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# IS POLISH GAAR COMPATIBLE WITH THE DIRECTIVE 2016/1164 (ATAD)?

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## INTRODUCTION

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The general anti-avoidance rule (GAAR) was first incorporated into Poland's General Tax Act (hereinafter: GTA)<sup>1</sup> in 2002 and took effect on 1 January 2003 but remained in force for a short time as the Polish Constitutional Tribunal ruled on 11 May 2004 (K 4/03) that it was in large part unconstitutional<sup>2</sup>. At the same time, the Constitutional Tribunal ruled that '(...) there is no constitutional legal problem with the fact of normative regulation adopted by the legislator to counter what are – from the perspective of the State's fiscal interests – negative

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<sup>1</sup> Article 24b of the General Tax Act of 29 August 1997 (*Ordynacja Podatkowa*), Journal of Laws of 2017, item 201 as amended.

<sup>2</sup> See A.Olesińska, A.Zalasiński, *Poland* [in:] *Anti-avoidance measures of general nature and scope – GAAR and other rules*, Cahiers de Droit Fiscal, vol. 103, IFA Seoul Congress 2018, p. 7. The history of the first Polish GAAR was presented by B. Brzeziński, K. Lasiński-Sulecki, *Poland* [in:] *A Comparative Look at Regulation of Corporate Tax Avoidance* (K.B. Brown ed.), Springer 2012, pp. 269-273; D. Mączyński, *General Anti-Abuse Rule under Polish Tax Law* [in:] *Selected issues in taxation and tax authorities in central Europe*, P. Smoleń (ed.), Wydawnictwo KUL Lublin 2016, p. 130; H. Filipczyk, A. Olesińska, *Poland* [in:] *GAARs – A Key Element of Tax Systems in the Post-BEPS World*, IBFD 2016, pp. 485-487.

economic practices, including within the sphere of contractual relations between taxpayers, including in the form of a “general anti-avoidance rule”.

In 2016, the legislator again implemented a general anti-avoidance rule into the General Tax Act (GTA)<sup>3</sup>. Its key element is Art. 119a, pursuant to which tax avoidance is *‘[a]n act carried out primarily in order to obtain a tax benefit that, in the given circumstances, contradicts the object and purpose of a tax law provision, (...) if the manner of conduct is artificial (tax avoidance)’*<sup>4</sup>. The tax benefit obtaining from such an act will be denied. The scope of the GAAR encompasses all taxes except VAT<sup>5</sup>.

A key element of any GAAR is a definition of the conditions which, when met, allow the tax authority to question the effectiveness of an act performed by the taxpayer – both individual acts and a series of them. Characteristics that give the tax authority cause to question the effectiveness of a transaction for tax purposes, and thus to deny it tax benefits which will be ruled in given circumstances to be ‘unjustified’, can be found in such rules as artificiality, ‘inappropriateness’, inadequacy to the economic situation of a given entity, absence of economic (or other) justification, the objective of obtaining a tax benefit which was not intended by the legislator or in conflict with the objective and essence of tax law provisions. Sometimes particular provisions directly employ the notion of ‘tax avoidance’ or ‘abuse’ (defined in various ways), but such norms are also constructed at times without reference to such terms<sup>6</sup>.

The Polish GAAR provided for in Section IIIA of the GTA<sup>7</sup> displays all of the characteristics for such rules present in modern legislation around the world. It particularly recalls those which have been adopted relatively recently (such as that of the UK or India). This is demonstrated by such features as the legislation’s significant expansion and detail, attempts at giving precision to vague notions – by defining them, or by listing examples of the

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<sup>3</sup> Act of 13 May 2016, changes to the General Tax Act in this scope went into effect on 15 July 2016, see also transitional provision Art. 7 of the amending Act of 13 May 2016.

<sup>4</sup> The same premises for determining that certain acts constituted tax avoidance are contained in the draft GTA (draft current as of 6 October 2017) prepared by the General Tax Law Codification Commission – see Art. 35 § 1: ‘An act performed primarily for the purpose of obtaining a tax benefit, contrary in the given circumstances to the object and purpose of tax regulations, shall not lead to the obtaining of a tax benefit if the arrangements were artificial (tax avoidance)’, <https://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/ciala-kolegialne/komisja-kodyfikacyjna-ogolnego-prawa-podatkowego/prace-komisji> accessed on: 8 April 2018.

<sup>5</sup> Separate legislation has been introduced for VAT in 2016 (Art. 5.5. of the VAT Act of 11 March 2004).

<sup>6</sup> A.Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania*, Toruń 2013, p. 299.

<sup>7</sup> The General Tax Act of 29 August 1997 (Ordynacja Podatkowa), Journal of Laws of 2017, item 201 with amendments.

components of a given notion. The Polish rule – similarly to that in other countries – is also accompanied by special procedural solutions. Also following in the footsteps of other states, an advisory committee has been appointed to offer non-binding opinions on the correctness of the rule's application in a specific case<sup>8</sup>.

