ARISTOTLE UNIVERSITY OF THESSALONIKI

Ευρωπαϊκή Ένωση
European Social Fund

Operational Programme
Human Resources Development, Education and Lifelong Learning
Co-financed by Greece and the European Union

ΕΣΠΑ 2014-2020
ανάπτυξη - εργασία - αλληλεγγύη

Jean Monnet Chair
EU Tax Policy & Administration

Co-funded by the Erasmus+ Programme of the European Union

SLS Annual Conference 2021

"The General Anti-Abuse Rule (GAAR) within the context of national public law"

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THE SOCIETY OF LEGAL SCHOLARS

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1/09/2021 - Doctoral Students Parallel Session - Tax Law

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The phenomenon of base erosion and profit shifting

Base erosion and profit shifting refers to tax planning strategies that take advantage of gaps, loopholes and mismatches of the tax laws.

Consequence: Loss of global taxable revenue 2013-2015: 4% - 10% of global corporate tax revenue ($ 100- $ 240 billion per year)

The aim of such strategies is the “disappearance” of income for tax purposes or its shifting to jurisdictions wit low or zero tax rates, where no real economic activity exists.

Result: No company taxation or minimum company taxation

Overview of the BEPS measures in view of the EU law

1. Digital economy

2. Neutralising hybrids
3. Strengthen CFC rules
4. Limit interest / finance deductions
5. Counter harmful tax practices

Establishing international **coherence** of corporate income taxation

6. Prevent treaty abuse
7. Prevent PE avoidance
8. Value creation – intangibles
9. Value creation – risk & capital
10. Value creation – high-risk transactions

Restoring the **full effects and benefits** of international standards

11. Data collection / analysis
12. Disclosure (aggressive tax planning)
13. Transfer pricing documentation
14. Dispute resolution

Ensuring **transparency** while promoting increased certainty and predictability

15. Multilateral instrument

Swift implementation

Anti-Avoidance Package

The Anti-Tax Avoidance Package

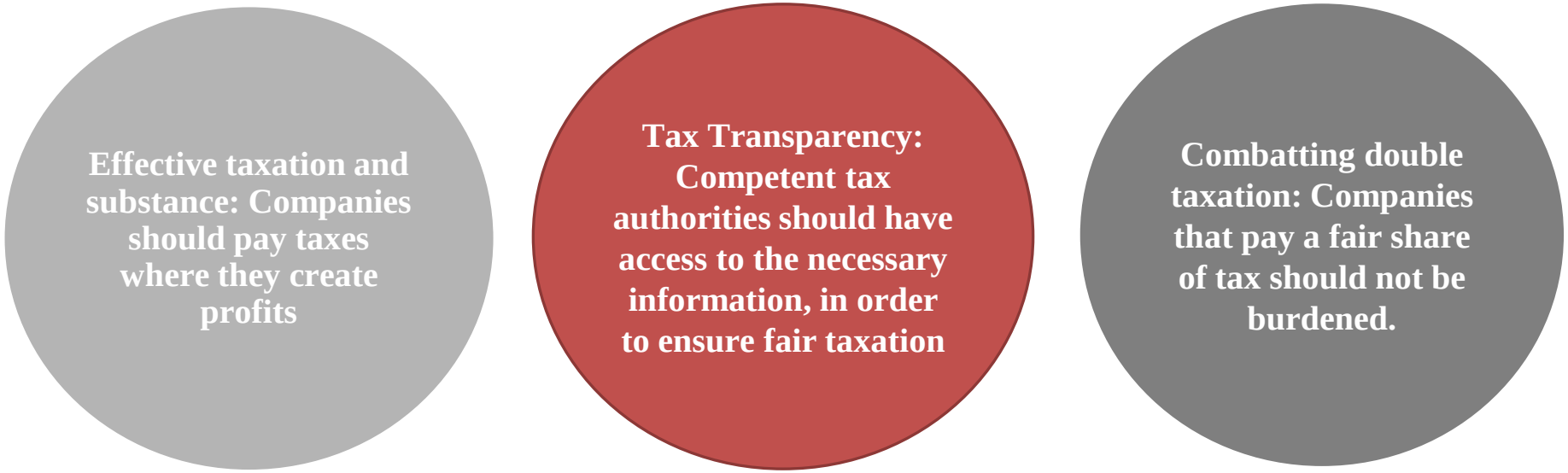
- The Anti Tax Avoidance Package is part of the Commission's ambitious agenda for fairer, simpler and more effective corporate taxation in the EU.
- The Package contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU.
- The Anti-Tax Avoidance Package operates in addition to the OECD BEPS Action on Base Erosion and Profit Shifting.
- It helps Member States take strong and coordinated action against tax avoidance and ensure that companies pay tax wherever they make their profits in the EU.

