General Anti-Avoidance Regimes Gain Prominence in the Ever-Developing World of Global Tax Policy

As new legislation that targets tax avoidance continues to be released globally, General Anti-Avoidance Regimes (GAARs) are springing up in several countries and must be considered for those engaging in tax planning. The below provides an overview of GAARs from several locations, including Australia, the European Union (EU), Germany, Poland and Spain.

Australia

General Anti-Avoidance Provisions

Australia has had a comprehensive GAAR for several years, but following some court decisions that tended to restrict the provisions, the government enacted amendments in 2013 to clarify and extend the operation of the provisions. These GAAR provisions allow the Commissioner of Taxation to cancel a tax benefit and effectively reconstruct transactions where a scheme or arrangement was entered into for the sole or dominant purpose of avoiding tax or obtaining a tax benefit. Whether the scheme was entered into for the sole or dominant purpose of avoiding tax is determined by an objective review of the facts and circumstances of the arrangement. Whether a tax benefit is obtained is determined by comparing the outcomes under the scheme and an "alternative postulate" of what would have happened if the scheme had not been carried out.

Multinational Anti-Avoidance Law

In addition to the general GAAR provisions, other specific provisions apply from January 2016 to multinational groups that have annual global income over AU$1 billion. The new law applies to foreign entities that supply goods or services to Australian customers and provide activities or support in connection with the supply in Australia, but where the income is not attributable to a permanent establishment (PE) in Australia. The provisions seek to prevent multinational groups from inappropriately structuring their arrangements to avoid a PE in Australia. Further, they apply where the principal purpose or one of the principal purposes of the scheme was to obtain an Australian or foreign tax benefit. These multinational anti-avoidance laws allow the Commissioner of Taxation to cancel the tax benefit and apply penalties and interest on any shortfall.

Although currently untested, it is considered that the operation of the special multinational anti-avoidance laws is potentially wider than the general GAAR provisions as they apply where "one of the principal purposes" of a scheme is to obtain a tax benefit, whereas the general anti-avoidance provisions apply only where the "sole or dominant purpose" is to obtain a tax benefit. We understand the Australian Taxation Office has already identified 175 multinational groups potentially caught by these provisions, but it is thought that there may in fact be thousands of groups impacted.

European Union

The European Commission (EC) proposed the introduction of an Anti-Tax Avoidance Directive (ATAD) in January 2016 as part of its Anti-Tax Avoidance Package. The ATAD (Council Directive [EU] 2016/1164) was adopted in June 2016 and was published in July 2016. It implements a wide range of mainly BEPS-related measures, but importantly, also moves beyond BEPS by including a GAAR (the EU GAAR) in Article 6. EU member states are obliged to apply the ATAD, including the EU GAAR, with effect from 1 January 2019.

The EU GAAR is designed to address aggressive tax planning when other, targeted, anti-avoidance rules either do not exist or do not apply. The EC describe the regime as a "safety net" and a measure to "fill in gaps". As with most GAAR proposals, the EU GAAR represents a measure of last resort to be utilised in circumstances that are as yet largely undefined. As such, the EU GAAR is necessarily underpinned by a principle of "substance" (i.e., the alignment of taxation with real economic activity). It is worth noting that the same principle of substance permeates the G20/OECD BEPS package (even though BEPS does not itself recommend the introduction of a GAAR).

If implemented in its current form, the EU GAAR would apply to arrangements that:

- Are not "genuine" or "non-genuine"
- The main purpose (or one of the main purposes) of which is to obtain a corporate tax advantage that defeats the purpose of the law

Following principles laid down in CJEU case law, an arrangement will be regarded as non-genuine to the extent it is "wholly artificial", which, in turn, broadly means it has not been put into place for valid commercial reasons reflecting the economic reality.

The effect of the EU GAAR being applied is that the non-genuine arrangement is ignored and the corporate tax liability is recalculated in accordance with national law on the basis of the substantive economic reality. In its present form, the EU GAAR only extends to corporate taxes. It remains to be seen whether it will be extended (or replicated) to cover other taxes, but in the meantime, the interaction of the EU GAAR with pre-existing domestic GAARs could be unwelcome and problematic.

The EU GAAR must be applied uniformly in domestic, intra-EU and third country situations so that "the scope and results of application in domestic and cross-border situations do not differ".