In substantive terms, the conditions for ignoring an arrangement (i.e. ignoring the effectiveness of a transaction or series of transactions) in Poland are similar to solutions that can be found in other countries' GAARs, particularly when considering rules enacted in recent years.

The external form of rules in effect in various countries is diverse: some are brief, or even laconic (Germany, Austria, Spain) while others include accounting regulations that make them expansive, taking up several pages (Ireland, UK, Australia, Poland). In substantive terms, these norms are, however, similar to a certain degree, and the penetration of notions across different legal systems can also be observed. It is clear that the experiences of some States are used in others who are implementing or expanding such regulation.

Rules in force around the world exhibit significant substantive similarity because States implementing or expanding their regulations within this scope draw on models taken from the experiences of other systems. However, there is no universal model yet on which such regulations could be based.

An attempt at creating a normative model general anti-avoidance rule has been undertaken by the European Union.

In Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)<sup>9</sup> the Commission recommended to the Member States the introduction into national tax law systems in respect of corporate income tax a norm of the following wording: 'An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance'. And in 4.1. Preamble: 'To counteract aggressive tax planning practices which fall outside the scope of their specific anti-avoidance rules, Member States should adopt a general anti-abuse rule, adapted to domestic and cross-border situations confined to the Union and situations involving third countries'.

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<sup>8</sup> It is mandatory for tax administration to seek an opinion of the Committee only if the taxpayer asks for it.

<sup>9</sup> C(2012)8806. Recommendation on corporate income tax.

This recommendation was a strong impulse to the commencement of work on the re-implementation of a general anti-avoidance rule into the Polish tax system. The impact of the Recommendation is visible in the draft amendments to the GTA composed by the Ministry of Finance that contains a draft GAAR<sup>10</sup>. The influence of the Recommendation is even more notable in the final shape of the adopted rule, contained in Section IIIA GTA, in force from 15 July 2016.<sup>11</sup>

And so, one of the conditions for ascertaining that a taxpayer is engaged in tax avoidance is, in light of Art. 119a GTA, artificiality in the taxpayer's arrangements – in which we may perceive the inspiration of the Commission's Recommendation of 6 December 2012 (4.2. and 4.4. of the Recommendation). Additionally, the formulation which says the tax benefit in given circumstances would be '(defeat) the object and purpose of tax legislation' clearly refers to the Recommendation, which employs a formula about violating the „object, spirit and purpose of the tax provisions” (4.5. Recommendation). Following the Recommendation, which refers to the 'essential purpose' of arrangements, in Art. 119d GTA an act is considered to be undertaken primarily with the purpose of obtaining a tax benefit when the other economic or commercial purposes indicated by the taxpayer appear to be negligible (4.6 Recommendation).

### COUNCIL DIRECTIVE 2016/1164 OF 12 JULY 2016 (ATAD)

A milestone in the unification of European standards for combating tax avoidance – including at the general level, *id est* through a general anti-avoidance rule – is the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market 2016/1164 of 12 July 2016.<sup>12</sup> The Directive establishes *inter alia* the obligation to introduce a GAAR to the tax systems of the Member States and provides for a model regulation. While the Directive only applies to corporate income tax, considering that income taxes are the primary sphere in which tax avoidance occurs, it is of capital significance

<sup>10</sup> This draft (put on the Government's agenda on 30 December 2014, no. UD 154) was not submitted to the Sejm, but it was a very important step along the path to implementing the rule.

<sup>11</sup> Apart from Poland, the influence of the Recommendation of 6 December 2012 is clearly visible in rules adopted recently in Greece and Italy, see A.P. Dourado, *op. cit.*, p. 14; D. de Carolis, *The Reverberation Effect of the EU Notion of Abuse of Law on the Italian Tax Legal System: Towards an Enhanced Horizontal Interaction Among National General Anti-Abuse Rules?* *Intertax* 2017, no. 2, p. 169 et seq.

<sup>12</sup> The so-called 'ATAD' (The Anti-Tax Avoidance Directive).

to the standardization of GAAR. It should also be added that, in accordance with Art. 3, the Directive sets out a minimum standard – a Member State may thus enact a higher level of protection of the State’s fiscal interests, but the Directive establishes the minimal level of that protection.

In accordance with Art. 11 of the Directive, Member States are obliged to apply the ATAD, including the EU GAAR, with effect from 1 January 2019. Thus, from the present-day perspective ATAD is the key normative model that should be used in comparisons with Polish legislation in effect. While it is true that such a rule is in effect in Poland, the question remains of whether it accurately reflects the model provided for by the Directive. If this is not the case, then national regulation should be adapted to Union requirements.

