Belgium

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Summary and conclusions

In Belgium, the taxpayer's right to choose the least taxed route is assured by two principles: (i) the constitutional principle of legality of tax, providing that taxes can only be introduced by a law, and (ii) the principle that tax law is governed by private law. Consequently, there is no room for judge-made anti-avoidance doctrines or concepts. Tax avoidance can only be prevented on the basis of a legal provision. SAARs and GAARs therefore must be provided by the law.

In 1993, Belgium introduced a legal GAAR in article 344, §1 BITC, which was generally considered to be ineffective because the tax administration was only allowed to substitute the legal characterisation of an act or a series of acts with an alternative legal characterisation insofar as the latter had similar legal consequences as the former. This requirement rendered the original GAAR virtually inoperable.

In 2012, the aforementioned GAAR was completely redrafted. The new version is clearly inspired by the CJEU case law prohibiting abusive practices: it introduces the concept of tax abuse which contains an objective and a subjective element. Tax abuse occurs when a taxpayer realises a 'transaction' whereby he/she obtains a tax advantage counter to the purpose of a provision of the income tax code (objective element) and whereby the essential goal is the obtaining of this advantage (subjective element). However, when the taxpayer proves that the legal act or series of legal acts is justified for non-tax reasons, then the GAAR will not apply. It can be concluded, therefore, that the obtaining of the tax advantage must be the exclusive goal. If the taxpayer does not provide such counter-evidence, then the taxable base and the calculation of the tax will be restored in such a way that the transaction will be subject to taxation in accordance with the purpose of the law as if the tax abuse had not taken place.

Given the recent introduction of this new GAAR, there is no case law available yet, except for the judgement of the Constitutional Court, which finds that the new article 344, §1 BITC respects the principle of legality if it is applied within certain boundaries. Essential to this understanding is that the purpose of the frustrated provision of the BITC should be sufficiently clear.

The preparatory works of the law introducing the GAAR and the administrative guidelines offer only limited guidance because they contain some inconsistencies, which are primarily due to the fact that the GAAR provision itself appears to be an imperfect compilation of different draft versions. Finally, guidance is offered by the detailed opinions of commentators who, nonetheless, diverge from one another on some points as a result of the ambiguity of the provision itself.

Notwithstanding this criticism and the lack of clarity on some points, it is clear that the introduction of the concept of tax abuse represents a large step forward towards a more

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effective GAAR provision (compared with the former version). And yet, in light of recent international trends on BEPS, and more specifically the GAAR contained in the EU ATAD, the domestic GAAR risks lagging behind as a result of its more restrictive wording. For example, the domestic GAAR will apply only to 'legal acts' that have the tax advantage as their 'exclusive' goal, whereas the ATAD GAAR targets 'arrangements' whose 'main purpose or one of whose main purposes' is to obtain a tax advantage. This leads to the conclusion that the transposition of the ATAD GAAR in Belgian domestic tax law by 31 December 2018 will require amendments to article 344, §1 BITC or at least the introduction of a new GAAR in the context of corporate income tax.

For the application of DTTs, it should be noted that the tax administration traditionally takes the view that no provision of the DTT can prevent the application of a domestic anti-avoidance provision. Belgian commentators, however, have developed a more nuanced approach that limits the number of cases in which the domestic GAAR could be applied to combat tax avoidance in the context of a DTT. Yet it can be expected that, in the future, there will be fewer conflicts given the fact that since 2007 Belgium has systematically endeavoured to introduce a GAAR provision in the DTTs it negotiates and because, through the MLI, the PPT will find its way into a large number of Belgian DTTs. Consequently, it can be expected that the GAARs in DTTs will become increasingly more important and will prevail over the domestic GAARs, considering that Belgium accepts the supremacy of international law.

1. General Anti-Avoidance Rules or Doctrines

1.1. General overview

1.1.1. Domestic GAAR

The Program Law of 29 March 2012 introduced a new domestic GAAR in article 344, §1 of the Belgian Income Tax Code 1992 (BITC).[2] This statutory GAAR introduces the concept of "tax abuse" into Belgian tax law. Its wording was clearly inspired by the Court of Justice of the European Union (CJEU) case law prohibiting abusive practices, which has a long history, dating back to the 1970s[3] and which (Belgian) policymakers in 2012 could not ignore, considering that in 2006 the CJEU first formulated and confirmed the prohibition of abusive practices in the field of VAT in the Halifax case[4] and subsequently in the field of direct taxation in the Cadbury Schweppes case.[5]

2 BSG (Belgian State Gazette, called *Belgisch Staatsblad/Moniteur Belge*) 6 April 2012, 3rd edition.

3 The *Van Binsbergen* case (CJEU 03 December 1974, 33/74) – even though it does not expressly refer to the notion of abusive practices – is generally mentioned as the first case in which the Court was confronted with a possible abuse of European Community law.

4 CJEU 21 February 2016, C-255/02, *Halifax*.

5 CJEU 12 September 2016, C-196/04, *Cadbury Schweppes*. See Preparatory works of the Program Law of 29 March 2012 (hereinafter: "Preparatory works"), session 2011-12, DOC 53 2081/001, 110-111, which also cite the 2010 analysis of this EU case law by L. DE BROE (in "Fraudebestrijding en charter van de belastingplichtige: noodzakelijk een paradox?", *TFR* 2010, nr. 379-380, 344).

The Halifax case led to the adoption of a GAAR in the Belgian VAT Code as early as 20 July 2006.[6] It took, however, six more years to introduce a GAAR into the BITC, which reads as follows:

"*Not enforceable towards the [tax] administration is the legal act or the series of legal acts leading to the same transaction when the administration demonstrates, by presumptions or by other means of proof [accepted in the tax code] and on the basis of objective circumstances, that tax abuse occurs.*"

"*Tax abuse occurs when the taxpayer, by means of performing a legal act or a series of legal acts, realises one of the following transactions:*

a transaction whereby the taxpayer places himself, contrary to the purpose of a provision of the [BITC] or the decrees adopted in execution thereof, outside the scope of such provision; or

a transaction whereby a tax advantage offered by the present Code, or the decrees adopted in execution thereof, is claimed while obtaining this advantage would be contrary to the purpose of this provision, and where the essential goal is the obtaining of this advantage."

"*The taxpayer must prove that the choice for his legal act or series of legal acts is justified by other reasons than the avoidance of income taxes.*

If the taxpayer does not provide proof to the contrary, then the taxable base and the calculation of the tax will be restored in such a way that the transaction will be subject to taxation in accordance with the purpose of the law as if the tax abuse had not taken place." (unofficial translation)

Interestingly the former GAAR (i.e. the previous version of art. 344, §1 BITC that had been introduced in 1993)[7] was generally considered to be ineffective. This was primarily due to the fact that the result of the former GAAR was the unenforceability, not of the transaction itself, but only of the legal characterisation as determined by the taxpayer. Consequently, under the former GAAR, the tax administration could not disregard the transaction itself: it had to provide an alternative legal characterisation of the same transaction, but with identical or at least similar legal (non-tax) effects as the original characterisation given by the taxpayer.[8] If the administration succeeded, the taxpayer would undergo the taxation that was proper to the administration's alternative characterisation of the transaction, unless the taxpayer's characterisation was justified by legitimate needs of a financial or economic nature. Belgian courts were rather reluctant to accept that alternative characterisations met these standards of identicalness or similarity. For example, the Belgian Supreme Court (Cour de Cassation) decided that the following transactions do not have sufficiently similar effects: redemption of shares and dividend distribution, or lease and usufruct.[9] This rendered the application of the former GAAR not easily workable in practice,[10] but it did not totally prevent its application either[11].

