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Tackling tax avoidance: a comparative study of general anti-abuse rules across Europe

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contents

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Introduction

In many European countries, a combination of the difficult economic conditions currently being experienced and the tide of public opinion (often badly informed) have inclined governments to seek new ways to challenge what they perceive to be abusive tax practices.

As a result, some countries, such as the United Kingdom and Belgium, have amended or introduced general anti-abuse provisions ("**GAAR**").

This development is likely to affect the way businesses operate in those countries (or in extreme cases whether the businesses operate in those countries at all). It is therefore important to be aware of the various national GAARs and their application by tax authorities.

This comparative study outlines the existing or planned GAARs in selected European countries. For each country we describe the relevant GAAR(s), examine the conditions in which it may apply, the likely consequences if it does and suggest some strategies to mitigate its effect.

In the course of our analysis, we also look in passing at some targeted anti-avoidance rules, which apply to specific taxes or areas of tax law ("**TAAR**").

Comparative analysis
United Kingdom

GAAR proposed to be introduced in July 2013 – Principles and scope of application

The UK Courts apply the *Ramsay* case law principle when interpreting tax statutes. This judge-made rule allows the Courts to construe the legislation *purposively* (not literally) and apply that purposive construction to the facts viewed *realistically* (which may, for example, mean that inserted steps in a wider transaction can be ignored).

The *Ramsay* principle has been used by the UK Tax Authority to challenge tax avoidance but it is neither a GAAR nor a general recharacterisation principle.

Separately, the UK tax code has a number of TAARs. In spite of these and the *Ramsay* principle, the UK Government has taken the view that a new and wider rule is needed.

The UK Government is introducing what it describes as a narrowly focused General *Anti-Abuse* Rule. Draft legislation has been issued for consultation. The GAAR is likely to be introduced in July 2013.

The proposed UK GAAR is intended to have a narrower application than the GAARs found in other jurisdictions. It is not intended to be a "broad spectrum" rule but rather is intended to target only "abusive" tax arrangements. The *intention* is that the proposed UK GAAR will not apply to the "centre ground of tax planning".

It is currently anticipated that the GAAR will apply to an extensive range of taxes. These are: Income Tax; Corporation Tax (including any amount chargeable as if it were Corporation Tax, such as the Bank Levy); Capital Gains Tax; Petroleum Revenue Tax; Inheritance Tax; Stamp Duty Land Tax; and the proposed new annual residential property tax for property held by non-natural persons. Separate legislation will apply the GAAR to social security contributions (National Insurance Contributions).

Taxes not covered by the proposed GAAR include: Stamp Duty and Stamp Duty Reserve Tax, Insurance Premium Tax and Excise Duties. In addition, to avoid complicated interactions with the EU Abuse doctrine the proposed UK GAAR will not apply to Value Added Tax.

Criteria for the GAAR to apply – What is abusive?

The draft legislation applies to "tax arrangements" (arrangements with a main purpose of obtaining a tax advantage) that are "abusive". Arrangements are abusive if they "cannot reasonably be regarded as a reasonable course of action", taking into account all the circumstances. This is known as the "double reasonableness" test.

The circumstances to be taken into account in applying the "double reasonableness" test include:

- whether the substantive results of the arrangement are consistent with the principles and policy behind the tax rules;
- whether there are contrived or abnormal steps;
- whether there is an intention to exploit loopholes in the tax rules; and
- any other arrangements of which the tax arrangements form part.

Also, in applying the "double reasonableness" abuse test the legislation has a list of matters which indicate that the tax arrangements are "abusive". These include:

- the reported income, profit or gains for tax purposes being significantly less than the amount for economic purposes;
- deductions or losses for tax purposes being significantly greater than the amount for economic purposes; and
- claims for repayment or crediting of tax where the tax is not paid.

The draft legislation also includes indicators of what is not abusive, for example, if the tax consequences are in accordance with established practice (accepted by the UK Tax Authority) at the time the arrangements were entered into.

The draft legislation is supported by draft guidance. The draft guidance provides that in applying the "double reasonableness" test of abuse the Court is not to decide whether they regard the course of action to be reasonable but rather to decide whether someone could reasonably hold the view that the tax planning was reasonable. It is the application of the test in this way which is supposed to preserve the centre ground of tax planning and ensure the proposed GAAR applies only to highly abusive transactions.

Interpretation of the GAAR

As the GAAR is not yet law it is yet to be tested in the UK Courts. However the clear intention is that the rule is to be applied narrowly to defeat only arrangements at the extreme end of the tax avoidance spectrum.

However there is a concern that the UK Courts may apply the GAAR more extensively than intended, particularly as the test of "abuse" is not precise.

Safety zone(s) – Can a tax ruling be obtained?

There is no express "safety zone" nor is it intended that there will be a clearance procedure. In an attempt to ensure that the GAAR does not apply outside the intended target of highly abusive arrangements, the draft legislation contains a number of "safeguards". These include:

- only a senior Tax Authority official can invoke the GAAR;
- before the senior official can invoke the GAAR, he/she must seek an opinion from a new independent Advisory Panel. The Advisory Panel's opinion must be taken into account in any subsequent court proceedings;
- the same Advisory Panel will approve the guidance and issue an annual anonymised digest of the key principles emerging from the Advisory Panel opinions, which will be used to update the guidance;
- the draft guidance (which will have the force of law) contains examples of transactions caught and not caught by the GAAR. However, the examples in the draft guidance do not assist greatly in identifying any discernible principle;
- the draft legislation also allows the Court to take into account other material in the public domain and evidence of established practice at the time the arrangements were entered into, such that the GAAR may not apply if, for example, the UK Tax Authority is already on record that they accept certain tax planning as valid;
- at court the burden of proof is on the UK Tax Authority to show that the key requirements of the GAAR are met.

Sanctions associated with the GAAR

Where the tax arrangements are abusive and the GAAR applies, the tax avoider's liability to tax can be adjusted on a 'just and reasonable' basis so as to counteract the tax advantage. This may involve comparing the transaction with a similar transaction which does not have the tax feature. If there is no comparable transaction, then in some cases it may be just and reasonable to assume that in the absence of the tax feature no comparable transaction would have taken place at all. In those circumstances, the counteraction of the tax advantage may be to deem that no transaction has taken place at all. The rules do not require a mandatory recharacterisation of the transaction to determine the "just and reasonable" adjustments.