## POLISH GAAR IN COMPARISON WITH THE GENERAL ASSUMPTIONS UNDERPINNING DIRECTIVE 2016/1164

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Certain doubts can arise as, according to Article 119b of the GTA, the Polish GAAR shall not apply if the tax benefit obtained or intended to be obtained by a taxpayer does not exceed PLN 100,000 (approx. 27,500 USD) during the settlement period, or in the case of taxes that are not settled periodically, if the tax advantage from the arrangement does not exceed PLN 100,000. It should be noted that ATAD does not provide for a minimum threshold below which a State would not be under an obligation to combat tax avoidance. However, we may probably assume that the threshold in the Polish legislation has been set at such a low level that we may consider the Polish legislator to have achieved the objective set by the Directive.

Further on, Recital 11 of the ATAD’s preamble clearly reaffirms the right of Member States to adopt further financial penalties that can be imposed on taxpayers in the event of the rule being applied to them. The result of the rule’s application is then not only to deny tax benefit and the imposition of standard interest for past-due payments, but also applying penalties where the GAAR is applicable. Such additional sanctions have existed for years in the laws of Australia and France, since 2014 in Ireland, and have also recently been introduced in the United Kingdom.<sup>13</sup> Recital 11 of the ATAD’s preamble allows them to be introduced, but does not explicitly encourage them, something poorly reflected in the Polish-language version of

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<sup>13</sup> The penalties are not so great in Ireland, but in the remaining countries they go as high as 80% of the sum of the reduced tax, see D.Fennell, *Finance Act 2014 – New General Anti-Avoidance and Mandatory Reporting Rules: Part 2*, Irish Tax Review 2015, no. 1, p. 54.

the Directive<sup>14</sup>. The wording in the English version is: ‘Member States should not be prevented from applying penalties where the GAAR is applicable’ – and when comparing this with other language versions<sup>15</sup> it can be said that the Directive does not require Member states to introduce such additional sanctions, but only declares that Member States enjoy the freedom to do so if they choose. Poland has not introduced such additional sanctions, and it should be understood that in the light of the Directive it is under no obligation to do so.

Further on, it is indicated in the Recital 11 of the ATAD’s preamble that GAARs are to be applied to tax systems in order ‘to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules’. General anti-avoidance rules thus serve to fill in gaps, but – as has been indicated – they should not inhibit the possibility of applying detailed provisions within the scope of counteractive abuses. The Directive thus sanctions the generally dominant view irrespective of a given legal system that detailed provisions against tax avoidance (SAARs and TAARs) take precedence in application over the general clause<sup>16</sup>. This standard is fully realized in the GTA, whose Art. 119a § 1(5) states that the clause is not to apply ‘if the application of other provisions of tax law allow for action to counter tax avoidance’.

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<sup>14</sup> In Polish: ‘Państwa członkowskie powinny mieć możliwość stosowania kar, w przypadku gdy zastosowanie mają przepisy ogólne przeciw unikaniu opodatkowania’.

<sup>15</sup> ‘Den Mitgliedstaaten sollte es freistehen, in Fällen, in denen die allgemeinen Vorschriften zur Verhinderung von Missbrauch zur Anwendung gelangen, Sanktionen zu verhängen’, ‘Il convient de ne pas empêcher les États membres d’appliquer des sanctions lorsque les clauses anti-abus générales sont applicables’; ‘Agli Stati membri non dovrebbe essere impedito di imporre sanzioni nei casi in cui è applicabile la norma generale antiabuso’; ‘No debería impedirse a los Estados miembros aplicar sanciones cuando sean aplicables dichas normas generales’; ‘Členským státům by v případech, kdy se použijí obecná pravidla proti zneužívání, nemělo být bráněno v uplatňování sankcí’.

<sup>16</sup> The rule performs the function of ‘a tool of last resort’, ‘last resort weapon’, ‘instrument of last resort’, ‘a measure of last resort’ see Tax Avoidance Revisited in the EU BEPS Context, A.P. Dourado (ed.), op.cit., IBFD 2017, p. 66, 70, 76, 197, 358, 453, 488, 692.

NORMATIVE MODEL OF THE RULE AS PROVIDED FOR IN ART. 6 ATAD  
AND ART. 119A GTA

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Art. 6 of the Directive contains the following model rule:

1. *For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.*

2. *For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*

3. *Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.*

In turn, Article 119a GTA holds in §1 that '[a]n act carried out primarily in order to obtain a tax benefit that, in the given circumstances, contradicts the object and purpose of a tax law provision, (...) if the manner of conduct is artificial (tax avoidance)'<sup>17</sup>. As concerns the artificiality mentioned here, pursuant to Art. 119c § 1 'on the basis of the circumstances, it should be concluded that [these arrangements] would not be adopted by a person/entity [pl. *podmiot*] acting reasonably and driven by lawful objectives other than obtaining a tax benefit contradicting the object and purpose of a tax law provision'. The following provision § 2 informs us that such artificiality shall be examined, in particular, by investigating the following characteristic features:

- unjustified splitting of an operation,
- engaging intermediaries without economic reason,
- circularity of an operation,
- the involvement of elements that have the effect of offsetting or cancelling each other,
- economic risk exceeding expected other-than-tax benefits such that it shall be recognised that a taxpayer acting reasonably would not choose this conduct.