[6] Art. 18 of the Program law published in the BSG 28 July 2006, 2nd edition introduced the GAAR in article 1,§10 of the VAT Code.

[7] Law of 22 July 1993, BSG 26 July 1993 (replacing the publication on 24 July 1993). For a general analysis of the former GAAR, see also: D. GARABEDIAN, *Cahiers de droit fiscal international*, vol. 87a, 2002, 157-165.

[8] Cass. 4 November 2005, *FJF*, no. 2006/21 and 22 November 2007, *FJF*, no. 2008/140.

[9] *Ibidem*.

[10] Preparatory works, 109-110.

[11] The constitutionality of the former GAAR was accepted by the CC within certain boundaries set by the principles of legality and equality (CC, 24 November 2004, no. 188/2004; 2 February 2005, no. 26/2005 and 16 March 2005, no. 60/2005). Furthermore, the applicability of the former GAAR was accepted in the following cases: Cass. 21 April 2005, *Pas.* 2005, 914; Cass. 11 December 2008, *TRV* 2009, 311 and 10 June 2010 (F.08.0067.N/4).

1.1.2. GAARs in Belgian DTT's

Belgium does not have a long-standing tradition of including GAARs in its Double Taxation Treaties (DTT's).[12] In summary, since the 1980s, Belgium has taken the view that no provision of a DTT could prevent the application of a domestic anti-avoidance provision. This view was reinforced by the changes to the 2003 OECD Commentary (Art. 1 §7), which clarified that a guiding principle of tax treaties is the prevention of tax avoidance and evasion.[13] Consequently, Belgium would combat tax avoidance in a treaty context through its domestic anti-avoidance provisions (see also points 1.5.1.4 and 1.6.1 below).[14]

A treaty GAAR was not introduced until the June 2007 version of the Belgian Model Tax Convention was released. This GAAR was further refined in the June 2010 version of the Belgian Model, in which article 27(3) reads as follows: "*Notwithstanding the other provisions of the Convention, the benefits of the Convention shall not apply if income is paid or derived in connection with an artificial arrangement.*" Consequently, Belgium's most recent DTTs almost systematically include this GAAR,[15] unless the other treaty party has requested another anti-avoidance clause such as a 'Limitation on benefits-clause'.[16]

1.1.3. MLI and ATAD

More recently, GAARs were included in tax policy developments to which Belgium has been subject at the EU and OECD levels. Firstly, a GAAR was included in the EU Anti-Tax Avoidance Directive (ATAD),[17] which, as with all EU Member States, must be transposed into Belgian law by 31 December 2018.

At the OECD level, a GAAR was introduced in the form of the Principal Purpose Test (PPT) included in the OECD's Multilateral Convention (also called the Multilateral Instrument or the MLI). The MLI, which Belgium signed along with the first group of signatories on 7 June 2017, provided an option for each signatory to choose from a range of choices: a treaty-based GAAR, namely the PPT, the simplified limitation on benefits (simplified LOB) clause, and the limitation on benefits (LOB) clause.[18] The PPT is the low watermark and most countries chose it. Belgium plans to apply the PPT to all treaties to which it will apply the MLI and will not implement either of the higher standards through the MLI. In all, Belgium's selections have the potential to change around 100 of its treaties, though Belgium decided not to alter

12 For a detailed and nuanced overview of this history, see L. DE BROE, "Het gebruik van de algemene antimisbruikbepaling (artikel 344, §1 WIB 1992) voor het voorkomen van misbruik van de Belgische dubbelbelastingverdragen", in C. Docclo (ed.), IFA Alabaster 1938-2013, Anthemis, 2013, (125) 127-130, and L. DE BROE, *International Tax Planning and Prevention of Abuse*, IBFD, 2008, 231 *et seq*.

13 See Com. Conv. 28/17, 9/3 and 5; Belgian Tax Authorities, *Introduction to the general commentary on the conventions for the avoidance of double taxation on income and on capital*, 11.

14 L. DE BROE, "Het gebruik van de algemene antimisbruikbepaling (artikel 344, §1 WIB 1992) voor het voorkomen van misbruik van de Belgische dubbelbelastingverdragen", in *o.c.*, (125) 129, nr. 6.

15 *Ibidem*, 129 and 131, nr. 6 and 10. For recent cases with such a self-standing treaty GAAR, see for example Taiwan (2004) and – not yet in force – Macao (2006) and Poland (Protocol 2014).

16 Typical examples include the DTT with Canada, Switzerland and the USA.

17 Art. 6 of Council Directive (EU) 2016/1164 of 12 July 2016.

18 See Art. 7 of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

certain key treaties (Germany, Japan, the Netherlands, Norway and Switzerland).[19]

In accordance with the guidelines for the national reports and because there will be a separate report on both the ATAD GAAR and the GAARs under the MLI, hereinafter only the most noteworthy differences or similarities, in light of the Belgian domestic GAAR, are highlighted without conducting a full analysis of these supranational GAARs.

1.1.4. Domestic SAARs

In addition to the GAAR, the BITC contains a variety of Specific Anti-Avoidance Rules (SAAR). Commenting on all of them in detail falls outside the scope of the present report.[20]

SAARs follow a series of broad categories. Firstly, there are SAARs with an essentially domestic focus.[21]

Secondly, other SAARs could be categorized as more or less typical measures that can also have an effect on international transactions and variations of which exist in many jurisdictions, such as provisions regarding transfer pricing adjustments,[22] controlled foreign companies (CFC),[23] disallowance of expenses,[24] thin capitalisation,[25] etc. These typical SAARs (of the first and the second category) are similar in that each of them identifies a specific way in which taxation is avoided and then provides a proper remedy to the identified avoidance. A typical example could be the refusal of the participation exemption for dividends received from low-tax jurisdictions.[26]

Thirdly, there is a (newer) category of SAARs that – contrary to those of the previous category – do not precisely determine how a given tax provision should be avoided or abused in order for the remedy to become effective. They simply state that the benefits of a certain provision will not be granted in cases involving what the concerned SAAR generically considers to be avoidance. A typical example is the recently introduced (on 1 December 2016) article 203, §1, 7° BITC which transposes the SAAR of article 1(2) of the Parent-Subsidiary Directive (PSD).[27] Another example of this type of SAAR, dating from 2008, is the one related to the tax neutrality regime for corporate restructuring operations.[28]

19 See Art. 2, Kingdom of Belgium MLI Position as of 17 August 2017. Available online at: http://www.oecd.org/tax/treaties/beps-mli-position-belgium.pdf.

20 For a more detailed overview, see M. BOURGEOIS and E. TRAVERSA, *Cahiers de droit fiscal international*, vol. 95a, 2010, 129-137.

21 For example, subject to conditions, recharacterisation of real estate rental income as director's income (art. 32, §2, 3° BITC).

22 Art. 26, 54-56, 79, 185, §2 and 207 BITC.

23 Belgium may not have a CFC-rule, but it does have CFC-like measures (art. 344, §2 BITC, and – in a personal income tax context – art. 2, § 1, 13° and its specific GAAR in art. 344/1 BITC).

24 Art. 49, 54, etc. BITC.

25 Art. 18, §2 and 198, 11° BITC.

26 Art. 203, § 1, 1° BITC.

27 COUNCIL DIRECTIVE (EU) 2015/121 of 27 January 2015, amending the PSD (i.e. Directive 2011/96/EU).

28 Art. 183bis BITC.

1.2. The tax avoidance scheme, arrangement or transaction

1.2.1. Domestic GAAR

The Belgian GAAR targets tax abuse (fiscaal misbruik/abus fiscal). Tax abuse occurs when a taxpayer realises a 'transaction' whereby, contrary to the purpose of the concerned provision, he/she (i) avoids taxation by putting himself/herself outside the scope of a (taxing) provision or (ii) claims a tax advantage by putting himself/herself within the scope of a (tax reducing/exempting) provision, and the essential goal of which is to obtain this advantage.