Where there has been counteraction of a tax advantage by the UK Tax Authority, the draft rules allow other parties (including those not party to the arrangements) to make a claim to have consequential relieving adjustments made to their tax position. As noted above, for the GAAR to apply it is not mandatory that there be a recharacterisation of the transaction. However, if in applying a "just and reasonable" adjustment to the tax avoider's position there is a recharacterisation, for example, treating debt as equity, one would expect that the lender's "just and reasonable" consequential relieving adjustment would follow the same recharacterisation (so it is treated as subscribing for equity and receiving dividends). However, there is no express obligation on the UK Tax Authority to regard the other party as having entered into the same recharacterised transaction used to counteract the tax avoider's tax advantage.

There will be no special penalty regime or other sanctions. The GAAR will operate within existing tax compliance machinery.

Last resort provision(s)?

The intention is that the GAAR supplements existing anti-avoidance rules/TAARs and *the Ramsay* principle (see above). However, the UK Tax Authority is not bound to apply the GAAR after other anti-avoidance rules. In practice it is likely that it will use the GAAR as an alternative weapon to existing case law principles and specific anti-avoidance rules which will be argued "in the alternative" in tax enquiries and litigation.

Typical examples in which the GAAR would/would not apply

In the draft guidance there are examples of transactions which are caught by the GAAR. These include:

- "double dipping" tax deductions;
- schemes to obtain a credit or repayment for overseas tax which has not been paid;
- artificially using prescriptive legislation to generate a large deemed tax deduction to shelter income where the deduction is far in excess of the economic loss; and
- exploiting the provisions of Double Tax Treaties to engineer double non-taxation.

Examples of transactions which are not caught by the GAAR include:

- intra-group arrangements to ensure losses are not "stranded" in a company in the group where those tax losses represent a true economic loss;
- using prescriptive legislation to ensure that Loan Notes issued on a takeover are structured to allow the holder to claim a deduction for economic losses should the issuer become insolvent;
- using a conditional contract to delay a tax event until a future basis period to take advantage of an announced future reduction in the tax rate; and
- tax structuring on a commercial transaction to avoid a "bear trap", for example a double charge on the same economic profit.

Anticipated evolution of the GAAR

Although the proposed UK GAAR is intended to apply only to the most aggressive and abusive forms of tax avoidance, the concern is that it may be applied more widely and/or that the legislation may be expanded in the future. Whilst the UK Government are keen to balance the twin aims of eradicating unacceptable avoidance and ensuring the UK tax system is competitive and attractive to business, the current proposals are likely to lead to some uncertainty for the centre ground of tax planning. Ultimately, the true impact of the proposed GAAR will not be known until cases reach the Courts – which is likely to be some time away.

Luxembourg

Principles and scope of application

The Luxembourg GAAR is mainly contained in Sections 5 and 6 of the Luxembourg Adaptation Law (*Steueranpassungsgesetz* "**StAnpG**") and applies to direct taxes (Personal Income Tax, Corporate Income Tax, Municipal Business Tax and Net Wealth Tax). These provisions are targeted at transactions which constitute an 'abuse of law'.

The abuse of law concept could also extend to indirect taxes although there is currently no case law to support this view.

Luxembourg also has specific TAARs, for example:

- the Law of 28 January 1948 includes provisions dealing with sham real estate transactions;
- artificial valuations of estates in the inheritance process; and
- the Law of 12 February 1979 which provides for penalties in cases of misstatement.

Criteria for the GAAR to apply – What is abusive?

Under Luxembourg tax law, there is an abuse of law if the following conditions are met:

- there is an Abuse ("*Missbrauch*") of the law ("*Gestaltungsmöglichkeiten des bügerlichen Rechts*");
- in order to avoid or mitigate a tax burden or to gain a tax benefit;
- using an inappropriate method ("*unangemessne Gestaltung*") which has no economic justification (other than to obtain a tax advantage).

It is not necessary for the taxpayer to have a fraudulent or abusive intention but this can be inferred from the absence of an economic justification for the transaction.

Interpretation of the GAAR

There is little case law in respect of abuse of law but generally Luxembourg Courts apply the legislation restrictively and recognise the freedom to choose tax efficient structures.

For instance, in a recent case, shareholders of a loss-making company sold their shareholding to other investors who then changed the activity of the acquired company. The target company wanted to carry forward its tax losses and offset them against profits derived from its new activity. The Court acknowledged that a combined change of control and activity may fall within the scope of "abuse of law" but ruled that there was no abuse of law on the facts. This recent case law underlines the strict approach taken by the Luxembourg Courts in applying the GAAR. The application of the GAAR is further restricted by the fact that the Luxembourg Tax Authorities usually bring claims based on specific anti-abuse rules such as those dealing with thin-capitalisation or hidden distributions.

Safety zone(s) – Can a tax ruling be obtained?

The Luxembourg Tax Authorities have refrained from issuing any ruling on the applicability of the GAAR and its conditions and limits.

Nevertheless, a taxpayer may request confirmation of the tax treatment applicable to any transaction through a Tax Clearance Letter ("**TCL**") filed with the Luxembourg Tax Authorities. Approval will be granted if the tax analysis described in the TCL is considered to apply to the proposed transactions and to be within the law, regulations and administrative practice currently in force.

Full disclosure of all the facts and circumstances is required for the Luxembourg Tax Authorities to issue a TCL confirming the tax treatment applicable to a specific transaction. Timing between filing the TCL and receiving written approval is usually 1-2 months but would depend on the complexity of the transactions and whether questions/comments are raised by the Luxembourg Tax Authorities.

As an alternative, confirmation can be sought at a pre-filing hearing conducted on a "no names" basis but any confirmation obtained will not be binding.

Sanctions associated with the GAAR

Where the GAAR applies, tax liability will be adjusted to reflect the tax treatment that would have resulted had there been no "abuse of law".

If the Luxembourg Tax Authorities adjust a transaction, such adjustment is normally applied in relation to the tax treatment of each party to the transaction. For instance, when a deemed distribution is recognised at the level of a company, it will also ordinarily be applied at the level of the beneficiary.

The Luxembourg tax legislation already provides for certain tax adjustment mechanisms for related party transactions without any reference to the abuse of law concept, for example, through the recharacterisation of any undue advantage either as a hidden capital contribution or hidden dividend distribution with related tax consequences (e.g., non tax deductibility of the hidden dividend distribution and potential liability to withholding tax).