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<sup>17</sup> Art. 119a GTA translated by A.Olesińska, A.Zalasiński, *Poland* [in:] *Anti-avoidance measures of general nature and scope – GAAR and other rules*, Cahiers de Droit Fiscal, vol. 103, IFA Seoul Congress 2018.

It should be stated that the Polish rule essentially fulfils the requirements set out by the Directive. The criteria provided for in Art. 119a GTA applied in defining tax avoidance are, in my view, aligned with the criteria set out in Art. 6 ATAD.

However, this issue should be analysed more closely, particularly as concerns one of the conditions for calling arrangements into question – specifically, the purpose of the taxpayer’s actions.

## THE PURPOSE OF OBTAINING A TAX BENEFIT – THE MAIN ONE, OR ONE OF THE MAIN?

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Article 6 of the Directive holds that Member States may ignore an arrangement or series of arrangements if they have been put into place ‘for the main purpose or one of the main purposes’ of their introduction was to obtain a tax benefit defeating the object or purpose of the applicable tax law. The key phrase is thus ‘the main purpose or one of the main purposes’.

Here we should take note of an interesting change introduced by the Directive in comparison to the previous Commission Recommendations of 2012 – this concerns the reference to the purpose of the taxpayer’s acts. The Recommendation held that the rule is aimed at combating acts whose ‘essential purpose’ was tax avoidance. It was then specified in 4.6. of the Recommendation that ‘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’.

Following in the footsteps of the Recommendation, the Polish legislator has declared in Art. 119a § 1 of the GTA that the rule is applicable when the taxpayer has acted ‘primarily’ in order to obtain a tax benefit that, in the given circumstances, contradicts (...)”. In Art. 119d this ‘primarily’ is defined entirely consistent with 4.6. of the Recommendation.

Meanwhile, under Art. 6.1 of the 2016 Directive, arrangements are to be ignored if entered into ‘for the main purpose or one of the main purposes’ of obtaining a tax advantage. Thus, it is neither a ‘primary’ or ‘essential’ purpose, as in the Recommendation, but rather ‘the main purpose or one of the main purposes’. This being the case, the model adopted in the Directive is more pointed in comparison to that provided for in the Recommendation of 2012. As judged from the perspective the tax authority, it seems to be an easier task, to proof a tax avoidance under a new provision, as it is sufficient to demonstrate that ‘main purpose or one of the main



purposes' (Art. 6 ATAD), as opposed to just 'the essential purpose' (Commission Recommendation 2012 and Proposal for a ATAD from 28. January 2016<sup>18</sup>), of the taxpayer was to achieve a tax benefit that, in the given circumstances, contradicts (...). At first glance, it may seem that from the taxpayer's perspective the rule has become more stringent. Even if the tax benefit was not the taxpayer's 'main' purpose, the rule will still apply even if it was 'one of the main' purposes. This norm seems is more far-reaching, voluminous, harsher on the taxpayer.

The question thus arises of whether the conclusion that the model implemented in the Directive is in fact harsher? Does the phrase 'essential purpose' from the 2012 Recommendation correspond with that of the 'main purpose or one of the main purposes' from the 2016 Directive? More importantly, however, the Polish legislator has to answer the question of whether the phrase 'primarily' ('first of all') as applied in Art. 119a § 1 GTA and then defined in Art. 119d GTA is aligned with the phrase from the Directive 'main or one of the main purposes'.

At first glance, it might seem that the formula 'primarily' is narrower in scope than 'main or one of the main purposes'. The formula 'primarily' indicates that this one particular purpose (potentially from among many purposes) can be assigned a dominant meaning, taking precedence over other purposes. This could mean that the premise of the purpose as provided for in the Polish legislation is more restrictive (for the tax authority) than that in the Directive, where the application of the rule is triggered by 'one of the main purposes' being the obtaining of a tax benefit. It may initially seem that the Polish rule is less harsh on the taxpayer – if we look solely at the premise of the purpose. The question arises, however, of whether the Polish rule is too lax on the taxpayer from the perspective of the requirements set out by the Directive. In spite of everything, this seems a doubtful proposition.

Firstly, an assumption of the Directive is to bring to life the notion taken from CJEU case law of abuse of a tax law. While this concept is not uniform and takes many shapes, it would ultimately seem to indicate a quite restrictive and narrow definition of abuse ('wholly artificial arrangement', 'sole purpose', 'principal aim')<sup>19</sup>. In the literature it is indicated that the Court of Justice of the European Union, based on the Merger Directive, has interpreted

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<sup>18</sup> Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Brussels, 28.1.2016, COM(2016) 26 final, 2016/0011 (CNS).

<sup>19</sup> L.de Broe, D.Beckers, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law* (2017) 26 EC Tax Review, Issue 3, p. 141.