Anti-Avoidance Package

The Anti-Tax Avoidance Package

The three pillars

- The Anti-Tax Avoidance Package is based upon three pillars:



- The current political priorities in international taxation highlight the need for ensuring that tax is paid where profits and value are generated. It is thus imperative to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty. A key objective of the ATAD is to improve the resilience of the internal market as a whole against cross-border tax avoidance practices. This cannot be sufficiently achieved by the Member States acting individually.

Anti-Avoidance Directive (ATAD)

- On 28 January 2016 the Commission presented its proposal for an Anti-Tax Avoidance Directive as part of the Anti-Tax Avoidance Package.
- On 20 June 2016 the Council adopted the Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
- In order to provide for a comprehensive framework of anti-abuse measures the Commission presented its proposal on 25th October 2016, to complement the existing rule on hybrid mismatches. The rule on hybrid mismatches aims to prevent companies from exploiting national mismatches to avoid taxation.
- The Anti-Tax Avoidance Directive contains five legally-binding anti-abuse measures, which all Member States should apply against common forms of aggressive tax planning.
- Member States should apply these measures as from 1 January 2019.
- It creates a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses.
- Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD 2)

Anti-Avoidance Directive (ATAD)

- The anti-avoidance measures in the Anti-Tax Avoidance Directive (EU) 2016/1164 are:

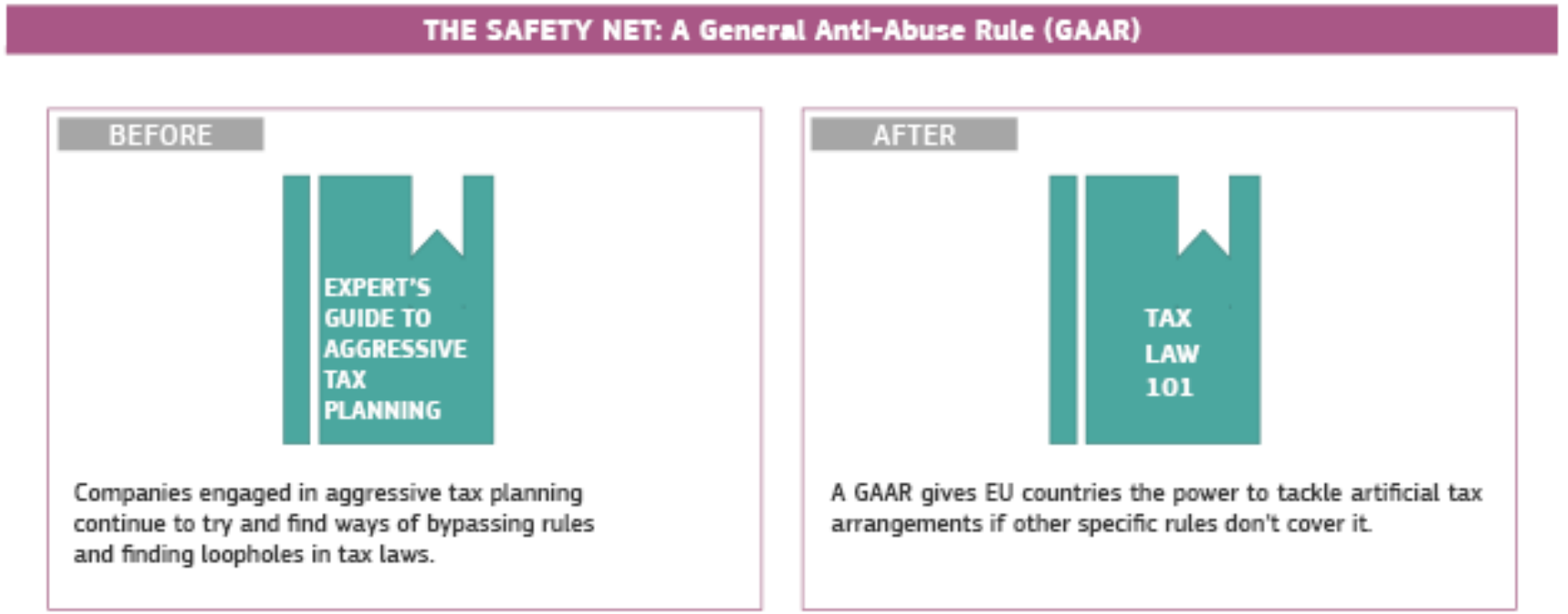
- **Controlled foreign company (CFC) rule**: to deter profit shifting to a low/no tax country.
- **Exit taxation:** to prevent companies from avoiding tax when re-locating assets.
- **Interest limitation:** to discourage artificial debt arrangements designed to minimise taxes.
- **General anti-abuse rule:** to counteract aggressive tax planning when other rules don't apply.
- **Rule on hybrid mismatches:** The rule concerns cases of different legal characterization. The term "hybrid" refers to an entity or instrument that, due to its different treatment in two or more jurisdictions, achieves either a deduction without corresponding taxation or a double deduction of the same expense.