In addition, the Luxembourg Tax Authorities may tax a taxpayer on a lump sum basis in case of undue transfer of profits to a non-resident. Administrative or criminal sanctions may also apply if the transaction falls foul of provisions aimed at combating fraud or tax evasion.

Last resort provision(s)?

The Luxembourg Tax Authorities usually apply specific tax regulations (e.g. thin capitalisation rules) before applying any general measure (e.g. abuse of law).

Typical examples in which the GAAR would/would not apply

The GAAR is rarely used in Luxembourg. Transactions are usually disclosed in advance to the Luxembourg Tax Authorities and all the necessary information to understand the economic rationale of the transactions provided at the outset. If a TCL is obtained, the danger of a recharacterisation under the GAAR is in practice eliminated.

However, the application of the GAAR will depend on all the facts and circumstances and the risk of a transaction being held to be abusive cannot be fully excluded.

Finally, it is worth mentioning a comment made by Luxembourg on the OECD Model Tax Convention regarding the application of anti-abuse rules in the context of a double taxation agreement: "*Absent any express provision in the convention, Luxembourg … believes that a State can only apply its domestic anti-abuse provisions in specific cases after recourse to the mutual agreement procedure*". This suggests that the Luxembourg Tax Authorities will only seek to invoke the Luxembourg GAAR after applying the provisions of any double tax agreement to which Luxembourg is party.

Anticipated evolution of the GAAR

We are not aware of any plan to change the GAAR or create an additional GAAR in Luxembourg.

France

Principles and scope of application

The general anti-abuse rule applicable in France is the abuse of law (*abus de droit*), which is set forth in Article L 64 of the French Tax Procedure Code (FTPC). It allows the French Tax Authorities to disregard or disqualify any legal transaction if it is deemed to be abusive from a tax perspective. The scope of "abuse of law" has been further defined by the case law. It covers all direct and indirect taxes applicable in France.

Criteria for the GAAR to apply – What is abusive?

The French Tax Authorities are entitled to disregard or disqualify legal transactions on the basis that they are abusive in either of the following cases:

- the transaction is a sham ("abuse of law by way of simulation"); or
- the transaction is not a sham but does not accord with the spirit of the law and is solely motivated by the avoidance or mitigation of tax liabilities that the taxpayer would have otherwise borne had it not entered into the transaction ("abuse of law by way of *fraus legis*").

A transaction will be an abuse of law by *fraus legis* where the taxpayer has (i) entered into the transaction only for tax purposes and (ii) used a provision in a way which is contrary to the objectives and spirit of the law.

In other words, in order to assess whether there is an abuse, it is necessary to look at both:

- *the intentions of the taxpayer*: the French Tax Authorities must demonstrate that the only purpose of the transaction was the avoidance or mitigation of tax (i.e., there will be no abuse of law if the taxpayer has valid non-tax justifications); and
- *the intentions of the law-makers*: to identify the objectives and spirit of the law.

Interpretation of the GAAR

The GAAR is intended to be a special procedure, and is applied restrictively by the French Tax Authorities and the French Courts. The French Tax Authorities bear the burden of proof (they have to demonstrate that the conditions for an abuse of law are fulfilled).

Furthermore, if the French Tax Authorities bring a claim under the GAAR, either the taxpayer or the French Tax Authorities can choose to go before an "Abuse of Law Committee" (*Comité de l'abus de droit fiscal*), which is an independent committee that will review the case. If the review is in favour of the taxpayer, the burden of proof remains with the French Tax Authorities. However, if the review favours the French Tax Authorities, the taxpayer will bear the burden of proof (the taxpayer has to demonstrate that the conditions for an abuse of law are not fulfilled).

The review issued by the Committee is not binding. The French Tax Authorities are not obliged to drop the claim if the Committee reviews against them and the Courts can rule against the Committee (although, in practice, the Courts tend to follow the opinions expressed by the Committee).

Safety zone(s) – Can a tax ruling be obtained?

It is possible to apply for a ruling before entering into a transaction.

A ruling request must include all the information necessary for the French Tax Authorities to understand the proposed transaction. In particular it should include:

- a detailed description of the transaction;
- the names and addresses of all persons involved;
- a description of the relationships which may exist between those persons; and
- a copy of all the drafts and documents relating to the transaction.

If the French Tax Authorities do not reply to a ruling request within six months the applicant(s) automatically benefit from an implicit ruling. In this case, even though no explicit ruling has been granted by the French Tax Authorities, provided that the transaction corresponds with what has been described in the ruling request, the French Tax Authorities will not be able to challenge it under the GAAR.

In practice, the ruling request procedure is rarely used.

Sanctions associated with the GAAR

The French Tax Authorities can recharacterise or disregard a transaction which is abusive in order to tax a given taxpayer accordingly. From a legal perspective, the original transaction remains legally in force regardless of the tax recharacterisation.

If there is no need for such recharacterisation, the French Tax Authorities are not entitled to use the abuse of law procedure. However, when confronted by an act or a transaction which is deemed not to be abusive, the French Tax Authorities may still reassess on grounds other than the abuse of law.

The French Tax Authorities are not obliged to be consistent when recharacterising transactions, for example, they do not have to automatically grant any benefit that may derive from it to all parties. Parties which want to claim the benefit of a recharacterisation have to apply to the French Tax Authorities.

Interest for late payment and other penalties may also be payable. These can be up to 80% of the avoided taxes. All the parties involved in the abusive transaction are jointly liable for the payment of the avoided tax, any associated interest and any penalties due.

Last resort provision(s)?

In addition to the GAAR, several targeted anti-abuse provisions exist, e.g. in relation to benefits realised by controlled foreign companies ("**CFC**") located in low-tax jurisdictions. These TAARs apply in the first instance, before the GAAR.

Typical examples in which the GAAR would/would not apply

In order to determine whether a transaction is abusive or not it is necessary to look at the particular circumstances. However, an analysis of the following typical schemes offers some guidance as to when the GAAR would or would not apply.