The legal definition of tax abuse therefore does not expressly rely on vague notions such as artificiality or abnormality. The characteristics of a transaction that constitutes an abuse are essentially determined by referring to the tax advantage – also called the 'objective element' of tax abuse – and to the intention of the taxpayer – also called the 'subjective element' of tax abuse. Both elements will be discussed separately below (points 1.3 and 1.4 respectively).

The key element in the definition of tax abuse is the term 'transaction' itself. According to article 344, §1 BITC, the taxpayer realises a transaction by performing a legal act or a series of legal acts.

A legal act is an act that is realised willingly with a view to generating legal consequences[29] (e.g. an agreement, the creation of a corporation, etc.). This terminology was chosen deliberately to prevent the GAAR from being applicable to mere facts or situations whose legal consequences – if any – were not the purpose of the act that lay at their origin (e.g. a delocalization of activities, a person's birth or death, etc.).[30]

A series of legal acts that leads to the same transaction are also targeted by the GAAR. This is to prevent taxpayers from being able to place themselves outside the scope of the GAAR by artificially splitting up one transaction into a series of acts over a longer period of time.[31] There is no limitation as to the acceptable period of time between the legal acts. A single transaction (targeted by the GAAR) could thus span periods longer than one fiscal year, provided that the tax administration can demonstrate that the transaction has a single intent at its origin which unifies all its constitutive legal acts. More specifically, the tax administration will need to demonstrate that, from the very first legal act, there was an intent to generate an indivisible series of acts. Proof for this indivisibility can be found in the fact that there is no meaning to be given to one or more acts other than the pursuit of tax avoidance.[32] For example, if party A could sell assets directly to party B, but he decides to split this transaction up into a presumptive more tax-efficient contribution of those assets to a company, followed by the sale of the company's shares to party B (who subsequently

29 H. DE PAGE, *Traité élémentaire de droit civil belge*, I, Brussels, Bruylant, 1939, no. 17.

30 L. DE BROE, "Fraudebestrijding en charter van de belastingplichtige: noodzakelijk een paradox?", *TFR* 2010, no. 379-380, 344.

31 Preparatory works, 113 as repeated in Circular letter (hereafter "Circular letter") AFZ no. 3/2012, 4 May 2012, point C.1.2.1. This part is recycled from the former version of the GAAR provision which, in its turn, was inspired by the British 'step by step' doctrine developed by the House of Lords, which targets 'separate acts that, taken together, realise the same operation' (See Parl.Doc., Chambre, 1992-93, no. 1072/8, 101. See also D. GARABEDIAN, "La nouvelle règle fiscale anti-abus et les 'ensembles d'actes juridiques réalisant une même opération'", in C. Docclo (ed.), IFA Alabaster 1938-2013, Anthemis, 2013, (443) 447, pt. 3 *et seq*.).

32 D. GARABEDIAN, *ibidem*, (443) 447, pt. 5.

liquidates the company in order to get hold of the assets), then one may be in the presence of one and the same transaction that was artificially split up in a series of legal acts for the reason of tax avoidance. Conversely, if there is no artificial split-up of a transaction, but there are just alternative steps to be taken to come to the same result, then there is no series of legal acts that leads to the same transaction. Professor Garabedian gives the example of a private individual selling shares of Company Z to Company A, which will subsequently merge with Company Z. Under Belgian tax law, this is more favourable (thanks to the exemption for capital gains on shares) than the equivalent alternative, whereby Company Z first sells all of its assets to Company A, after which the private shareholder decides to liquidate Company A. Regardless which of these alternatives is chosen, two steps are required to come to an identical result. Under such circumstances, one cannot argue that one and the same transaction has been artificially split into two steps with a view to avoid taxes. Consequently, there is no series of legal acts that constitute the same transaction (which leads to tax abuse).

Finally, the transaction needs to be realized by the taxpayer himself. This suggests that it would not be possible to use the GAAR vis-à-vis a taxpayer who was implicated in a transaction that forms a tax abuse, but that he did not realize (see also 1.5.1.2 below).

1.2.2. Treaty GAAR

The GAAR of the 2010 Belgian Model Convention is very brief in its description of the targeted tax avoidance scheme. It applies in cases involving an artificial arrangement, which leaves ample room for interpretation and discussions.

1.2.3. MLI and ATAD

The technical nature of the terminology "legal act or series of legal acts" used in the domestic GAAR, which narrows its scope, is in great contrast with the rather open-ended description of the avoidance scheme in the PPT of the MLI and in the ATAD GAAR.

The PPT describes the targeted tax avoidance scheme as *"any arrangement or transaction"*.

The ATAD refers to *"an arrangement or a series of arrangements"* whereby *"an arrangement may comprise more than one step or part"*. It seems from the use of the term 'arrangement' that the ATAD targets a wider range of situations or factual constellations than does the domestic GAAR. It can therefore be expected that the domestic GAAR will not suffice in order to have the ATAD GAAR transposed in Belgian tax law.

Another remarkable difference with the Belgian domestic GAAR is that the ATAD GAAR makes no reference to the taxpayer who is the author of the arrangement.

The ATAD GAAR itself does not expressly refer to tax avoidance, but the provision concerned (i.e. article 6 of the ATAD) bears the title "General anti-abuse rule". Perfectly in line with the tax abuse doctrine, the GAAR provision does have an objective element and a subjective element. Both elements will be discussed below (under 1.3 and 1.4).

1.2.4. Domestic SAAR

Since a SAAR is intended to target a specific type of tax avoidance, most domestic SAARs will

provide a detailed description of the targeted arrangements or situations.

A (newer) category of SAARs (see 1.1.4) does not contain a reference to a specific tax avoidance technique or situation. Instead, such SAARs will aim to combat tax avoidance that is related to a specific provision more generically, without defining the specific situations or arrangements that should be targeted. In this respect, this type of SAAR is akin to GAARs (and is largely inspired by the CJEU's case law on tax avoidance[33]). As a typical example of this, we mentioned the transposition of what is often referred to as the "GAAR" of PSD in Belgian law. It denies the advantages of the PSD (i.e. participation exemption for dividends received by a parent company and exemption from dividend withholding tax) for dividends that are distributed in the context of a legal act or a series of legal acts which the tax administration demonstrates to be artificial and to have been effectuated to obtain the exemptions concerned as its principal or one of its principal purposes.[34]

1.3. The tax benefit, gain or advantage

1.3.1. Domestic GAAR

The GAAR provision refers to the tax advantage, i.e. the objective element of tax abuse, in both a negative and a positive way.

Stated negatively, the advantage consists of the avoidance of a taxing provision. More precisely, the taxpayer places itself outside the scope of a taxing provision of the BITC (or the decrees adopted in execution thereof) even though this is contrary to the purpose of this provision. As a result, the taxing provision is not applied. Phrased positively, the taxpayer obtains an advantage offered by the application of a relief provision of the BITC (or the decrees adopted in execution thereof), even though the obtaining of this advantage is contrary to the purpose of this provision. This is the case for instance when the taxpayer benefits from a specific tax exemption or tax reduction in a situation for which the exemption or reduction was not intended to be available.

