

- **Absolute criterion**
  - "Tax advantage" as a result of the arrangement carried out
  - No "tax advantage" => no abuse
- **Element of subjectivity**
  - "Tax advantage" as the difference between the tax effects of the arrangement carried out and the tax effects of another (fictitious) arrangement
  - Finding the comparator is subjective
- Related to the **legal consequence**
  - What would the taxpayer have done instead?

Finding abuse (iv)
The Objective Test

"[...] tax advantage that **defeats the object or purpose of this Directive** [...]"

- What is the **"object or purpose" of the CC(C)TB Directive**?
- **Arrangement** (which leads to a tax advantage) needs to defeat the statutory requirements of the Directive or an Article.
- **Objective test**
  - **Distinguishes** "abusive" from "non-abusive" arrangements
  - Potentially abusive arrangements have something in **common** (artificial, non-genuine, absurd, no other reasons, etc)
  - But does this make them abusive?
  - Finding the appropriate **benchmark**: the (taxing) statute sought to be circumvented or exploited
  - Question of **statutory interpretation**

Legal consequences

"**For the purposes of calculating the tax base** under the rules of this Directive, a Member State shall **disregard** […]."

- Disregarding only for Chapter II of the CC(C)TB Proposal
  - Chapter I: "Subject matter, scope and definitions" (Art 1 – Art 5)
  - Chapter II: "**Calculation of the tax base**" (Art 6 – Art 14)
  - Chapter III: "Timing and quantification" (Art 15 – Art 29)
- How far do the legal consequences go?
  - "Disregard" as if taxpayer had done **nothing**?
  - "Disregard" as if taxpayer had done something **differently**?
  - Para 3: "**economic substance**"

The GAAR in a nutshell

- Four criteria need to be fulfilled **cumulatively**
- At the core lies the **objective test**
- **Additional subjective tests** are…
  - Unnecessary
  - Meaningless
  - Dangerous and detrimental to the legal culture
- **Where to put subjectivity**?
  - At the level of the facts, e.g. *Part Service*
    - "*[M]arketing, organisation or guarantee considerations*" are **facts**
    - Have nothing to do with Art 11A (1) VAT Directive (on the taxable amount for supplies of goods)
- **Despite the problems: The GAAR will not go away**

Thank you for your attention

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