- Cases where the GAAR is likely to apply:
  - a merger between a holding company and its subsidiary, immediately after the acquisition of this subsidiary (e.g. through an LBO), could be challenged under the GAAR. According to the French Tax Authorities, the sole purpose of the transaction could be to allow the holding company to offset the acquisition costs incurred against the profits of the subsidiary.
  - the use by a French company of a Luxembourg investment holding company with no substance which is exempt from taxes in Luxembourg. In a case, which came before the French Courts, a French company benefited from the participation-exemption but was just below the threshold for the LuxCo to be treated as a controlled foreign company under the CFC rules. The sole purpose of the LuxCo was to hold financial assets, the French investors had no influence over the management of the LuxCo's assets, the LuxCo had no specific technical competence in financial investments and the shareholders did not attend the statutory shareholders' meetings. The French company failed to give non-tax reasons justifying the use of a subsidiary located in Luxembourg. As a result, the overall scheme was deemed to be abusive and dividends paid to the French company were taxed as ordinary income (without the benefit of the participation-exemption).
- Cases where the GAAR is unlikely to apply:
  - the French Tax Authorities have indicated that they will not use the GAAR to challenge an election for corporate income tax just before a merger, in order to benefit from the favourable tax regime set forth in the FTC, applicable only to mergers between companies subject to corporate income tax in France.
  - the sale and repurchase of shares in French companies before and after dividend distributions, for the sole purpose of benefiting from tax credits is not considered an abusive transaction by the French Courts.

Anticipated evolution of the GAAR

There is no proposed amendment to the currently applicable GAAR, nor are we aware of any proposal to create any new general anti-abuse rules.

Germany

Principles and scope of application

German tax law distinguishes between a generally applicable GAAR and TAARs with a particular (usually narrow) scope of application.

The basic GAAR is set out in section 42 of the General Tax Code of Germany (*Abgabenordnung*) ("**GTC**").

Criteria for the GAAR to apply – What is abusive?

Abusive legal transactions which are enacted solely for the purpose of avoiding German tax are not recognised by the German Tax Authorities. The German Federal Tax Court (*Bundesfinanzhof*) has set out the following criteria which have to be met in order for the GAAR to apply: the transaction has to be (i) abusive, (ii) without economic justification and (iii) mainly aimed at the avoidance of German taxation. A legal structure is abusive, in general, if reasonable parties acting normally would not have chosen it for achieving the intended commercial outcome.

The German Tax Authorities have also published the following guidelines for determining where the GAAR applies:

- a legal structure is chosen which is not appropriate for what is economically intended to be achieved;
- the chosen structure results in a tax benefit which would not have been available under the appropriate structure;
- the achieved tax benefit is not intended to be available in the circumstances in issue; and
- the taxpayer cannot demonstrate sound commercial reasons (other than tax) for the chosen structure.

If the Tax Authorities succeed in proving the first three requirements, the taxpayer will be required to demonstrate sound commercial (non-tax) reasons for the chosen structure (the final requirement). If the taxpayer cannot demonstrate sound commercial (non-tax) reasons for the structure, the structure will be disregarded for tax purposes and deemed to be replaced by an appropriate structure. The tax arising under the adjusted structure is imposed.

If a number of steps are combined to achieve a tax benefit, there is a sound economic reason for each separate step or each step analysed in isolation does not trigger a tax saving, but the tax benefit arises out of the combination of various steps, the GAAR may not apply. However, if the steps of the transaction taken together constitute an "overall plan", the entire transaction can still be disregarded by the German Tax Authorities as abusive. An "overall plan" is a plan made in advance (before the beginning of a transaction) containing all the steps necessary and relevant for accomplishing the intended objective.

Interpretation of the GAAR

As the GAAR overrules and limits the tax benefits which are provided for in German tax law, it is applied restrictively by the German Courts. However, the German Tax Authorities tend to interpret the scope of the GAAR more widely.

Safety zone(s) – Can a tax ruling be obtained?

It is possible to obtain a tax ruling in advance of entering into the transaction. A tax ruling cannot be granted anonymously so the identity of the taxpayer and all details of the contemplated transaction must be disclosed at the outset.

There is no time-limit for the Tax Authorities to issue a ruling. However, as a rule of thumb, they generally take a minimum of three months. Further, the application triggers an administrative fee which is payable irrespective of whether a positive ruling is granted.

Sanctions associated with the GAAR

The application of the GAAR will result in the "correct" taxation being imposed, including interest (at 6% p.a.) on the outstanding amount in the case of delay. This interest is not tax deductible.

If the GAAR applies, the German Tax Authorities will recharacterise the acts performed by the taxpayers and base their tax assessment on the structure which would normally have been chosen to achieve the economic objectives. Generally, the recharacterisation does not have an impact on the transaction itself, i.e. from a legal perspective, the transaction is and remains unchanged (apart from certain exceptions) but such recharacterisation is necessary to determine the tax amount payable under the GAAR.

Any recharacterisation made under the GAAR must be made in respect of all the parties involved in the transaction.

Penalties and imprisonment may apply in the case of tax evasion.

Last resort provision(s)?

The GAAR can be applied in addition to other anti-abuse provisions, but if the requirements of a specific TAAR are met, the GAAR cannot be applied as well.

Anticipated evolution of the GAAR

The current draft annual tax law (*Jahressteuergesetz*) for 2013 does not contain plans for new general anti-abuse rules.

However, certain amendments in respect of TAARs are currently under discussion (e.g.an anti-RETT (i.e. real estate transfer tax) TAAR and a TAAR to prevent the implementation of the so-called “Goldfinger”-model by which German tax residents trigger foreign losses to minimise their German tax burden).

Belgium

Principles and scope of application

Belgian tax law provides for different GAARs applicable, respectively, to direct income tax, registration and inheritance duties and VAT.

The GAARs applicable to direct income tax and to registration/inheritance duties were amended by a law of 29 March 2012 (the "**Law of 29 March 2012**") to widen the powers of the Belgian Tax Authorities to recharacterise an abusive transaction in order to enable the Belgian Tax Authorities to fight more effectively against tax abuse in these areas.

The GAAR applicable to VAT has also been amended in order to comply with the decision of the European Court of Justice in the *Halifax* case.

As the GAARs applicable to direct income tax and to registration and inheritance duties represent the most interesting aspects of the Belgian GAAR regime, we will focus our analysis there.

Criteria for the GAAR to apply – What is abusive?

The following criteria must be satisfied for a "tax abuse" to exist under the two new GAARs:

(a) What must the Tax Authorities prove?

The Belgian Tax Authorities bear the burden of proof (they must prove the existence of an abuse, in the circumstances). In the absence of any other factors, an abuse exists if the transaction contradicts the purpose or intention of the relevant statutory provision and is motivated by a desire to realise a tax benefit.