The scope of the GAAR in the BITC is restricted to income tax advantages in relation to provisions of the BITC (or the decrees adopted in execution thereof). Consequently, tax advantages resulting from an abuse of provisions in other tax codes cannot give rise to tax abuse for Belgian income tax purposes (unless of course the transaction would also result in income tax advantages) and vice versa. Such tax abuse will be targeted by the GAARs in the respective tax codes (such as article 1, §10 of the VAT code or the federal and regional codes for registration taxes or death taxes). Furthermore, by referring only to the provisions of the BITC, it follows that a tax advantage that is obtained only on the basis of an abusive application of a DTT should not constitute a tax advantage covered by the GAAR either.

A number of commentators posit that this wording implies a codification of the principle

[33] With regard to the PSD SAAR, see K. MORBEE, "Economische realiteit", *T.F.R.* 2015, no. 474, 59-60, who also refers to the delicate balance between the concepts of such SAARs and the principles to be derived from the CJEU case law (such as the *Cadbury Schweppes* case).

[34] Art. 203, §1, 7° BITC and article 266 *in fine* BITC.

of the doctrine on fraus legis (fraude à la loi).[35] The most important reasons are that the new GAAR was inspired by a proposal made by Professor De Broe, who situated his proposal in the framework of fraus legis[36], and the fact that the GAAR itself and the preparatory works[37] use expressions akin to those used in the Dutch fraus legis doctrine by referring to situations in which a taxpayer has come so close to a situation that is taxable that, in light of the object and purpose of the concerned tax provision, his/her situation should also be taxable. Other commentators do not share this view.[38] Professor Haelterman expressed his concerns as to the possibility that the GAAR would give a wild card to the tax administration to replace the actual set of facts by any other set of facts as it may deem fit.[39] If this really is the case, then the GAAR risks being unconstitutional. Article 170, §1 of the Belgian Constitution upholds the principle of legality in tax law, reifying it in the expression 'no taxation without representation'. Accordingly, only a law can establish the essential elements of a tax, whereby the essential elements include the taxpayer, the taxable matter, the taxable amount, the tax rate and any tax exemptions or reductions.[40]

On 30 October 2013, the Belgian Constitutional Court (CC) seems to have closed the discussion above, as it ruled – in the only case relating to the new GAAR that has been brought before a Court so far – that article 344, §1 BITC does not violate the principle of legality. The Court found sufficient elements in the preparatory works to ascertain that the GAAR does not allow the tax administration to determine what should be the taxable matter. According to the Court, the GAAR is merely a legal means of proof that helps the tax administration to factually establish the taxable amount in an individual case. The GAAR provision therefore does not affect the legally established taxable amount or tax rate.[41]

Furthermore, the definition of the objective element of the tax abuse in article 344, §1 BITC offers the CC further reassurance that the GAAR does not give a wild card to the tax administration to unilaterally establish what the taxable matter should be in a given situation. The Court emphasises the importance of the requirement that the obtaining of the tax advantage should be "contrary" and not simply "strange" to the purpose of the provision concerned.[42] This should indeed guarantee that the tax administration cannot use the GAAR as a pretext to levy taxes under circumstances that were not envisaged by the tax code. The GAAR should thus not be seen as an opening to apply tax provisions by analogy.

The above, however, presupposes that the purpose of the provisions concerned is sufficiently clear. If such is not the case, then, as stated, the application of the GAAR would be unconstitutional. The CC clarifies that the purpose of a provision should clearly be evident

35 L. DE BROE and J. BOSSUYT, "Interpretatie en toepassing van de algemene antimisbruikbepalingen in de inkomstenbelasting, registratie- en successierechten", *AFT* 2012, no. 11, (4) 7, no. 10; see also Br. PEETERS, "De algemene fiscale antimisbruikbepalingen. Een commentaar in het licht van de rechtspraak van het Grondwettelijk Hof", *A.F.T.* 2014/5, 20 & 34; S. VAN CROMBRUGGE, "Fraus legis of wetsontduiking in het Belgisch fiscaal recht anno 2012", *T.R.V.* 2012, 540.

36 L. DE BROE , "Fraudebestrijding en charter van de belastingplichtige: noodzakelijk een paradox?", *TFR* 2010, no. 379-380, 338-339.

37 Preparatory works, 111 and DOC 53 2081/016, 69.

38 D. GARABEDIAN, "La nouvelle règle fiscale anti-abus et les 'ensembles d'actes juridiques réalisant une même opération'", in *o.c.*, 452, footnote 42.

39 A. HAELTERMAN, "De doelstellingen van de fiscale bepaling bij de organisatie van privévermogen en het gebruik van de management- en patrimoniumvennootschap", *TFR* 2012, 757.

40 CC, 30 October 2013, n° 141/2013, B.18.

41 *Ibidem* B.15 and B.20.4.

42 *Ibidem*, B.21.1.

from the wording of the provision itself (in which case no further interpretation is required – interpretatio cessat in claris) and from the preparatory documents.[43] In this respect, the tax administration will have to take into account the general context of the relevant tax legislation, the (market) practices at the time the tax provision concerned took effect, as well as any SAARs that may prevent the abuse of the provision concerned.[44] In light of these considerations, it seems needless to say that an earlier assertion by the Minister of Finance (MoF) that tax statutes are charging provisions aimed at collecting public funds[45] cannot seriously be used as a general credo to define the purpose of all the provisions of the tax code.

1.3.2. Treaty GAAR

The GAAR of the 2010 Belgian Model Convention merely refers to the benefits of the DTT. It is not expressly stated that such benefits should be obtained contrary to the object or purpose of a given provision of the DTT, but the provision does specify that the benefits of the DTT may be denied if they are claimed in connection with an artificial arrangement.

1.3.3. MLI and ATAD

Both the PPT of the MLI and the ATAD GAAR relate to a tax benefit that is obtained contrary to the object or purpose of the relevant treaty provisions and respective tax laws.

Quite remarkably, the PPT can apply as soon as it is reasonable to conclude that obtaining the benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit. It seems to include the subjective element in the definition of the targeted tax benefit, while the object and purpose of the relevant treaty provision seem to function more like forms of counter-evidence (because the benefit shall not be granted unless granting the benefit would be in accordance with the object and purpose of the relevant provisions).

Notably, the ATAD GAAR only applies to corporate income tax advantages. Additionally, unlike the Belgian domestic GAAR, the ATAD GAAR does not make a distinction between a positively and a negatively phrased tax advantage.

1.3.4. Domestic SAAR

Most domestic SAARs are technical provisions that determine the tax consequences of certain specific situations or circumstances (which may implicitly be understood to lead to tax avoidance or even tax evasion). They do not need to explicitly refer to a tax benefit. This should be different for GAAR-like SAARs. For instance, the SAAR in the PSD explicitly refers to the obtaining of a tax advantage that defeats the object or purpose of the PSD. Quite remarkably, the Belgian transposition of this SAAR only refers to the obtaining of the partic-

43 See also D. GARABEDIAN, "La nouvelle règle générale anti-abus et 'l'objectif' des dispositions fiscales: portée, arbre de décision, cas pratiques", *TFR* 2012, nr. 427, 752-753.

44 CC, 30 October 2013, n° 141/2013, B.21.2.

45 Preparatory works, 2011-2012, DOC 53 2081/016, 6.

ipation exemption or dividend withholding tax exemption under the relevant domestic provisions or the PSD, without further reference to the object or purpose of these provisions.

1.4. The taxpayer's purpose or intent

1.4.1. Domestic GAAR

1.4.1.1. The subjective element

The taxpayer's purpose also forms a constitutive element of tax abuse, referred to as the subjective element.