[Switchover rule: to prevent double non-taxation of certain income]

- Minimum level of protection: This Directive shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases.
- As mentioned in the preamble of the Anti-Tax Avoidance Directive, its rules aim to combat cross-border tax avoidance practices and provide for a common framework for the implementation of the results of the OECD BEPS Project in the national tax legislation of the member states in a coordinated manner.

Anti-Avoidance Directive (ATAD)

General anti-abuse rule (Article 6)



Anti-Avoidance Directive (ATAD)

- ✓A General Anti-Tax Abuse Rule is introduced, which allows tax authorities to disregard artificial/non-genuine arrangements and impose a tax on the basis of the economic reality.
- ✓General anti-abuse rules (GAARs) feature in tax systems 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.
- ✓Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs.
- ✓When evaluating whether an arrangement should be regarded as non-genuine, it could be possible for Member States to consider all valid economic reasons, including financial activities.

Aim and scope of the research

- To analyse the Greek GAAR within the frame of the Greek public law (constitutional, administrative and tax law)
- To highlight the mission of the GAAR from a Greek legal order perspective and give solutions to specific problems related to the application and interpretation of the (Greek) GAAR.
- The research will focus, among others, on:
- the interaction of the Greek GAAR with the Greek SAARs
- The interaction of the GAAR with the provisions of DTTs
- The interaction of the GAAR with the general principles of administrative law and human rights
- The impact of the GAAR on the Greek case law of administrative courts

Main hypothesis

The enactment of ATAD and ATAD II as well as the incorporation of a GAAR in the EU legal order mark a significant step towards the integration of national tax legislations of the Member States and the harmonization of corporate taxation within the EU.

The introduction of a GAAR in a national tax system materially affects the whole rationale of it. The insertion of the Greek GAAR marks the differentiation of the philosophy of the whole Greek tax system and its transition from the form-over-substance approach to the substance-over-form approach.

In a legal system such as the Greek one, in the absence of a relevant provision that would confer such jurisdiction and competence on the courts so that they may be able to ignore an arrangement or series of arrangements if they consider them to be artificial, the development of relevant case law would lead to a legal gap, although it could result in the creation of a customary rule of law.

Main arguments/conclusions

- General principles of administrative law, principle of legality, human rights and jurisprudential prohibition of disallowance of business expenses following the application of a purpose test by the courts should be taken into account. The latter seems to be subject to change.
- It should be noted that there is a long-standing and prevailing jurisprudence of the Greek administrative courts, as regards the prohibition of disallowance of business expenses due to expediency reasons, following a respective purpose test, which, however, seems to be also subject to change following the enactment of the Greek GAAR.
- Indeed, it seems inevitable for this case law to gradually change, given that the application of a GAAR entails to a certain degree a purpose test of the respective business expenses as a conditio sine qua non. In other words, such a purpose test seems to be inherent to a GAAR in any case and, therefore, its compatibility with such a case law seems to be questioned.

Main arguments/conclusions

- Questions arise as regards compatibility of GAAR the EU fundamental freedoms as well as the human rights and fundamental freedoms protected by the European Convention on Human Rights (ECHR), such as art. 6, as regards the right to a fair trial and art. 1 of the First Protocol to the ECHR protection of property.
- Legal uncertainty generated by granting wide discretion to tax authorities and courts: need for proper safeguards (panel of experts, tax ruling procedure, detailed administrative guidelines issued by the tax administration, reliance upon CJEU case law)

Main arguments/conclusions

- According to the national (Greek) tax law, in case a DTT contains a Principal Purpose Test ("PPT") provision, such a provision prevails, in comparison to the GAAR and applies exclusively. In any other case, the national GAAR still pplies and the DTT's benefits are not granted.
- Greek GAAR still applies even in case of treaty benefits granted by a DTT, in case no PPT exists in the DTT. The Greek guideline as per the relationship of the internal tax law with the international contractual law is rather innovative. It is not as self-evident as it may seem to be, since, in the Greek legal order, there is a hierarchical relation, according to which international conventions, following their legal ratification, prevail over national law. Contradiction as per the interaction of GAAR with SAARs/TAARs?