Belgian tax law recognises the freedom of the taxpayer to structure legitimate arrangements in order to pay the least amount of tax. It is clear from the parliamentary documents that the intention behind the GAARs is not to fundamentally change this principle but to combat purely artificial transactions.

Transactions are purely artificial where they "*(i) do not accord with the economic objectives of the tax legislation (ii) are totally disconnected from economic reality or (iii) are not performed under market conditions. In other words, they relate to legal acts that are performed solely to avoid tax.*"

Of course, divining the legislative intention behind particular provisions is a formidable task. Even by relying on standard principles, in examining the language of a provision and the parliamentary documents relating to it, it is not always possible to judge whether a particular provision applies to a specific transaction. It may be difficult for the legislature to anticipate the creativity of businesses and their advisors and it is striking that the Law of 29 March 2012 did not contain any concrete examples of when the new GAARs would apply.

Recharacterisation to determine what is deemed to be the "normal" (i.e. non-abusive) transaction is also problematic. In particular, if a transaction could potentially be recharacterised in different ways, a question arises as to which transaction should be deemed to be the "normal" one by the Belgian Tax Authorities. The one which is subject to the heaviest taxation? This question is not addressed by the new GAARs, leading to substantial uncertainty in their application.

(b) Counter-arguments by the taxpayer

If the Belgian Tax Authorities are able to demonstrate that a *prima facie* tax abuse exists according to the criteria listed above, the taxpayer must prove that the transaction was essentially motivated by genuine non-tax reasons rather than to obtain a tax benefit.

This argument will not be accepted if the transaction is solely motivated by tax reasons or if the non-tax reasons are so insignificant that a reasonable taxpayer would not have entered into the transaction in the absence of the tax benefits.

(c) Consequences

If the taxpayer's counter-argument is unsuccessful the following consequences may follow:

- the legal act or series of legal acts involved in the transaction will not be enforceable against the Belgian Tax Authorities;
- a legal act or series of legal acts effecting a single transaction may be recharacterised by the Belgian Tax Authorities; and
- the taxable basis and the tax computation are restored so that the transaction is subject to a tax assessment according to the purpose of the law (as if no abuse had occurred). The Belgian Tax Authorities will therefore tax on the basis of the transaction deemed to be "normal".

(d) Additional feature of the GAARs' provisions

The Law of 29 March 2012 also provides that the concept of a series of legal acts effecting a single transaction includes the artificial division of a transaction into different successive acts spread over a period longer than one assessment year, in which case the Belgian Tax Authorities may also apply the GAAR provided that they can demonstrate the unity of intention between the different acts.

Interpretation of the GAARs

As the two GAARs are very recent, there has not yet been any case law relating to them. The application of the GAARs by the Belgian Tax Authorities will certainly depend on the specific facts and circumstances of each situation.

However, as a matter of principle, the GAARs should in our view be construed narrowly by the Courts as they constitute an exception to the general principle recognised under Belgian tax law that a taxpayer is free to structure arrangements in order to pay the least amount of tax.

Safety zone(s) – Can a tax ruling be obtained?

Generally, Belgian taxpayers may obtain a tax ruling from the *Service des Décisions Anticipées en matière fiscale/Dienst Voorafgaande Beslissingen in fiscale zaken* (the "**SDA**") confirming the tax treatment of a transaction. The tax ruling may only be obtained before the transaction is entered into. It can take between 3 to 6 months to obtain a tax ruling, depending on the complexity of the operation and whether or not questions are raised by the Belgian Tax Authorities. Tax rulings are valid for five years once issued.

If applicants are concerned with preserving their anonymity a pre-filing request can be submitted to test the likely outcome of a full tax ruling request. All the details of the proposed transaction must be disclosed, subject to a guarantee that this information will not be communicated by the SDA to the Belgian Tax Authorities. If the pre-filing has a positive outcome, the applicant could then file a formal tax ruling request in order to obtain a binding decision as to the tax treatment of the proposed transaction. If the outcome of the pre-filing request is negative, the applicant does not have to make a request for a formal tax ruling.

Although the SDA is competent to examine the extent to which a transaction is justified by non-tax motives, it will not be entitled to conclusively determine whether or not the Tax Authorities are entitled to apply a GAAR.

Sanctions associated with the GAARs

As mentioned above, the GAARs enable the Belgian Tax Authorities to disregard the abusive acts performed and tax the recharacterised transaction as if the abuse had not occurred.

In our view, any recharacterisation under a GAAR should be consistent with respect to the tax position of all the parties involved in a transaction. This has not, however, been explicitly confirmed in case law or by the Belgian Tax Authorities.

As the GAARs' provisions constitute a means of proof for the Tax Authorities, no sanctions (such as fine, penalty, etc.) are, in our view, associated with them as their application does not amount to a violation of the Belgian tax code. The Tax Authorities do not share this view and have expressed in a recent circular that tax penalties could be levied in cases where a GAAR is applied, depending on the circumstances of the case.

Last resort provision(s)?

The new GAARs' provisions are used only as a last resort (i.e in cases where the ordinary methods of interpretation, technical provisions of the relevant tax code, anti-abuse provisions (TAAR) and the sham theory cannot be used in the case at hand).

Typical examples in which the GAARs would/would not apply

One typical example where a GAAR could apply is where the amount of equity in companies that will be merged in the near future is increased solely with a view to increasing the tax losses available to the company that will survive the merger. According to Belgian tax law, the amount of tax losses which can be carried forward post-merger is determined on the basis of the net asset position of the merging companies just before the merger. It is therefore tempting to improve the net asset position of the merging companies (for example by increasing their share capital) to increase the amount of tax losses available post-merger. However, if the transaction is only carried out for this reason, the Belgian Tax Authorities can disregard the increases in share capital and adjust the amount of available tax losses accordingly.

Another example concerns the transfer of shares in a real estate company. Transfers of real estate assets located in Belgium are in principle subject to a 10 or 12.5% registration duty. The sale of shares in company holding real estate assets are normally not subject to this transfer tax. However, if, for example, all assets other than the relevant real estate are hived down shortly before the sale, the Tax Authorities could argue that the method is purely artificial and only aimed at avoiding the levy of the registration duties, in which case the duty would be payable.

Anticipated evolution of the GAARs

As the two new GAARs have been introduced in 2012, it is not currently anticipated that they will be amended in the near future.