Unfortunately, the text of article 344, §1 BITC leaves room to argue that the subjective element is only required in cases involving tax abuse that result from the claiming of a tax advantage under a relief provision contrary to its purpose (called the 'positively phrased tax advantage' above). This interpretation would, however, not be in line with the CJEU case law that formed the inspiration for article 344, §1 BITC. Furthermore, confirmation of the fact that the subjective element must be seen as a constitutive element of either type of tax abuse (positively or negatively phrased) can also be found – but not unequivocally – in the preparatory works and in the administrative circular letter.[46]

1.4.1.2. Essential or exclusive purpose test

The question arises as to whether the application of the GAAR requires that the obtaining of the tax advantage is either the 'essential' purpose or the 'exclusive' purpose.

The definition of tax abuse given by article 344, §1, par. 2 BITC literally refers to the obtaining of the advantage as the 'essential' goal, which implies that the presence of other motives does not necessarily exclude tax abuse. It should be noted, however, that the effect of the GAAR does not depend exclusively on this strict definition of tax abuse. To assess the effect of the GAAR, the tax abuse definition should be read in conjunction with the possibility of counter-evidence provided by the taxpayer. In fact, the GAAR only becomes effective if the taxpayer does not provide counter-evidence, which is to be understood as proof that *"the choice for his legal act or series of legal acts is justified by reasons other than the avoidance of income taxes"* (see article 344, §1 BITC). The legal definition of tax abuse, on the one hand, and the scope of application of the GAAR, on the other, are therefore not perfectly aligned.[47]

The GAAR provision does not specify that any such other reason(s) should be more essential than the tax motive. A contrario, this means that any other reason should be

[46] Preparatory works, 113; Circular letter, point C.1.2.2 and CC, 30 October 2013, n° 141/2013, B.4.1. See also M. BOURGEOIS and A. NOLLET, "L'introduction d'une notion générale 'd'abus (de droit) fiscal' en matière d'impôts sur les revenus, de droits d'enregistrement et de droits de succession", *RGF* 2012/6, (4) 11; L. DE BROE and J. BOSSUYT, *o.c.*, 9-10, nos. 15 and 18. For additional textual arguments, see also C. DOCCLO, "Petit manuel d'utilisation de l'article 344, § 1 CIR 1992", *T.F.R.* 2012, no. 427, (767) 768.

[47] This is probably due to the fact that, during the legislative process, two text versions of the GAAR were combined; see also the issue on the inconsistency of the legal consequences of the GAAR (see 1.5.1.1).

sufficient to prevent the application of the GAAR to a certain situation, save where such other reason would be "*so insignificant that the transaction seems impossible if there were no tax motives*".[48] According to the preparatory works, the latter would be the case if (i) the non-tax motives are so general that they are not specific to the transaction concerned, or (ii) the non-tax motives are specific to the transaction but they are of such low importance that no reasonable person would enter into the transaction for this non-fiscal motive, so that the latter cannot be the true motive for the transaction.[49]

Given the above, most commentators agree that the combination of the definition of tax abuse, on the one hand, and the possible counter-evidence provided by the taxpayer, on the other, makes it such that, in practice, the GAAR will only apply to a transaction if tax avoidance is the exclusive goal (or when the non-tax motives are purely artificial).[50] The subjective element should therefore be understood as an exclusive purpose test.

The above view is also in line with the preparatory works for the GAAR provision, which point out that the GAAR is intended to target 'wholly artificial arrangements', which are described as legal acts that are solely executed with a view to avoid taxes. But it would be impossible for the tax administration to positively prove that there are absolutely no other motives for the legal acts concerned.[51] Consequently, the tax administration can only be expected to prove that tax avoidance was the essential purpose of the taxpayer.[52] If the taxpayer subsequently does not succeed in providing any counter-evidence (i.e. valid non-tax motives), then it can be concluded that tax avoidance must have been the exclusive purpose of the transaction.

From a critical angle, one might reason that, ultimately, by disregarding all so-called insignificant motives, this exclusive purpose test is in reality some kind of an essential purpose test in which the essential purpose is defined as the exclusive purpose without all the insignificant motives. This is all the more true if one considers that the insignificance of the non-tax motives is not free of discussion (for example, it could be argued that a general/transaction non-specific motive is not insignificant per se[53]). To counter this criticism, it should be emphasised that an essential purpose test suggests a weighing of tax and (no-insignificant) non-tax motives to determine whether or not the tax motive is the essential one, whereas under the GAAR provision the proof of a single (non-insignificant) non-tax motive will suffice to prevent the application of the GAAR, thus making it an exclusivity test (see also point 3 below).

1.4.1.3. The inquiry into the intent of the taxpayer: the objective approach of the subjective element

The GAAR provision itself does not clarify how the intent of the taxpayer can be established.

48 Preparatory works, 115.

49 This is inspired by the CJEU's ruling in the *Foggia* case (10 November 2011, C-126/10, pts 46-49).

50 M. BOURGEOIS and A. NOLLET, "L'introduction d'une notion générale 'd'abus (de droit) fiscal' […]", *RGF* 2012/6, 12; L. DE BROE and J. BOSSUYT, *o.c.*, 10-12.

51 Preparatory works, 114.

52 It should be noted that this reflects a reasonable interpretation (to which we subscribe) of what can be considered to be a very unclear and confusing part of the preparatory works, which leaves room for various interpretations. M. BOURGOIS and A. NOLLET confirm this interpretation (*o.c.*, *RGF* 2012/6, 11).

53 T. AFSCHRIFT, *L'abus fiscal*, Groupe De Boeck, 2013, 135, no. 191 and L. DE BROE and J. BOSSUYT, *o.c.*, 11, no. 21.

It does not include a list of statutory indicia of reasons, objectives, effects or consequences that are regarded as objective considerations of the taxpayer's purpose. Neither does it provide a set of legal presumptions that allow the presence of the subjective element to be considered as soon as certain facts have been demonstrated.

Article 344, §1 BITC stipulates that the tax administration has to prove that tax abuse is occurring *"by presumptions or by other means of proof [accepted in the tax code] and on the basis of objective circumstances"*, whereby 'other means of proof' refers to all means that are generally accepted under Belgian evidentiary law, including witness statements and the tax officials' own findings, but with the exception of a statement under oath. Presumptions (of fact), especially, are expected to play an important role in practice, as they allow an unknown fact (e.g. the intention of the taxpayer) to be proven on the basis of established facts (e.g. the absence of substance in a company).[54]

The fact that the proof presented should also be based on objective circumstances is another witness of how the judgements of the CJEU served as an inspiration for the Belgian GAAR. The Court refers to objective circumstances to objectify the subjective element. Advocate-general Poiares Maduro formulated this strikingly in the context of the VAT abuse case Halifax: *"[the subjective element] is subjective only in so far as it aims at ascertaining the purpose of the activities in question. That purpose – which must not be confused with the subjective intention of the participants in those activities – is to be objectively determined on the basis of the absence of any other economic justification for the activity than that of creating a tax advantage."*[55] Objective circumstances could thus be understood as circumstances that would be relevant to any other party in the same situation regardless of the specific motives of an individual taxpayer. The reference to objective circumstances should therefore not be seen as tautological in combination with the reference to the use of all generally accepted legal means of proof which, by definition, are to be used with respect for the objectivity of the facts.[56] Even though the latter could be used in all objectivity to (attempt to) demonstrate an individual taxpayer's intention, conviction and mind-set (e.g. by producing evidence in which the taxpayer is shown to have explicitly expressed his intentions), it is clear that this kind of objectively gathered proof is not required from the tax administration.

