



One Size Fits All?
A Legal Comparatist's View on Designing a GAAR
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EU-Initiatives on the implementation of GAARs

Commission recommendation on aggressive tax planning (12/2012) “encourages” member states to adopt the following rule:

“An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored.” → taxation “by reference to [...] economic substance”

Art. 6 Council Directive (EU) 2016/1164 (7/2016): minimum standard

“For the purpose of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine (...) an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality”.



GAARs as tools for line-drawing

acceptable tax planning ↔ **aggressive tax planning**
tax mitigation **tax avoidance**

“Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury.”

(Judge Learned Hand in Helvering v. Gregory, 69 F.2d 809 [2. Cir. 1935])

“The freedom to arrange one’s affairs to minimize taxes does not include the right to engage in financial fantasies with the expectation that the IRS and the courts will play along.”

(Forseth v. Commissioner, 85 T.C. 127 [1985])



Does a tax system need a GAAR at all?

Not every jurisdiction has a GAAR, but every jurisdiction faces the problem of how to address new tax shelters.

→ Judicial “activism” (see UK, US) or extension of other concepts (sham – see France, US; requalification)

Decades of experience in various countries have shown that **fighting tax avoidance is not just a mere exercise of purposive interpretation.**

A GAAR is not necessary but helpful to **avoid a “functional misuse”** of other instruments and to address concerns with respect to the **separation of powers principle.**



A Case for Harmonisation?

- Would a harmonisation of statutory GAARs lead to **greater uniformity in drawing the line** between acceptable and unacceptable tax planning?
- Is it likely that a harmonisation of statutory GAARs would have any **negative effects**?
- Is there any **need for harmonisation** given the similarity of the criteria used in different jurisdictions to “define” tax avoidance?



Background: Comparative Research

Unproblematic criteria

- Legal arrangement
- Tax advantage (broad understanding)

Problematic criteria

1. Attributes of transactions

artificial/inadequate/unusual/unreasonable...

2. Tax advantage **contrary to the purpose** of statutory law

3. No (substantial) **non-tax reasons**/no (substantial) **non-tax effects**

4. **Taxpayer's intent**

5. Discrepancy **form/substance (legal/economic?)**

Criteria (?) for tax avoidance (1): artificiality

GAAR DE

artificiality

may indicate →

inadequateness

GAAR UK

contrived/abnormal steps

i.a. relevant for →

abusiveness as defined by **double reasonableness test**

GAAR F

artificiality

may indicate →

??? (defeat of legislative purpose? sole purpose test?)

US

artificiality

may indicate →

divergence substance/form

GAAR EU (2012)

artificiality

← defines

lack of commercial substance

GAAR EU (2016)

∅

primary

secondary

statutory

case law



Criteria (?) for tax avoidance (2): form and (economic) substance (ES)

GAAR D	legal form \neq economic purpose	defines \rightarrow	inadequateness
UK	abhorrence of ES arguments		
	GAAR: legal gain/loss \neq economic gain/loss	indicates \rightarrow	abusiveness as defined by double reasonableness test
GAAR F	substance \neq form	may indicate \rightarrow	??? (defeat of legislative purpose? sole purpose test?)
US	lack of economic substance (economic) substance \neq form	may indicate \leftarrow	various criteria
GAAR EU (2012)	lack of commercial substance (ES relevant for tax adjustments)	defines \rightarrow	artificiality
GAAR EU (2016)	valid commercial reasons reflecting economic reality	define \rightarrow	genuineness of arrangement

Criteria (?) for tax avoidance (3): defeat of legislative purpose

GAAR D

defeat of legislative purpose

GAAR UK

substantive results of arrangements consistent with principles/policy objectives of provisions?

relevant for →

double reasonableness test
(„...reasonable course of action in relation to the relevant tax provisions“?)

GAAR F

defeat of legislative purpose

← may indicate?

artificiality
substance ≠ form

US

the argument concerns „relevance“ of economic substance doctrine

GAAR EU
(2012)