Spain

Principles and scope of application

In Spain, anti-abuse tax measures are divided into:

- The GAAR, which applies where there is either (a) a conflict in the application of tax regulations or (b) simulation; and
- TAARs, which prevent specific kinds of transactions or apply a different tax treatment to the one sought by the parties.

The Spanish GAAR is established in Law 58/2003, of 17 December, on General Taxation and applies in two cases:

(a) **Conflict in the application of tax regulations.**

A conflict would exist where a taxpayer avoids a taxable event or reduces its taxable basis or tax payable through transactions in which any of the following occurs:

- the transaction is highly artificial or not typical for achieving the result obtained; and
- the transaction achieves material legal or economic effects or benefits that differ from those that would have resulted from the non-artificial transaction.

The Spanish Tax Authorities need to get a favourable report from a special commission in order to apply the GAAR. If the GAAR applies, the result is tax on the transaction that would normally have been carried out.

(b) **Simulation.**

This occurs when there is a hidden purpose behind a transaction, for example (i) not entering into any agreement when the parties otherwise would; or (ii) entering into an agreement other than the one actually intended by the parties.

In case of "simulation", the real purpose sought by the parties is hidden behind a fake transaction or a "sham". An example of this could be donations (the real purpose of the transaction) which are disguised as purchase agreements (the simulated acts).

In those transactions where there is "simulation", the parties would be taxed on the deemed transaction together with interest and penalties.

Criteria for the GAAR to apply – What is abusive?

For the GAAR to apply in the case of a conflict in the application of tax regulations, the Spanish Tax Authorities need to show there has been an abuse. There is no specific definition under Spanish tax law of what constitutes an abuse although the term is defined in the Spanish Civil Code.

The "conflict in the application of tax regulations" concept applies the same principles as an abuse of law, since the conflict in the application of the tax regulations would involve the use of artificial business or legal forms for a purpose other than the one intended by the regulations leading to the same commercial result but with lower taxation.

The "conflict in the application of tax regulations" is tested objectively: the Spanish Tax Authorities would compare the external behaviour (business or legal transactions) carried out by the taxpayer (regardless of the taxpayer's motives) in order to verify whether these businesses or transactions are genuine or artificial.

Interpretation of the GAAR

The Spanish Tax Authorities and Courts look at the facts of each case in order to determine whether or not the "conflict in application of tax regulations" regime should apply.

Challenges using abuse of law as such are rarely made by the Tax Authorities (although there are some recent precedents in connection with the tax deductibility of financial expenses). There is no discernible trend in favour of taxpayers or authorities in abuse of law cases.

The Tax Authorities (and some administrative or judicial courts) generally tend to apply Spanish tax law in broad terms (*i.e.* based on its spirit) instead of specifically applying the Spanish GAAR provisions, because the GAAR applies narrowly.

Safety zone(s) – Can a tax ruling be obtained?

Any taxpayer can request a binding tax ruling from the Spanish Tax Authorities and that would protect the taxpayer provided there was full disclosure.

The procedure usually takes between six to nine months on average although there is no legal deadline for the Tax Authorities to issue a ruling.

Sanctions associated with the GAAR

The Spanish Tax Authorities have to produce a special report justifying the application of the GAAR to a particular transaction and setting out the tax consequences that flow from the GAAR applying.

If a transaction involves two parties, any adjustment made by the Tax Authorities need not be made to both.

If the GAAR applies and the factual circumstances constitute a conflict in the application of tax regulations, the tax reassessments would (i) eliminate the tax benefits by applying the regulations which would have applied but for the use of the tax structure and (ii) charge interest for late payment. If the factual circumstances constitute a simulation, both of the above may be chargeable, together with tax penalties.

The distinction between "artificial" and "simulated" elements in complex transactions may not always be clear and evident.

Last resort provision(s)?

According to Spanish general legal principles (in particular, the principle of "specialty"), if there is a specific anti-abuse rule (TAAR) (e.g., the transfer tax anti-abuse provision), this is applied before the relevant GAAR provisions are. It is easier to apply a TAAR (which normally contains objective criteria) rather than the broader GAAR which requires a specific procedure to be followed.

The general trend in Spain is towards an increased number of TAARs as opposed to greater use of the GAAR.

Typical examples in which the GAAR would/would not apply

An example of the conflict in the application of the tax regulations (provided by the Spanish Tax Authorities) is a case where a taxpayer grants a loan to a related party and later the same taxpayer requests the same party to grant him an equivalent loan in order for him to acquire a new home. In this situation, the General Directorate of Taxation has ruled that the granting of the loans is artificial as the taxpayer's sole purpose was to benefit from a tax credit on the acquisition of his new home.

Anticipated evolution of the GAAR

Currently, no amendment of the Spanish GAAR is proposed.

In the current economic situation, the Spanish government is approving a raft of new tax measures intended to prevent tax fraud, including a requirement to provide specific tax statements describing the ownership of assets located abroad, limitation of payments made in cash and extension of legal tax liability cases, etc.

The Netherlands

Principles and scope of application

The Dutch tax code provides for TAARs aimed at preventing the abuse of tax law. The nature of the regulations varies depending on the area of the law at which the TAAR is targeted. In practice, these regulations take the form of specific conditions that must be fulfilled for certain tax exemptions or favourable tax treatment to be available.

In respect of a GAAR, the Dutch tax law has the concept of "*fraus legis*", (i.e. the Dutch *abuse of law* doctrine). This doctrine is not explicitly set out in the Dutch tax code but is a judicial creation which evolved as a result of a series of 'groundbreaking' rulings of the Dutch Supreme Court. In essence, this judicial GAAR provides for a 'substance over form' approach in combating abuse. There is, in principle, no area of Dutch taxation that the GAAR does not apply to. In the past there has been some debate around the application of the GAAR to VAT. However, a recent ruling of the Dutch Supreme Court implies the extension of the GAAR to that tax. Furthermore, as the Dutch excise tax regulations are developed under a similar legal framework to VAT, the GAAR doctrine could extend to this area of taxation (although, to date, there has been no Dutch tax case confirming this).

Certain areas of taxation are less likely to be relevant to the GAAR, whereas more 'technical' areas (e.g. structured transactions) are more likely to be subject to it.

Criteria for the GAAR to apply – What is abusive?

A transaction or structure will be abusive if it is set up:

- with the sole intention of avoiding tax or where tax avoidance is a decisive motive with no reasonable commercial underpinning; and
- the transaction or structure would be contrary to, or in violation of, the purpose and intention of Dutch tax law.