A typical example of a relevant objective circumstance would be the presence of an artificial arrangement (through which taxes are avoided). This would indeed justify the conclusion that any given taxpayer who uses such an arrangement does so with the intent to avoid taxes. A typical example would be the use of a 'letterbox' or 'front' subsidiary.[57] Other examples include the purely artificial nature of transactions and links of a legal, economic and/or personal nature between the operators involved.[58]

In this respect, it may be interesting to point out that the preparatory works give, as an example of wholly artificial arrangements, such transactions that have no link with economic reality or that occur in disregard of commercial or financial market conditions.[59] Professor De Broe voices the concern that this might wrongfully create the impression that the GAAR could be used in transfer pricing discussions or that it would even imply the

[54] Circular letter, point C.1.2.3 (for critical comments on how the technique of presumptions of fact is described therein, see T. AFSCHRIFT, *o.c.*, 133, no. 189).

[55] Opinion 7 April 2005, C-255/02, *Halifax a.o.*, pt. 87.

[56] *Contra* T. AFSCHRIFT, *o.c.*, 141, no. 199.

[57] CJEU, 2 May 2006, C-341/04, *Eurofood IFSC*, pt. 34-35; CJEU, 12 September 2006, C-196/04, pt. 68.

[58] CJEU, 21 February 2008, C-425/06, *Part Service*, pt. 62.

[59] Preparatory works, 114.

introduction of an economic reality test.[60] This cannot have been the intention of the preparatory works. The reference to economic reality should rather be understood as a marginal check to verify whether the situation is 'wholly' artificial or not.

1.4.2. Treaty GAAR

The GAAR of the 2010 Belgian Model Convention does not expressly refer to the intention of the taxpayer, but it denies the benefits of the DTT that are claimed in connection with an "artificial arrangement".

1.4.3. MLI and ATAD

In sharp contrast with the domestic, exclusive purpose test is the PPT in the MLI, which applies as soon as it is reasonable to conclude that obtaining the benefit was one of the principal purposes. In addition to the fact that it may be difficult to identify the purposes that underlie a transaction, it will be even harder to make out what constitutes a principal purpose and to distinguish between principal purposes, as well as between a principal purpose and a secondary, subordinate or auxiliary purpose.[61] Another important difference with the domestic GAAR is the disconnection with the taxpayer: the PPT refers to the purpose of the arrangement or the transaction.

Very similarly, the ATAD GAAR refers to the main purpose or one of the main purposes and it also appears to disconnect the taxpayer, to some extent, from the purpose of the arrangement. In addition, the ATAD GAAR seemingly introduces a new concept by qualifying the targeted arrangements as not 'genuine' in pertaining to all relevant facts and circumstances, whereby 'non-genuine' is defined as not put into place for valid commercial reasons that reflect economic reality. While this definition seems to fall back on the wording used by the CJEU in the context of wholly artificial arrangements,[62] commentators point out that the ATAD introduces this new terminology to steer away from the CJEU's case law on tax abuse and direct it more towards the fight against base erosion.[63]

1.4.4. Domestic SAAR

Most domestic SAARs imply a non-rebuttable presumption that, in a given situation, there is an intention to avoid or reduce taxation (e.g. thin capitalisation rule disallows the deduction of interest in cases involving intra-group loans exceeding a 5:1 debt-equity ratio). The domestic transposition of the PSD SAAR, however, does refer to a subjective element. But unlike the domestic GAAR, and rather like the PSD itself (and also the ATAD GAAR), this provision does not link the subjective element directly to the taxpayer who enjoys the fruits of the tax abuse. It refers to a legal act (or a series of legal acts) which the tax administration

60 L. DE BROE and J. BOSSUYT, *o.c.*, 10, no. 20,

61 L. De Broe and J. Luts, "BEPS Action 6: Tax Treaty Abuse", *Intertax*, 132, no. 26.

62 See, for instance, CJEU, 3 October 2013, C-282/12, *Itelcar*, pt. 34: "*wholly artificial arrangements which do not reflect economic reality*".

63 F. VANISTENDAEL, "De Europese invulling van BEPS", *AFT* 2017/4-5, (2) 4.

proves to be artificial in light of the relevant facts and circumstances, and that has been put into place for the main purpose or one of the main purposes of obtaining the PSD exemption.

1.5. The consequences of the GAAR application to a given case

1.5.1. Domestic GAAR

1.5.1.1. Legal consequences

The consequences of the domestic GAAR are defined by the following two principles:

i) Once the tax administration has proven that there is tax abuse, the legal act or series of legal acts leading to the same transaction will not be enforceable towards the administration (art. 344, §1, par. 1 BITC). In other words, the legal act (or series of legal acts) is not binding for the tax administration as soon as there is tax abuse.

ii) If the taxpayer does not provide counter-evidence, then the taxable base and the calculation of the tax will be restored in such a way that the transaction will be subject to taxation in accordance with the purpose of the law as if the tax abuse had not taken place (art. 344, §1, par. 4 BITC).

As was pointed out above, the legal definition of tax abuse literally only requires an essential purpose test for the subjective element, whereas the GAAR only has its full effect if the taxpayer has not provided counter-evidence (exclusive purpose test, see 1.4.1.2). In this respect, it may be confusing that the first principle (i.e. the non-enforceability) would apply as soon as there is tax abuse, regardless whether or not the taxpayer is able to provide counter-evidence. This issue, however, seems to have never been commented on before, so that it can be assumed that this is only an involuntary drafting mistake (see also 1.4.1.2 above concerning the mismatch of the definition of abuse and the scope of the GAAR). Following this approach, both of the above principles would then only come into play if there is tax abuse and the taxpayer has not provided counter-evidence.

The GAAR provision does not explain how taxation in accordance with the purpose of the law should be achieved. In certain cases, in which the advantage of a tax relief provision is abusively claimed, it may suffice to rely on the first principle (unenforceability) in order to disregard the legal act(s) because, in the absence thereof, the tax reducing or exempting provision will no longer be applicable. But in other cases, this has led to differing views among commentators because the provision does not precisely state how the tax administration should come to a situation that permits the restoration of the desired taxable base and calculation of the tax.[64] Ultimately, most commentators share the view that, if the legal act (or series of legal acts) is not binding the tax administration (first principle), then as a next step the tax administration must redefine, convert or recharacterize the legal acts in

[64] For an insightful overview of different views, see T. AFSCHRIFT, *o.c.*, 154-162, nos. 217-234. He analyses the view that the GAAR provision gives the tax administration the right to change the facts so that they can justify the application of the circumvented taxing provision. He argues, however, that the GAAR does not allow the tax administration to change the facts. Instead, if there is tax abuse and the taxpayer does not provide counter-evidence, then the scope of the circumvented provision should be interpreted in such a way as to cover the abusive transaction as well.

such a way that the transaction falls within the scope of the circumvented taxing provision. In doing so, the tax administration does not have to respect all (non-fiscal) legal consequences of the recharacterised legal act(s). A recharacterisation may even imply the elimination of certain acts, but it should always respect the transaction that was brought about by the legal act(s) by which the tax abuse was realised.[65] Furthermore, it should be emphasised that the recharacterisation only converts the legal label that has been given to the facts, but it does not in any case alter the facts themselves: "*The facts are the facts.*"[66]

In its judgement of 30 October 2013, the CC (see 1.3.1 above) has concluded that a recharacterisation based on article 344, §1 BITC is in line with the principle of legality because the provision sufficiently sets the boundaries within which the tax administration should apply such recharacterisation. The Court sees the GAAR provision as a means of proof and finds a safeguard against analogous applications of tax provisions in the objective element of the definition of tax abuse. According to the Court, the principle of legality does not ask for a more detailed description of the conditions for applying the GAAR because this would be impossible given the nature of the phenomenon (i.e. tax abuse) that the GAAR is destined to combat.[67] It should be added that most commentators submit that the GAAR provision has a hybrid character. They argue that it is not only a means of proof, but that its application also leads to a recharacterisation of the facts, which affects all the elements of the taxation.[68]

1.5.1.2. Relative effect of the GAAR

The effect of the GAAR – being the unenforceability and recharacterisation of the legal act(s) – is not absolute. It is restricted to the application of the provisions of the BITC or the decrees adopted in execution thereof. This principle is interpreted strictly. The GAAR provision does not even apply to income tax provisions that can be found in other codes or laws. The application of the GAAR will therefore certainly not affect the legal consequences of the transaction, nor will it have any effect on the application of other taxes, such as VAT or registration taxes (for which separate GAARs exist).