‘main purpose’ as ‘sole purpose’, in the sense that other purposes should be ruled ‘marginal, trivial or negligible’<sup>20</sup>. In Explanatory Memorandum from 28. January 2016 has been stated: ‘In compliance with the acquis, the proposed GAAR is designed to reflect the artificiality tests of the CJEU where this is applied within the Union.’<sup>21</sup>. The subject literature contains expressions of hope that the CJEU will continue to follow this interpretative course also on grounds of the ATAD Directive<sup>22</sup>. However, the quoted authors do perceive an uncertainty in this respect, which the Court will need to resolve in the future<sup>23</sup>.

Secondly, it should be noted that in the 16 March 2011 version of the draft Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)<sup>24</sup>, with the common GAAR contained in Art. 80, it is suggested that such a rule be applied to artificial transactions whose ‘sole purpose’ is tax avoidance<sup>25</sup>.

Thirdly, in Art. 7 of the Draft ATAD Directive<sup>26</sup> the rule is to be applied to acts whose ‘essential purpose’ is to achieve a tax benefit (...)’<sup>27</sup>. The change consisting in replacing that phrase with the expression ‘main or one of the main purposes’ appeared at the last possible moment. The preference of the term ‘main purpose or one of main purposes’ over the original ‘essential purpose’ of the directive proposal suggests that the interpretation is meant to be in line with the motive test of the Parent Subsidiary Directive<sup>28</sup> GAAR<sup>29</sup>. It resembles the ‘principal purpose or one of the principal purposes’ in the Merger Directive<sup>30</sup> as well.

<sup>20</sup> Ibidem, p. 142. This is how the authors comment on the ruling in C-126/10 Foggia, §47.

<sup>21</sup> Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Brussels, 28.1.2016, COM(2016) 26 final, 2016/0011 (CNS).

<sup>22</sup> Ibidem, p. 142.

<sup>23</sup> Ibidem, p. 142.

<sup>24</sup> Brussels 2011, 121/4, 2011/0058.

<sup>25</sup> For more on the subject see S.V.Aramayo, *A Common GAAR to Protect the Harmonized Corporate Tax Base: More Chaos in the Labyrinth*, 25(1) EC Tax Review 2016, No. 1, p. 4 et seq.

<sup>26</sup> COM (2016) 26 final.

<sup>27</sup> A GAAR proposed in this document (Article 7): ‘Non-genuine arrangements or a series thereof carried out for the essential purpose of obtaining a tax advantage that defeats the object or purpose of the otherwise applicable tax provisions shall be ignored for the purposes of calculating the corporate tax liability’, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, Brussels, 28.1.2016, COM(2016) 26 final, 2016/0011 (CNS). More broadly A.Navarro, L.Paradda, P.Schwarz, *The Proposal for an EU Anti-avoidance Directive: Some Preliminary Thoughts*, EC Tax Review 2016, no. 3, p. 124.

<sup>28</sup> Council Directive (EU) 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345/8.

<sup>29</sup> See E. Aaltonen, *GAAR of the Anti-Tax Avoidance Directive – Interpretation and Effects on the Finnish GAAR of VML SEC. 28, Helsinki 2017, p. 30*, [https://helda.helsinki.fi/bitstream/handle/10138/219400/Gradu\\_Aaltonen\\_18.7.2017.pdf?sequence=2](https://helda.helsinki.fi/bitstream/handle/10138/219400/Gradu_Aaltonen_18.7.2017.pdf?sequence=2)

<sup>30</sup> Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of

## PURPOSE OF ARRANGEMENTS AS A PREMISE FOR THE APPLICATION OF THE RULE IN LIGHT OF SELECTED EUROPEAN GAARS

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It should be noted that in many European Union Member States, the premise of purpose is worded similarly to in Poland, while not being a literal repetition of Art. 6 ATAD. It is thus either the sole, exclusive, or primary purpose, but (with the exception of the United Kingdom) probably nowhere is the requirement concerning the purpose weakened by the phrase ‘main or one of the main’.

In Austria, the case law has developed a condition that the rule be applied only if the tax purpose observed by the taxpayer was the sole or exclusive one<sup>31</sup>. The presence of another justification precludes the application of the rule, even if the remaining premises are met, that is, even if the arrangement is ‘inappropriate’; the burden of proof as to another justification rests with the taxpayer<sup>32</sup>. In France as well, the rule is applicable only if the tax purpose is the exclusive, sole one (‘the objective of the arrangements could only be the desire to avoid or reduce tax burdens’). In 2014, a proposal was made to change the provision (‘exclusive’, ‘sole’ purpose was to be replaced with ‘principal’)<sup>33</sup>. However, this proposal was called into question by *Conseil d’Etat*<sup>34</sup> on grounds of allowing for excessive discretion and the absence of clear criteria<sup>35</sup>. However, and interestingly, the case law of *Conseil d’Etat* has adopted the understanding that if a purpose can be considered dominant, it should be held as the ‘sole’ purpose, which in turn opens the door to the application of the rule<sup>36</sup>.