It is likely that this uniform cross-border application of a principled – but abstract – EU GAAR across numerous, specifically designed national tax systems will cause the most difficulty in practice. For example, will the application of the EU GAAR (and the re-characterisation of an arrangement) in one jurisdiction necessitate its application in another? Perhaps even more problematic, could the EU GAAR be utilised by a jurisdiction dissatisfied with the tax outcome (and non-application of the EU GAAR) in another?

Germany

German GAAR provisions have been around since initial inception of the General Tax Code close to 100 years ago. The legal definition of Germany's GAAR reads as follows:

> *An abuse shall be deemed to exist where an inappropriate legal option is selected which, in comparison with an appropriate option, leads to tax advantages unintended by law for the taxpayer or a third party. This shall not apply where the taxpayer provides evidence of non-tax reasons for the selected option which is relevant when viewed from an overall perspective.*

In light of this long history, one would expect that the judicial system should have had sufficient time and opportunity for interpretation of such rule, leaving no or only select issues undecided at present. Surprisingly, however, quite a few open issues have not been clarified to date. The reason lies in the fact that German GAAR is a rule that needs to evaluate the effects of ever evolving legislation and business forms.

The starting point for analysing tax structures is the German Constitutional Court, which continues to clearly support the principle that taxpayers are entitled to structure their legal relations in a way that lowers their tax exposure. So, all things considered, that is the real general rule, not the German GAAR. So despite its name, German GAAR does not constitute a general rule, but rather a general exception to a rule. This distinction has significant effects: in line with fundamental legal principles, general rules may be interpreted widely, whereas exceptions to the rules are to be interpreted narrowly.

That being said, the German GAAR's language is fairly straightforward and by and large follows the internationally accepted principle purpose test: a legal structure is deemed to be abusive if it (i) is inappropriate (compared to an appropriate structure) in order to achieve the commercial objective of the transaction, (ii) results in a tax benefit for the taxpayer or a third party and (iii) the taxpayer cannot prove good business or other acceptable non-tax reasons for choosing the transaction challenged. It is interesting to note that this definition does not explicitly require the intention of the taxpayer to reduce taxes. However, since the taxpayer needs to prove sound business reasons for the chosen transaction if challenged, its purpose and intention will ultimately surface as well.

As in other jurisdictions, the key item is the definition of "inappropriate". Over the years, the German tax courts have developed a plethora of descriptions, including complex, complicated, artificial, cumbersome, uneconomical, unnatural, preposterous, needless, unnecessary, non-transparent, inefficient, impractical or irrational, all of which seem to bear elements of "inappropriate".

In addition to German GAAR, there are various specific anti-abuse rules (SAAR) in Germany's tax laws. If such SAAR applies, German GAAR may not be applied cumulatively under German laws, i.e., it is not a catch-all clause in SAAR situations. In the event the taxpayer is not able to prove good business reasons for the chosen transaction, the tax effects of the abusive structure will be disregarded and replaced by the tax effects of an appropriate structure. In contrast to tax evasion, breaching German GAAR or SAAR is seen as mere tax avoidance and thus, not a criminal offense. Consequently, the tax effects of a mere abuse are generally only subject to interest charges of 6% per annum. It should be noted, however, that complete disclosure of the facts and circumstances enabling the tax authorities to assess a potential abuse is required – and a breach of such obligations may be treated as a criminal offence.

Poland

Poland introduced a statutory general anti-abuse rule in July 2016 by amending the Tax Ordinance Act. The Polish GAAR allows the Polish Ministry of Finance to counteract abusive tax arrangements, defined as activities performed primarily in order to achieve a "tax benefit" that is inconsistent with the purpose and substance of tax laws in the given situation and if the use of such solutions is "artificial". As the Ministry of Finance will be the relevant authority to apply Polish GAAR, the local tax authorities will not have such power.

To assess if the transaction was "artificial", the tax authorities will consider, among other things, the following factors: (1) excessive complexity, (2) splitting up the transaction without any reasonable justification, (3) involvement of intermediaries despite there being no good business reason, (4) if the transaction leads to a situation identical or nearly identical to the baseline situation, (5) if there are mutually compensatory elements or elements that cancel each other out, and (6) the economic or business risk that exceeds the expected benefits other than tax benefits to the extent that it is to be concluded that a reasonably acting entity would not have chosen this course of action.