The tax administration is of the opinion that the effect of the GAAR can either be limited to the taxpayer who carried out the transaction or it can extend to all parties involved. This is to be determined on a case-by-case basis.[69] This view can be endorsed to the extent that the legal act(s) should only be unenforceable and recharacterised in relation to the taxpayer who has realised the abusive transaction. After all, the GAAR provision itself only refers to the taxpayer who realises the abusive transaction. The GAAR, therefore, should be applied asymmetrically: it should negatively affect only the taxpayer who realises the abuse, to the exclusion of others.[70]

65 Br. PEETERS, *o.c.*, 29, no. 77.

66 L. DE BROE and J. BOSSUYT, *o.c.*, 13, no. 25.

67 CC, 30 October 2013, n° 141/2013, B.20.4 and B.21.1.

68 M. BOURGEOIS and A. NOLLET, «La réécriture de la mesure 'générale antiabus' applicable en matière d'impôts sur les revenus, de droits d'enregistrement et de droits de succession», *JT* 2012, no. 23, 500-501; L. DE BROE, "Antimisbruikbepaling niet in strijd met de Grondwet", *Fisc. Act.* 2013, no. 39, 4-9; S. VAN CROMBRUGGE, *o.c.*, 540; Br. PEETERS, *o.c.*, 13-14.

69 Circular letter, point C.1.2.4.

70 Br. PEETERS, *o.c.*, 29, no. 78; and L. DILLEN, "Symmetrische of asymmetrische toepassing van de fiscale algemene antimisbruikbepalingen", *AFT* 2013/1, (15) 17, nos. 9-10.

The tax administration's view must be criticised, however, in so far as it would allow the tax administration to increase taxation for one taxpayer (e.g. refuse exemption of the sales price) and deny the tax-reducing effect of measures that typically correspond with such taxation in respect of the other party to the transaction (e.g. deduction or amortisation of the purchase price). The goal of the GAAR provision is to levy taxes in accordance with the object and purpose of the circumvented tax provision. This is not achieved if the situation is restored for one party only and not for the other(s). The principle of legality demands a balanced restoration for all parties involved.[71] Otherwise there would also be a high risk of unequal treatment of taxpayers, economic double taxation and arbitrariness on the part of the tax administration.

1.5.1.3. Further consequences or sanctions

The application of the GAAR should not, in principle, lead to the imposing of criminal penalties or administrative fines, because the GAAR itself is merely a procedural measure providing a special means of proof to the tax administration. The GAAR itself is therefore not a rule that could be breached. More generally, the application of the GAAR does not imply a breach of any other tax provision. Nonetheless, the tax administration contends that administrative penalties may be imposed.[72]

Since a tax abuse is not seen as a breach of a legal provision, the application of the GAAR in itself does not justify the application of the extended assessment period for tax evasion.[73]

1.5.1.4. GAAR vs. DTT

The GAAR itself cannot be used to combat an abusive application of a provision of a DTT because the GAAR only targets provisions of the BITC or the royal decrees in execution thereof (see point 1.3.1 above). It is however possible that the application of the GAAR to a transaction would affect the outcome of the application of the DTT. In order to fully comprehend the interaction between the domestic GAAR and the DTT, it should be noted that Belgium is a monistic country. Consequently, the supremacy of international law is generally accepted.

If the DTT concerned contains a provision that expressly allows for the application of domestic anti-avoidance rules, then this should not raise an issue. But if the resulting taxation is inconsistent with the normal outcome of the application of the DTT and considering that most DTTs predate the introduction of the Belgian GAAR in 2012, the application of the GAAR may nevertheless be in breach of the DTT. In such cases, the principles of the DTT should prevail.

If the DTT does not contain such a provision and there is actually an abuse of the DTT, then the analysis is more complicated. The official position of the tax administration would be that Belgium is entitled to apply its GAAR in any event. The tax administration takes the view that the prevention of tax avoidance is a guiding principle of tax treaties, certainly since

71 L. DE BROE and J. BOSSUYT, *o.c.*, 14, no. 28.

72 Circular letter, point C.2.4.

73 *Ibidem*. On the former GAAR: P. Faes, *Het rechtsmisbruik in fiscale zaken – artikel 344 §1 WIB 15 jaar later*, Larcier 2008, 140.

the 2003 OECD Commentary, so that there can be no conflict between the domestic GAAR and the DTT (see also point 1.1.2 above). But this view has been heavily criticised by commentators[74] and has led to a more nuanced alternative analysis by scholars discerning a difference between various situations.[75]

A first situation could be the one in which the DTT has granted the power to tax to Belgium, but the application of the GAAR leads to a higher tax. In principle, this will not lead to treaty override, since Belgium already holds the power to tax. The GAAR then does not infringe the DTT.

In cases in which the DTT does not entitle Belgium to levy taxes on the income concerned and the recharacterisation of the legal act(s) under the domestic GAAR leads to a characterisation as a type of income that should be taxable in Belgium under the DTT, then two situations should be distinguished:

i) the DTT does contain an autonomous definition of the type of income concerned: the GAAR appears to infringe the DTT, unless the non-application of the DTT could be justified by reference to an abuse of the DTT provisions themselves, which is a difficult issue in the absence of clear guidelines on how an abuse of DTT provisions should be construed.
ii) the DTT does not contain an autonomous definition of the income: the application of the GAAR may be permitted, but this should be further analysed in light of the context of the DTT. Professor De Broe gives a number of examples,[76] two of which are reported here. One example is where the DTT contains an anti-abuse provision (e.g. LOB-provision) that should be applied to the situation concerned, then this provision should take precedence and should prevent the application of the domestic GAAR. Another example would be the situation in which a DTT that predates the introduction of the domestic GAAR provision. In such a situation, it cannot be determined with certainty that it has been the intention of the parties to the DTT that the Belgian GAAR could be decisive to determine the taxation of the transaction.

1.5.1.5. GAAR vs EU freedoms

As indicated above, the domestic GAAR was designed in light of the CJEU case law (e.g. Cadbury Schweppes case), which finds anti-tax avoidance measures of the EU member states to be compatible with the EU freedoms to the extent that they target wholly artificial arrangements and provided that they are proportionate in relation to that objective (in which case a taxpayer cannot rely on the EU freedoms). Accordingly, when applied within these boundaries, the Belgian GAAR should not violate the EU freedoms.[77]

74 For a detailed overview, see F. DIERCKX, "Franco suisse le Ski in time of BEPS" in *Mélanges Pascal Minne – Fiscalité internationale et patrimoniale*, Brussels, Groupe Larcier 2017, 173-225 (on the impact of later OECD commentaries: 208-209).