In Luxembourg, it has been acknowledged in practice that the rule is applicable if the ‘tax purpose’ is the exclusive one; recent case law, however, has slightly shifted the focus by

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different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009, L310, p. 34).

<sup>31</sup> S.Bergmann, *Austria* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, pp. 152-153.

<sup>32</sup> Ibidem. See also Mirek I., *Kwestia gospodarczego sposobu rozpatrywania prawa podatkowego i nadużycia możliwości kształtowania stosunków prawnych w prawie podatkowym Austrii oraz Szwajcarii i Niemiec*, *Kwartalnik Prawa Podatkowego* 2004, no. 4.

<sup>33</sup> E. R de la Blétière, *op. cit.*, p. 328.

<sup>34</sup> French Supreme Administrative Court, see E. R de la Blétière, *France* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 312.

<sup>35</sup> E. R de la Blétière, *op. cit.*, pp. 328-329.

<sup>36</sup> *Garnier-Choiseul* case of 2013, see E. R de la Blétière, *op. cit.*, pp. 328-329.

holding that for an arrangement to be excluded from the application of the rule, it should deliver another significant economic benefit than merely a tax benefit<sup>37</sup>.

The Italian rule adopted in 1990 initially defined the purpose as 'sole'<sup>38</sup>; this changed in 1997, while under the new rule adopted in 2015, the taxpayer's intentions are of no significance, and there is no reference to purpose<sup>39</sup>. However, the rule only applies if the transaction does not generate any significant effects other than the tax benefit and is deprived of economic sense, in other words, *de facto* if the tax motive is the dominant one<sup>40</sup>.

In Finland, in reference to the objective of obtaining a tax benefit, the norm states that tax purpose must be 'essential'; it must be obvious that the transaction has been undertaken in order to avoid a Finnish tax. The rule is not applicable if real other purposes were present<sup>41</sup>. In Sweden, the rule is applicable only to an arrangement in which the tax motivation is the 'predominant reason'<sup>42</sup>. In Ireland, the rule can be applied if the transaction was not performed for a primary reason other than the tax benefit<sup>43</sup>. The Spanish GAAR is applicable if valid business reasons do not exist<sup>44</sup>.

In Germany, the provision does not make reference to the purpose of the transaction<sup>45</sup>. However, GAAR is not applied if the taxpayer indicated other purposes than tax ones which, in the given circumstances, are significant ('*beachtlich sind*')<sup>46</sup>.

In Greek legislation the purpose is defined as 'essential'<sup>47</sup>, as is the case in Luxembourg<sup>48</sup>, while in the Netherlands it is given as 'dominant' (in the GAAR case law, the doctrine of *fraus*

<sup>37</sup> W. Haslehner, *Luxembourg* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 444.

<sup>38</sup> 'The sole purpose of fraudulently obtaining tax savings', G.Zizzo, *Italy* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 399. See also C.Fornari, *Unikanie opodatowania i nadużycie prawa we włoskim prawie podatkowym*, *Kwartalnik Prawa Podatkowego* 2014, No 3, p. 20-21.

<sup>39</sup> G.Zizzo, *op. cit.*, pp. 400, 403.

<sup>40</sup> *Ibidem*.

<sup>41</sup> R. Immonen, J. Lindgren, *Finland* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 285, 296.

<sup>42</sup> A. Hultqvist, *Sweden* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 678.

<sup>43</sup> Taxes Consolidation Act of 1997, sec. 811: (ii) *the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.*

<sup>44</sup> "Que de su utilización no resulten efectos jurídicos o económicos relevantes, distintos del ahorro fiscal y de los efectos que se hubieran obtenido con los actos o negocios usuales o propios", see also J.M.Lopez, E.G. Garcia, *Spain* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, IBFD 2017, p. 648-649. In the authors' opinion, the GAAR of Art. 15 of the GTA is, in general terms, in line with the provision designed by the ATAD.

<sup>45</sup> See § 42 Abgabenordnung; E. Reimer, *Germany* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 347.

<sup>46</sup> § 42 (2) Abgabenordnung '*Dies gilt nicht, wenn der Steuerpflichtige für die gewählte Gestaltung außersteuerliche Gründe nachweist, die nach dem Gesamtbild der Verhältnisse beachtlich sind.*' See E.Reimer, *op. cit.*, p. 353.

*legis*). The Portuguese rule is applicable to transactions whose primary or sole objective was tax purposes<sup>49</sup>. In the Danish rule there is no requirement that the purpose be the ‘main’ or ‘sole’ one (as has been mentioned, the Danish rule is applicable only to cross-border situations). And while it is not a member of the EU, the rule in Norway is also worth recalling – pursuant to that country’s case law on the practice of combating tax avoidance, it is considered that only the taxpayer’s exclusive tax motivation is sufficient grounds for calling arrangements into question (judiciary GAAR, ‘*court-made*’ GAAR)<sup>50</sup>.