defeat of legislative purpose

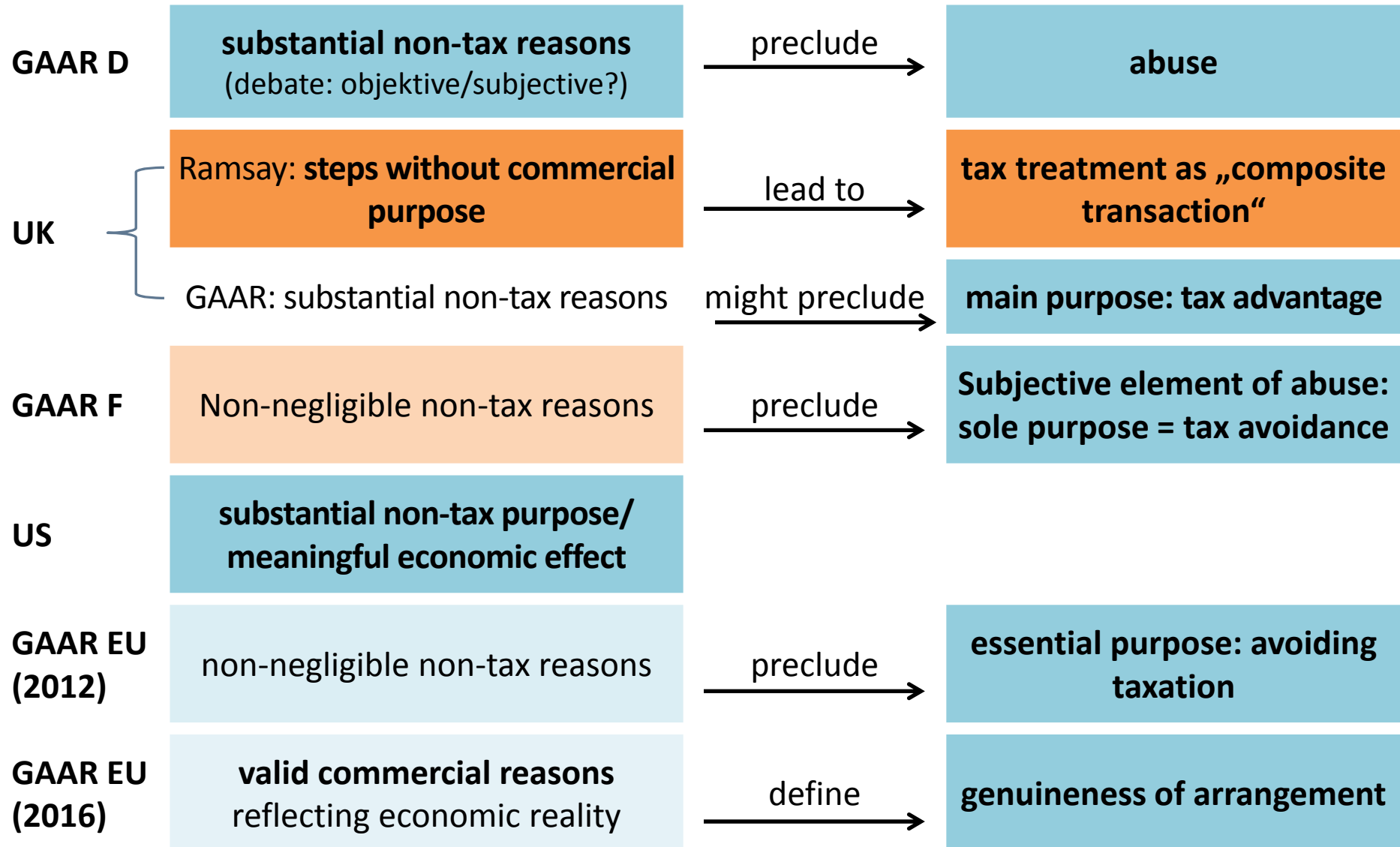
defines →

**Purpose of arrangement =
avoiding taxation**

GAAR EU
(2016)

defeat of legislative purpose

Criteria (?) for tax avoidance (4): non-tax reasons/effects





A Case for Harmonisation?

- **Similar criteria**
- **Unclear function and relevance**
(circumstantial/substantial?
essential criteria/mere indicators?)
- **Interchangeability?**

Certainly yes – but to what extent?

➔ A case for harmonisation?



A Case for Harmonisation?

But...

➤ Unclear relevance → **how to harmonise?**

➤ **Watch out:**

It is not possible to deduce the **effectiveness** of a GAAR from its wording.

➤ **Watch out:**

It is not possible to deduce differences in **how particular cases are decided** from terminological differences.

➔ **Is there any need for harmonisation?**



The Dangers of Harmonisation

GAARs necessarily contain **vague concepts**; in every jurisdiction, these concepts are interpreted in line with its **particular legal and constitutional tradition**.

- What a British tax lawyer might call „realistic view of the facts“ might be, for an US tax lawyer, an economic substance analysis (which the British tax lawyer will fervently deny)
- What the CJEU calls „main purpose test“ is equivalent to the „sole purpose test“ in French law

→ Will harmonisation of GAARs really foster uniformity in their application or might it result in the opposite?



Beware of Harmonisation

- ➔ **Harmonisation of GAAR terminology** will not help to ensure uniform GAAR application but will **bring about new uncertainties**.
- ➔ **Harmonisation of GAAR terminology** might even **increase differences** in how GAARs are applied in practice.

Is there a way to avoid pure judicial discretion amounting to a „smell test“?



A way ahead...?

We need to focus on the function of GAARs

Their aim is **not to provide the best description of the real-world phenomenon of tax avoidance.**

Their aim is **to define a threshold for overriding legal rules** in cases where their justification (“purpose”) is not applicable.



A way ahead...?

To perform this function various types of criteria are conceivable, e.g.

- criteria addressing the **degree of tension** between literal application of provision and legislative purpose (**degree of “wrongness”**)
 - criteria addressing (lack of) **legitimate expectations** of taxpayers
 - criteria addressing whether the legislator could have foreseen a certain tax planning opportunity when drafting the provision (**drafters’ responsibility**)
- (...)



Thank you for your attention!