An abusive transaction or structure can be ignored or recharacterised to establish a "taxable event", resulting in the tax liability being adjusted to reflect the tax treatment which would have applied to the recharacterised transaction.

Interpretation of the GAAR

The Dutch Courts interpret the GAAR restrictively but any decision will depend on the specific facts and circumstances. Because it developed through court rulings rather than legislation, the GAAR retains some flexibility and may change further as a result of new court decisions.

Safety zone(s) – Can a tax ruling be obtained?

The Dutch Tax Authorities have a general policy that if the correct tax treatment for a transaction is 'unclear', a taxpayer can request a ruling from the Tax Authorities in order to obtain certainty. Broadly, this procedure takes up to 6 weeks where the facts are relatively simple, while for more complex cases the procedure can take up to 3 months. In order to obtain a ruling, the Tax Authorities require the disclosure of the identity of the relevant party, although in some cases, it may be possible to negotiate with the Tax Authorities on an anonymous basis. The decision to engage in ruling negotiations – and grant certainty under a ruling to a taxpayer is, however, at the full discretion of the Tax Authorities. The Tax Authorities will generally not grant a ruling in cases involving areas particularly susceptible to opportunistic tax planning; in such cases the Tax Authorities also tend to avoid providing any 'general position papers' discussing 'hypothetical' cases. In practice, the Tax Authorities are reluctant to grant any form of upfront information on their position and approach in relation to the GAAR.

Sanctions associated with the GAAR

If the GAAR applies, a transaction or structure can be ignored or recharacterised to establish a 'taxable event', resulting in a different tax treatment, as described above.

Recharacterisation would, in principle, only be in respect of the relevant taxpayer. It does not, in general, fundamentally change the actual events or acts for legal purposes or indeed for general tax purposes. The application of the GAAR should therefore not have an effect on the Dutch tax position of another taxpayer (assuming the other taxpayer is not itself intentionally avoiding any Dutch taxation under the transaction). Therefore, no Dutch tax advantages (e.g. a step-up) can be claimed by a taxpayer on the basis of the application of the GAAR to the tax position of any other taxpayer.

In principle, the application of the GAAR will not trigger specific sanctions on the condition the taxpayer has a 'reporting position' (*pleitbaar standpunt*) which is based on a reasonable interpretation of the law. However, if a taxpayer's transaction or structure could be successfully challenged under the GAAR and the taxpayer would not have a reasonable reporting position, the taxpayer might be subject to financial penalties, depending on all the facts and circumstances.

Last resort provision(s)?

The GAAR typically serves as a last resort. However, it may apply where existing TAARs are insufficient to combat abusive transactions or structures (especially if the abusive structures or transactions have been considered in the legislative history to the TAAR). Having said this the use of the GAAR in an area that is already covered by TAARs is rare.

Typical examples in which the GAAR would/would not apply

Typical examples where the Dutch Tax Authorities have successfully challenged a transaction or structure on the basis of the GAAR are:

- *interest deduction for Dutch corporate tax purposes*: a dividend distribution or capital contribution that would not result in an actual cash transfer or pay-out but has been made in interest-bearing debt, in order to artificially create interest deductions at the level of a corporate taxpayer. The relevant interest payments will be ignored under the GAAR. Such schemes have resulted in a considerable amount of GAAR case law that has subsequently been enacted into the Dutch tax code as TAARs;
- *interest and cost deduction for Dutch personal income tax purposes*: to reduce the taxable profit generated upon the discontinuation of business enterprise in view of an emigration out of the Netherlands, a taxpayer makes certain investments which at the time of the investment were already unprofitable; under the GAAR, this sort of artificial transaction can be ignored for Dutch personal income tax purposes;
- *avoidance of Dutch transfer taxation liability*: Dutch real estate transfer tax would in principle be due not only on the transfer of the real estate itself but also on the transfer of participations in a Dutch real estate company;
- *avoidance of non-recoverable Dutch VAT*: to avoid non-recoverable VAT on the acquisition of assets a VAT-exempt entity structured an asset acquisition by participating as limited partner in a partnership. This partnership in turn acquired the relevant assets and subsequently leased the assets to the VAT-exempt limited partner. The lease agreement provided for an asset purchase option to acquire the assets (after a certain period); this construction resulted in considerably less non-recoverable VAT at the level of the VAT-exempt limited partner;
- *avoidance of Dutch Gift tax liability*: a giver aims to avoid a relevant Dutch gift tax liability on the gift of dividend coupons through structuring the gift as 'usufruct' of shares; under the GAAR, the temporary usufruct will be treated as a gift of dividend coupons taxable for Dutch gift tax purposes.

A typical example where the application of the GAAR would be limited is:

- *access to tax treaty benefits*: according to the Dutch Supreme Court, access to tax treaty benefits can only be denied under the GAAR if the relevant double tax treaty would in principle allow the use of anti-abuse provisions.

Anticipated evolution of the GAAR

As noted above, the GAAR has been developed judicially and is subject to ongoing change as cases come before the Courts.

There are currently no plans to legislate in relation to the GAAR. Over the years, the Dutch legislature has enacted aspects of GAAR case law into *specific* TAARs. We would expect that the legislature will continue this approach.

Italy

Principles and scope of application

Italian tax legislation does not provide for a GAAR although the Italian income tax code does contain a TAAR aimed at disregarding any tax benefit arising from a number of listed transactions if they have no valid economic basis and aim to circumvent tax legislation.

However, in a number of decisions, the Italian Supreme Court has developed a judicial principle of "abuse of law for tax purposes", which has been endorsed by the Italian Tax Authorities. According to this principle, Italian tax legislation should be interpreted in a way that avoids abuse which the Italian Supreme Court has interpreted as meaning a misapplication of any Italian tax provision in connection with a transaction without a clear and significant business purpose.

In the opinion of the Supreme Court this judicial GAAR is based on a provision of the Italian Constitution which states that all must share the burden of public expense in proportion to their respective ability to pay taxes. In relation to EU harmonized taxes (VAT and customs duties), the Supreme Court refers to "abuse of rights" principles set out in the case law of the European Court of Justice.

Criteria for the GAAR to apply – What is abusive?

A transaction is deemed to be abusive whenever a taxpayer (resident or non resident) derives a tax benefit from that transaction in the absence of clear and significant economic reasons for carrying it out.