In fact, in Europe probably it is only the UK GAAR that refers to the premise of the purpose in exactly the same manner as Art. 6 ATAD. Article 207 (1) Finance Bill 2013 holds that a tax arrangement is one in which the obtaining of a tax advantage is the main purpose or one of the main purposes<sup>51</sup>. However, only superficially does the British rule apply in a greater scope than those in which the requirement concerning the purpose is more restrictive (judged from the perspective of tax authorities, the requirement is restrictive, while from the perspective of the tax payer it is laxer). The British rule is applied if ‘reasonably assessing’ the conditions for the conclusion or execution of a transaction leads to the conclusion that they cannot be considered a reasonable action. The rule thus contains a strong mechanism limiting its application. The wording of the provision containing the essence of the regulation twice refers to ‘reason’ (‘...cannot reasonably be regarded as a reasonable course of action...’). The phrase ‘double reasonableness test’ is used widespread in texts (not only scholarly) addressing the British rule<sup>52</sup>. In the opinion of the draft’s authors, the use of this ‘double reasonableness test’ is supposed to result in the rule being applied only to artificial activities and ones clearly ‘abusing’ the possibilities provided for by the law (‘artificial and abusive scheme’). In the context of the manner under analysis of how the particular legislation of different European countries refers to the notion of the purpose of an act (transaction), it can be said that this premise is not the one which limits the scope of application of the British rule, and it is not of

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<sup>47</sup> E.Theocharopoulou, Greece [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 389.

<sup>48</sup> Article 344 Code des impôts sur les revenus 1992: ‘...dont le but essentiel est l’obtention de cet avantage’, see also W. Haslehner, *op. cit.* [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 444.

<sup>49</sup> Art. 38 Lei General Tributaria: *essencial ou principalmente*.

<sup>50</sup> B. Folkvord, Norway [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, p. 540.

<sup>51</sup> ‘(...) obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements’.

<sup>52</sup> A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania*, Toruń 2013, p. 239; A. Seely, *Tax avoidance: a General Anti-Abuse Rule*, Library Standard Note: SN6265, House of Commons, 9 May 2013.

key significance for determining the boundaries of the abuse which the rule is intended to prevent.

## FINAL REMARKS

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The reflections that the ATAD has inspired to date in the European literature demonstrate that the national rules in effect in the vast majority of states are considered to be aligned with the model set out in Art. 6 of the Directive<sup>53</sup>, in spite of not literally reflecting the wording of Art. 6 ATAD.

The issue of reviewing GAAR in effect for compliance with the Directive is not only a Polish problem. Rather, we should stay calm and wait for the development of events in Europe instead of engaging in a feverish sharpening of the Polish rule<sup>54</sup>. Time will show how the situation develops in other European Union Member States.

It should also be kept in mind that if the formula 'primarily' in Art. 119a of Tax Ordinance 1997 were to be replaced by a less stringent requirement that the obtaining of a tax advantage be the 'main or one of the main' purpose of the taxpayer, this would mean that the rule becomes more restrictive, narrowing the field for acceptable, permissible tax planning. The tax system thus becomes less taxpayer-friendly, and can thus lead to its being perceived as less attractive by investors than other systems in which the rule may retain its more relaxed form – which cannot be excluded in other European Union Member States.

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<sup>53</sup> A.P.Dourado [in:] *Tax Avoidance Revisited in the EU BEPS Context*, A.P. Dourado (ed.), IBFD 2017, s. 14 ('most EU jurisdictions consider that they will not introduce the new GAAR in article 6 of the ATAD because they see no added value in doing so. Most reported jurisdictions are satisfied with their national GAARs, considering them compatible with the recommended GAAR'). See also A.Linn, T.Braun, *The ATAD and its effect on German Tax Law*, *International Tax Review* 2016, 15. Dec. 2016, ('(...) as Germany has a long-standing GAAR in its domestic tax law (...), based on a principal purpose test, no action should be required in this area') <http://www.internationaltaxreview.com/Article/3647344/The-ATAD-and-its-effect-on-German-tax-law.html> Similar remarks about Finnish GAAR: 'compatibility of the ATAD GAAR with Union primary law will likely be tested regarding the rule's implementation in Member States. As almost all the Member States' tax systems already include a GAAR it remains to be seen whether the statutory rules are amended or whether the lining the interpretation doctrine to correspond with the ECJ is considered as sufficient action. As the Finnish VML Sec. 28 resembles the ATAD GAAR closely, especially in its application, it seems unlikely that any statutory amendments would be made and the differences would be done away in the interpretation of the provision', E.Aaltonen, *GAAR of the Anti-Tax Avoidance Directive – Interpretation and Effects on the Finnish GAAR of VML SEC. 28*, Helsinki 2017, p. 82.