Main arguments/conclusions

- According to the national tax law, the GAAR does not apply in case a particular SAAR exists. However, a uniform approach could be selected, according to which even in case of the existence of a particular SAAR, a GAAR could also be implemented as an ultimum refugium, in case an unintentional legislative gap arises and to the extent that such a GAAR covers all loopholes of the law.
- The ATAD sets a minimum level of protection for the internal market, and, thus, the Member States can adopt even stricter anti-avoidance rules, upon their discretion.
- Member states could adopt a stricter and wider interpretational approach. According to this approach, GAARs could still apply in case of unintentional gaps of SAARs or even in case a particular SAAR is sought to be circumvented.

Main arguments/conclusions

- Let's think of a hypothetical example, where no transfer pricing or interest limitation rules exist in a particular state, let's say State X. Could a GAAR fill this gap effectively? Or this could be interpreted in such a way, so that the legislator did not actually intend to include these SAARs in this tax framework and, consequently, the national GAAR should not fill the respective gap?
- Apart from the above, although the Greek transfer pricing provisions explicitly refer to the OECD TP Guidelines as the proper interpretational tool, there are some doubts as per whether the Greek courts could solely depend upon them, in order to disregard a particular transaction (for example a provision of a particular service), in case it seems to be purposeless for an associated party, although it is documented that it is arm's length.
- Maybe such a result could be effected pursuant to the general provision regarding the disallowance of business expenses. However, this could be against the Greek case law on prohibition of a jurisprudential purpose test as regards business expenses.

Main arguments/conclusions

- This is where the GAAR could constitute an additional, subsidiary legal basis for ignoring the tax benefits arising from this particular intercompany transaction.
- The co-existence and parallel adoption of a GAAR (as a rule of last resort) and SAARs/TAARs for "high risk" tax areas could potentially lead to an effective grid of fuller protection against the phenomenon of tax abuse and circumvention of tax law, despite the inherent disadvantages of the multiplicity and overlapping that may arise. Proper safeguards should be used, in this respect.

Το υλικό αυτό περιέχει αποκλειστικά και μόνο γενικές πληροφορίες και η έδρα Jean Monnet στην Ευρωπαϊκή Φορολογική Πολιτική και Διοίκηση του Αριστοτελείου Πανεπιστημίου Θεσσαλονίκης δεν δύναται να εκληφθεί ότι δι' αυτού παρέχει συμβουλές ή υπηρεσίες. Ως εκ τούτου, προτείνουμε ότι οι αναγνώστες θα πρέπει να αναζητήσουν εξειδικευμένες συμβουλές σχετικά με κάθε ειδικό πρόβλημα που αντιμετωπίζουν. Η έδρα Jean Monnet στην Ευρωπαϊκή Φορολογική Πολιτική και Διοίκηση του Αριστοτελείου Πανεπιστημίου Θεσσαλονίκης δεν αποδέχεται ευθύνη για οιαδήποτε ζημία υποστεί οποιοσδήποτε που βασίσθηκε στο παρόν. Το εν λόγω υλικό απηχεί αποκλειστικά την άποψη των συγγραφέων και σε καμία περίπτωση της Ευρωπαϊκής Επιτροπής ή του Education, Audiovisual and Culture Executive Agency, τα οποία δεν ευθύνονται για οποιαδήποτε τυχόν χρήση των περιεχόμενων πληροφοριών.

Στην Έδρα Jean Monnet σεβόμαστε την ιδιωτικότητά σας και δεσμευόμαστε να διασφαλίζουμε το απόρρητο και την εμπιστευτικότητα των προσωπικών σας δεδομένων. Σε συμμόρφωση με τον Γενικό Κανονισμό για την Προστασία Δεδομένων Προσωπικού Χαρακτήρα (679/2016/ΕΕ - GDPR), χρειαζόμαστε τη συναίνεσή σας για να σας ενημερώνουμε για τις δραστηριότητες της Έδρας και να σας προσκαλούμε σε εκδηλώσεις, ομιλίες και συνέδρια που διοργανώνει. Μπορείτε να ανακαλέσετε οποτεδήποτε την παραπάνω συναίνεσή σας, καθώς και να ασκήσετε τα δικαιώματα που σας παρέχει η σχετική με τα προσωπικά δεδομένα νομοθεσία.

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