Polish GAAR is not applicable:

- Where an aggregate "tax benefit" is less than PLN100,000 in a given settlement period
- If a TAAR (i.e., Targeted Anti-Abuse Rule) may be applied instead
- If a taxpayer received a special advanced tax opinion issued by the Minister of Finance
- To VAT

A "tax benefit" within the meaning of the Polish GAAR is a situation where:

- A tax liability has not arisen, but has been postponed or reduced
- A tax loss has been incurred or overstated
- A tax overpayment or the right to a tax refund has arisen, or a tax overpayment or tax refund has been increased

Taxpayers who wish to safeguard their tax settlements against Polish GAAR will be entitled to apply to the Minister of Finance for a formal opinion of non-applicability of Polish GAAR in their specific case.

This will require disclosure of the taxpayer's intended course of action and assumed benefits, including tax benefits. The fee for obtaining such opinion is PLN20,000. The opinion will be issued within six months of the filing date of the application. The Minister may refuse to issue an opinion if the described circumstances provide that the Polish GAAR might be implemented.

In contrast, the individual tax rulings will not give protection against application of Polish GAAR. Furthermore, the tax authorities may refuse to issue the individual tax ruling if they deem that the scope of facts of the case, as well as future events, are considered to be tax avoidance. The individual tax rulings are far more convenient to obtain for taxpayers as they are inexpensive to obtain and are issued within three months.

Although Polish GAAR does not apply to VAT, very similar principles regarding abuse of the tax law were introduced in the VAT Act. For VAT, there is no ability to obtain a formal opinion of non-applicability of Polish GAAR. Also, there is no clear procedure regarding application of the anti-abuse provisions for VAT issues. Unlike the Polish GAAR, these provisions will be applied by the local tax authorities.

Spain

As a general rule, the Spanish GAAR is regulated in two ways: the so called "conflict" in the application of the tax law and the simulated schemes.

Conflict in Application

A conflict exists where a taxpayer avoids, totally or partially, performing a taxable event or reduces its taxable base or tax payable through transactions in which either of the following occurs:

- The transaction is highly artificial or not typical for achieving the result obtained
- The transaction does not achieve relevant legal or economic effects other than tax savings

Therefore, under the conflict doctrine, the Spanish tax authorities may challenge artificial transactions where valid business reasons do not exist and are primarily aimed at achieving only a tax benefit. It is worthy to mention that it is mandatory for Spanish tax authorities to obtain a favourable report from an advisory committee in order to apply the conflict doctrine.

Simulated Schemes

The second doctrine deals with acts or transactions where a tax sham exists. In this case, Spanish tax authorities will issue the corresponding tax assessment in order to apply the relevant taxation to the taxable event that has effectively been performed by the parties in such acts or transactions. If the Spanish tax authorities determine a tax sham exists, the taxpayer will be assessed late payment interest and penalties. Spanish tax authorities must prove that the acts or transactions performed by the relevant party constitute a non-substantive transaction resulting from a tax sham.

Finally, other specific anti-abuse provisions (SAAR) have been implemented in the Spanish tax law. For example, there is a SAAR applicable to the Parent-Subsidiary Directive exemption, which prevents the application of the exemption in the event the ultimate parent company to which the dividend is paid is not a resident within an EU or EEA country, unless it can be proved that the incorporation and operations of the EU parent company are based on valid economic motives and substantial business reasons.

Conclusion

While many countries have had GAARs for some time, we are seeing an increasing and ever-evolving use of them as global tax policy places more scrutiny on aligning substance and value creation with taxable profit. Therefore, a consideration of local and regional GAAR provisions should be undertaken in connection with any tax planning.

Authors

Linda Pfatteicher
Partner, San Francisco
T +1 415 954 0347
E linda.pfatteicher@squirepb.com

Louise Boyce
Of Counsel, Sydney
T +61 2 8248 7802
E louise.boyce@squirepb.com

Robert O'Hare
Professional Support Lawyer, London
T +44 207 655 1157
E robert.o'hare@squirepb.com

Thomas Busching
Partner, Frankfurt
T +49 69 17392 445
E thomas.busching@squirepb.com

Dominika Kupisz
Associate, Warsaw
T +48 22 395 55 63
E dominika.kupisz@squirepb.com

Jose Aguilar Shea
Senior Associate, Madrid
T +34 91 520 0751
E jose.aguilarshea@squirepb.com

Mitch Thompson
Partner, Cleveland
T +1 216 479 8794
E mitch.thompson@squirepb.com

25896/01/17