A transaction is abusive if:

- it is aimed at avoiding tax laws;
- any tax benefit or saving deriving from it is a dominant and substantial reason for carrying it out; and
- there are no clear economic reasons (other than obtaining a tax advantage or saving) for entering into it.

A transaction can be deemed to be abusive independently of any criminal offences committed during its implementation. In practice, the GAAR is mainly relevant to the misapplication of tax provisions in transactions which are not fraudulent but aimed at obtaining a particular benefit or circumventing the law.

Interpretation of the GAAR

The principles set out by the Italian Supreme Court in interpreting the GAAR are evolving continuously. However, the following factors are relevant:

- the tax benefits obtained by the transaction are contrary to the spirit and objectives of the law;
- the transaction is implemented mainly to obtain a tax advantage. It is irrelevant whether (i) there are other reasons to enter into the transaction, if the tax benefit is the principal reason, or (ii) the transaction is composed of a number of separate transactions, if the overall purpose is obtaining a tax benefit;
- there are no clear and significant economic reasons for the transaction. The economic reasons can be "clear" and "significant" even if there is no immediate return.

The burden of proof is on the Italian Tax Authorities who must demonstrate the tax advantage derived from the transaction and clearly show that the specific elements proving it is abusive are satisfied. Taxpayers can rebut the reconstruction of the facts made by the Tax Authorities by providing clear and significant business reasons justifying the transaction.

Safety zone(s) – Can a tax ruling be obtained?

In principle, rulings can be obtained. Taxpayers can submit tax ruling requests to the Italian Tax Authorities, in relation to the application of statutory provisions, if the Ministry of Finance has not yet issued an interpretation through a circular, ruling or other official document published on the Ministry's website. A tax ruling request can only be made in relation to an actual transaction and must be filed before the relevant transaction is entered into. The application must be accompanied by all the information and documentation relevant to the transaction together with the interpretation of the relevant provisions of tax law proposed by the applicant.

The Italian Tax Authorities must issue a written reply justifying its ruling within 120 days of the submission of the tax ruling request. If no reply is given, the interpretation of the taxpayer is considered as accepted by the Tax Authorities, although it is only binding on the Tax Authorities with respect to the applicant and cannot be extended to similar transactions carried out by other taxpayers.

Sanctions associated with the GAAR

The Italian Tax Authorities can recharacterise an abusive transaction to apply the rates of tax that would have been applied had the abusive transaction not been entered into. Where the Tax Authorities recharacterise a particular transaction, there is no obligation to recognise the recharacterised tax treatment in respect of any other party involved. However, the other party can submit a tax ruling request to the Tax Authorities to confirm the tax treatment in its hands.

The Italian Supreme Court has stated that financial penalties or criminal law sanctions are not applicable to transactions deemed abusive under the GAAR.

Last resort provision(s)?

Where a transaction falls under a TAAR or specific anti-avoidance rule, those provisions are applied before the GAAR which, being a judicial and not a legislative creation, is subsidiary.

Typical examples in which the GAAR would/would not apply

The abuse of law principle is applicable to all transactions not already covered by a TAAR provision or another anti-avoidance rule.

Anticipated evolution of the GAAR

A bill for reform of the Italian tax system has been approved by the Chamber Of Deputies of the Italian Parliament and transmitted to the Senate for final approval.

The bill aims to revise the existing anti-avoidance provisions in Italian tax legislation with a view to unifying such rules under a statutory GAAR.

Conclusions

Our summary shows that the approaches taken by law-makers in creating GAARs and by judges in interpreting them have certain common features.

Common features include:

- GAARs will apply to transactions which are deemed to be abusive. The "artificiality" of a transaction and the motives underlying it are central in testing whether there is an abuse. Therefore, in carrying out tax planning, the importance of being able to demonstrate adequate financial and/or economic motives (i.e., motives other than avoiding tax) for a given tax structure is critical and becoming more so.
- Most jurisdictions make a distinction between tax fraud or sham transactions (where penalties may be applicable) and abusive transactions where taxpayers have used a provision in a way which is contrary to the objectives or spirit of the law (and for which no penalties – but possibly late interest – may be applicable).
- In most jurisdictions, the legal effects of a recharacterisation will be limited to tax (i.e. tax will be applied as if no abuse had taken place). However, from a legal perspective, the original transaction will remain in force regardless of the tax recharacterisation.
- GAARs are generally used by tax authorities as a last resort and only if specific anti-abuse provisions (TAARs) are not applicable.
- A transaction which is composed of multiple steps may still be caught by a GAAR, for example, if the tax authorities can demonstrate the steps are linked.

Despite these similarities, there are significant differences in the methods of enforcement, the criteria required for a GAAR to apply and the construction given to these criteria by the national courts and tax authorities between jurisdictions. For example:

- In certain jurisdictions, the law-makers have introduced safeguards in order to limit over-zealous application of the GAAR by tax authorities, e.g. by providing that the GAAR may only be invoked by a senior official or by providing for a review by an independent committee that assesses whether a transaction falls under the GAAR.
- The survey shows that there are differences between jurisdictions as to whether relieving adjustments are granted automatically or must be applied for.

The current political context and the tide of public opinion driving governments to fight against "tax abuse" has led to major amendments to existing GAARs (e.g. Belgium) and the enactment of new GAARs (e.g. UK). Unfortunately, these changes inevitably mean a greater degree of uncertainty until case law and administrative practice have clarified and refined the application of those GAARs. Some tax authorities seem to be encouraging this uncertainty (which some have compared to a "keep off the grass" sign to dissuade potentially abusive transactions), for example, by refusing to provide examples of where a GAAR may apply.

It is to be hoped that, in construing the notion of "tax abuse", the various national courts and tax authorities will take inspiration from the case law of the European Court of Justice, for example, from the concept of tax abuse which has been developed in relation to the application of the Merger Directive. A coherent approach across Europe is vital to enable European businesses to structure their tax affairs effectively, particularly in an area where legal certainty is difficult to secure. A common approach to national GAARs is also important in cross border transactions.

Disclaimer
The above analysis gives an overview of certain aspects of specific and general anti-abuse provisions under UK, Luxembourg, French, Belgian, Spanish, German, Italian and Dutch tax laws. It does not provide a comprehensive analysis of those provisions and is not tax or legal advice and should not be relied on as such. For further detail in respect of the issues and topics covered above, please contact those identified in the relevant section or your usual Clifford Chance contact.

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