<sup>54</sup> See interesting remarks M.F. de Wilde, *The ATAD's GAAR: A Pandora's Box?* (May 1, 2017). Available at SSRN: <https://ssrn.com/abstract=3040709> or <http://dx.doi.org/10.2139/ssrn.3040709>

So far, the reactions of Member States to the requirements of ATAD concerning GAAR have been restrained<sup>55</sup>. A.P. Dourado in 2017 observed that “most EU jurisdictions consider that they will not introduce the new GAAR in article 6 of the ATAD because they see no added value in doing so. Most reported jurisdictions are satisfied with their national GAARs, considering them compatible with the recommended GAAR”<sup>56</sup>. In my opinion it is rather unlikely that the Member States that currently have GAARs in force will adopt Art. 6 ATAD by reflecting its wording in a very strict way. Taking into consideration all of these observations, it is my conviction that the conclusion that the requirement as to the purpose of the arrangement as provided for by 119a § 1 GTA is inconsistent with the Directive would be hasty and excessive.

## SUMMARY

### Is Polish GAAR Compatible with the Directive 2016/1164 (ATAD)?

Poland has had a GAAR in force since 15 of July 2016. In substantive terms, the conditions for ignoring an arrangement (i.e. ignoring the effectiveness of a transaction or series of transactions) in Poland are similar to solutions that can be found in other countries' GAARs, particularly when considering rules enacted in recent years. Recently an attempt at creating a normative model of GAAR has been undertaken by the European Union. A milestone in the unification of European standards for combating tax avoidance – including at the general level, i.e. through a general anti-avoidance rule – is the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market 2016/1164 of 12 July 2016. The Directive establishes inter alia the obligation to introduce a GAAR to the tax systems of the Member States and provides for a model regulation. In accordance with Art. 11 of the Directive, Member States are obliged to apply the

<sup>55</sup> For example, the Dutch government in 2017 released a consultation document containing a draft bill of law and explanatory memorandum on the EU Anti-Tax Avoidance Directive, which does not include a proposal for a general anti abuse rule ('GAAR') because Dutch tax law already includes the unwritten doctrine of abuse of law (fraus legis). What is more, it has been observed, that GAAR included in ATAD consists of three requirements that should be met to ignore an arrangement or a series of arrangements for the purposes of calculating the tax liability, and the Dutch doctrine of abuse of law includes only two of those requirements. However, according to the legislator, the necessity of valid commercial reasons which reflect economic reality that is part of the GAAR included in ATAD, are also relevant for testing the subjective criterion that is part of the fraus legis doctrine. Furthermore, based on EU case law, a general legal framework that can be interpreted consistent with the respective provision in the directive, suffices for the implementation by a member state of a directive. Finally, it has been concluded, there is no need for making any legislative changes in Dutch tax law (as for the GAAR). See <https://www.stibbe.com/en/news/2017/july/tax-alert-consultation-document-on-implementation-of-atad-released-by-dutch-government> (20.07.2017).

<sup>56</sup> A.P.Dourado, op. cit., p. 14.

ATAD, including the EU GAAR, with effect from 1 January 2019. Thus, from the present-day perspective ATAD is the key normative model that should be used in comparisons with Polish legislation in effect. While it is true that such a rule is in effect in Poland, the question remains of whether it accurately reflects the model provided for by the Directive. It should be stated that the Polish rule essentially fulfils the requirements set out by the Directive. All the criteria provided for in Art. 119a GTA applied in defining tax avoidance are, in the Author's view, aligned with the criteria set out in Art. 6 ATAD.

Certain doubts can arise as, according to Article 119b of the GTA, the Polish GAAR shall not apply if the tax benefit obtained or intended to be obtained by a taxpayer does not exceed PLN 100,000 (approx. 27,500 USD) during the settlement period, or in the case of taxes that are not settled periodically, if the tax advantage from the arrangement does not exceed PLN 100,000. It should be noted that ATAD does not provide for a minimum threshold below which a State would not be under an obligation to combat tax avoidance. However, we may probably assume that the threshold in the Polish legislation has been set at such a low level that we may consider the Polish legislator to have achieved the objective set by the Directive.

Article 6 of the ATAD holds that Member States may ignore an arrangement or series of arrangements if they have been put into place 'for the main purpose or one of the main purposes' to obtain a tax benefit defeating the object or purpose of the applicable tax law. The key phrase is 'the main purpose or one of the main purposes'. Following in the footsteps of the Commission Recommendation 2012, the Polish legislator has declared in Art. 119a § 1 of the GTA that the GAAR is applicable when the taxpayer has acted 'primarily' in order to obtain a tax benefit (...). In Art. 119d GTA 'primarily' is defined entirely consistent with 4.6. of the Commission Recommendation 2012 but the question is, whether Art. 119a GTA is in line with Art. 6 ATAD as well. This issue is analysed more closely. In the Author's opinion, the conclusion that the requirement as to the purpose of the arrangement as provided for by 119a § 1 GTA is incompatible with the Directive would be hasty and excessive.

**Key words:** tax law, tax, general anti-avoidance rule, GAAR, ATAD

**Słowa kluczowe:** prawo podatkowe, podatek, klauzula ogólna przeciwko unikaniu opodatkowania, GAAR, ATAD