75 In more detail: L. DE BROE, "Het gebruik van de algemene antimisbruikbepaling (artikel 344, §1 WIB 1992) voor het voorkomen van misbruik van de Belgische dubbelbelastingverdragen", *o.c.*, 16 *et seq.*

76 *Ibidem*, 140, no. 22.

77 C. DOCCLO, *o.c.*, no. 427, 771.

1.5.2. Treaty GAAR, MLI and ATAD

Just as the GAAR of the 2010 Belgian Model Convention, the PPT of the MLI plainly stipulates that the benefit of the DTT concerned will not be granted. The ATAD GAAR stipulates that the EU member states shall ignore the non-genuine arrangement(s) for the purposes of calculating the corporate tax liability. The tax liability will then have to be calculated in accordance with the national law of the member state.

1.5.3. Domestic SAAR

Domestic SAARs either state specifically what the consequences should be (e.g. disallowed expense, recharacterisation of the type of income, etc.) or they deny the benefits of a specific provision (e.g. the domestic PSD SAAR denies the benefits of the Belgian version of the participation exemption).

1.6. Conflicts between domestic and treaty GAAR or between domestic GAAR and SAAR

1.6.1. Conflicts between domestic and treaty GAAR

Taking into consideration the principles explained above (see item 1.5.1.4) and especially the fact that Belgium accepts that international treaties concluded by Belgium take precedence over domestic law (monistic system), the application of a Treaty GAAR should prevail (over the domestic GAAR).

1.6.2. Conflicts between domestic GAAR and SAAR

The GAAR is generally construed as a means of last resort. It is used only if the ordinary means of interpretation, technical provisions of the BITC, SAARs and the sham theory do not have the desired effect.[78] Consequently, the GAAR must not be used to 'correct' the shortcomings of a SAAR on a quantitative level. For instance, if a SAAR requires a minimum holding period or a certain debt-equity ratio, then the GAAR cannot be used to target situations in which the quantitative criteria are just barely met (e.g. a one day longer holding than the minimum period). The quantitative criteria should indeed be seen as the expression of the purpose of the SAAR provision. Even if the quantitative criteria are just barely met, then the purpose of the SAAR is respected and the GAAR cannot lead to an alteration of these criteria. Nonetheless, it cannot be excluded that the GAAR could complement the SAAR when the latter is being circumvented by an abusive practice.[79]

[78] Circular letter, point C.2.3.

[79] Br. PEETERS, *o.c.*, 25-26 (no. 66-67).

2. Case law on statutory or court-developed GAARs

2.1. General overview

Given the relatively recent introduction of the GAAR (in 2012) there is no published case law available on the application of the GAAR, except for the judgement of the CC on the constitutionality of article 344, §1 BITC, which was discussed in detail above at various instances.

2.2. Noteworthy cases on the operation of the statutory GAARs

As indicated above, there is no case law available on the practical application of the new GAAR (with regard to the former GAAR, see item 1.1.1 above).

2.3. Judge-made general anti-avoidance doctrines or concepts

In the Belgian legal order, there is no place for judge-made anti-avoidance doctrines or concepts. It is established case law of the Supreme Court that, in light of the constitutional principle of legality and the principle that tax law is governed by private law (and the freedom to contract), the taxpayer has the right to choose the least taxed route.[80] This right can only be restricted by law, which is realised via article 344, §1 BITC.

3. GAAR and taxpayer's safeguards

3.1. Constitutional and EU safeguards

The GAAR can only be applied with respect for constitutional principles such as the principle of legality, which prevents the tax administration from using the GAAR to apply tax provisions analogously, i.e. outside their actual scope (see 1.3.1 above). Furthermore, the GAAR cannot be applied in such a way that it would result in an unjustified restriction of the EU freedoms (see 1.5.1.5 above).

3.2. Allocation of the burden of proof: possibility to provide counter-evidence

Within the boundaries explained above, the GAAR will only have an effect if (i) the tax administration demonstrates that there is tax abuse and (ii) the taxpayer does not provide counter-evidence of motives other than the motive to obtain a tax advantage (see point 1.4.1.2).

[80] Cass., 6 June 1961, *Pas.*, 1961, I, 1082 and Cass., 22 March 1990, *Pas.*, 1990, I, 853. For more details, see D. GARABEDIAN, *Cahiers de droit fiscal international*, vol. 87a, 2002, p. 153-170, and P. FAES, *Het rechtsmisbruik in fiscale zaken*, Brussels, Groep De Boeck, 2008, 24-30.

Article 344, §1 BITC does not contain any further specifications on the nature of the reasons or motives whose existence should be proven by the taxpayer. The former version of this provision only permitted economic or financial motives that allowed it to conclude that the GAAR would not be applicable in the context of private wealth planning, since this implies personal motives. There is no such limitation in the new GAAR. This makes commentators conclude that, for example, non-tax reasons of a purely personal nature should be taken into consideration (within the boundaries set out above, e.g. no insignificant arguments)[81] or that even erroneous motives could be relevant as counter-evidence if the taxpayer can prove that they were seriously considered in tempore non suspecto.[82]

Similarly, for the counter-evidence, article 344, §1 BITC only refers to reasons other than the avoidance of income taxes. Certain commentators therefore argue that tax motives other than income tax motives should be valid as well.[83]

3.3. Procedural safeguard

The tax administration does not have to follow a specific procedure in order for it to apply the GAAR. Neither is the use of the GAAR reserved for tax officials with a certain grade or seniority.

3.4. Advance tax rulings

The legal uncertainty following from the potential application of the domestic GAAR can be mitigated by applying for an advanced tax ruling, which is issued by a separate branch of the tax authorities named the ruling commission (Dienst Voorafgaande Beslissingen/Service des Décisions Anticipées) and which is binding on the tax administration (in principle, for five years). A tax ruling application must be submitted before the transaction has had any effect from a tax point of view. Upon the introduction of the new GAAR, there was uncertainty as to whether the ruling commission would be fully competent to rule on the applicability of the domestic GAAR. After all, rulings confirm how a tax provision will be applied to a specific transaction, but on the basis of its place in the tax code (i.e. in the section on evidentiary rules), the domestic GAAR is not a taxation provision.[84] Although this view was initially followed, it was immediately nuanced by the assertion in the preparatory works and the administrative circular that the ruling commission was nevertheless competent to rule on the question of whether there are other motives apart from tax motives for the transaction. In other words, by way of a ruling the taxpayer can obtain certainty that the subjective element is missing (and thus that the GAAR cannot apply). One year later, the MoF went a step further by stating that the ruling commission can only assess such non-tax motives (i.e. the counter-evidence of the taxpayer) after it has first determined that the condition of the

81 S. VAN CROMBRUGGE, *o.c.*, 556.

82 T. AFSCHRIFT, *o.c.*, 136, no. 194.

83 Ph. SALENS, "Hoe gemakkelijk is het tegenbewijs?", *Fiscale actualiteit* 2012, no. 22, 4–7, with reference to the case law of the European Court of Justice, 20 May 2010, C-352/08, *Zwijnenburg*.

84 Art. 1, 3° of the Royal Decree of 17 January 2003 expressly states that the ruling commission cannot make rulings on the application of evidentiary rules.

objective element has been satisfied.[85] As a result, in practice rulings are issued regarding the applicability of the GAAR.[86]

[85] *Vr. en Antw.* Kamer 2012-2013, no. 53/124, 498-501 (Q. no. 190, Wouters, 7 March 2013).

[86] However, some commentators still question the legal basis for this practice, see M. BOURGEOIS and A. NOLLET, "Chapter 5: Belgium" in M. LANG e.a. (eds), *GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World*, Online Books IBFD 2016, no. 5.3.3; Br. PEETERS, *o.c.*, 32.