Poland's Implementation of EU GAAR Compromises Constitutional and EU Principles (Forthcoming: Intertax, vol. 49, 2021, issue 3)

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Articles 3 and 6 ATAD: a dangerous EU legislative mix

In the forthcoming issue of Intertax, I make an in-depth analysis of the issues concerning the partial implementation of the EU GAAR, as enshrined in Article 6 ATAD, by Poland in 2019. One of the main hypotheses is that the combination of Articles 6 and 3 ATAD is a dangerous EU legislative mix. If the legislatures of the Member States presume that the EU GAAR constitutes just a minimum standard for the prevention of abusive tax avoidance, which they may legitimately do according to Article 3 ATAD, then the Member States may implement the EU GAAR to protect their tax bases. However, they should know it comes at the expense of constitutional and EU principles. This happened in Poland's case, with the effect of compromising a set of cardinal constitutional and EU principles – the principles of good legislation, legal certainty, and proportionality. Although this conundrum originates primarily from the decision of the Polish legislature rather than Article 6 ATAD, it must be said that Article 3 ATAD was equally to blame.

The full article in Intertax sets out the full picture through an in-depth analysis of the hypothesis and the provisions of the Polish GAAR and the examination of their compatibility with the constitutional principles and the EU general principles. Since most publications on GAARs concentrate heavily on their hypotheses, this short piece offers a fresh overview of the provision. Apparently, by following Article 6(3) in combination with Article 3 ATAD, the Polish legislator assumed that have a great leeway when designing the provisions of the Polish GAAR, as explained below.

The tax consequences of the Polish GAAR: how repressive can it be?

Once the hypothesis of the GAAR is fulfilled, i.e. all three tests are passed, the resulting tax consequences are severe and may be quite complex. The only straightforward consequence is that the tax advantage is denied. Then, depending on the circumstances, various consequences may follow. One of them is the automatic determination of additional tax liability in the form of a fine. The fine causes a tax on top of the statutory tax rate that is applicable to the income in question after a tax advantage has been denied. The size of the fine depends on the circumstances under which the Polish GAAR was applied: (i) if tax avoidance concerns CIT or PIT, excluding flat-rate forms of taxation, then the additional tax liability is equal to 10% of the sum of the unduly disclosed or overstated tax loss and the undisclosed taxable income to the extent arising from the decision based on the Polish GAAR. The amount that is subject to the additional 10% tax rate will often be much higher than the amount of the tax advantage, e.g. an overstated tax loss will always be more substantial than the resulting tax advantage. These additional tax rates are doubled if, among other things, the base for determining additional tax liability exceeds PLN 15 million (ca. EUR 3.27 million) – with regard to the amount in excess of that amount.

In practice, the combination of the above-mentioned legal consequences may lead to taxation that severely jeopardises the cash flow of the taxpayer and entirely consumes the income from the action targeted by the Polish GAAR. For example, the head of the National Revenue Authority (NRA) will apply the GAAR in 2021 to conclude that the tax loss of a taxpayer in 2020 was overstated by PLN 120 million. In that example, the double additional tax rate (20%) applied to the overstated tax loss in excess of PLN 15 million (PLN 105 million) would be PLN 21 million. That would mean the taxpayer would have to pay PLN 21 million in income tax for 2020, even though they did not generate any income in that year. Assuming that the taxpayer has an income in 2021 of PLN 21 million, the obligation to pay PLN 21 million under the GAAR in 2021 for the overstated tax loss in 2020 would entirely consume the taxpayer's income in 2021. Moreover, a statutory 19% tax rate has to be paid by the taxpayer in relation to taxable income in 2021, i.e. almost PLN 4 million. This demonstrates how the application of an additional tax rate (20%) under the GAAR by the head of the NRA may completely distort the taxpayer's cash flow by consuming not only the entire income at their disposal, but even their savings. Such a scenario would likely lead to the bankruptcy of the taxpayer.

Conclusions

In short, an examination of the provisions of the Polish GAAR reveals that the legal consequences are quite unusual and extremely severe. At first glance, the implementation of Article 6 ATAD in this manner appears to be compatible with ATAD, since Article 6(3) ATAD states that, '[w]here arrangements, or a series thereof, are ignored in accordance with paragraph 1, the tax liability will be calculated in accordance with national law', and Recital 11 of the preamble to ATAD indicates that 'Member States should not be prevented from applying penalties where the GAAR is applicable.' Those passages of the ATAD, together with its Article 3, clearly allow Poland to implement rules governing the legal consequences of the Polish GAAR without much limit. However, it is going too far to confiscate the taxpayer's property for overstating a tax loss coming from tax avoidance. This is clearly repressive (extremely disproportional) and thus an unconstitutional legislative outcome.

Combining the features of the Polish GAAR (with its very broad and vague hypothesis) with the severe legal consequences of its application, it becomes vividly clear that the Polish GAAR is neither necessary nor reasonably balanced with the private interests of taxpayers and their freedom of economic activity and right of ownership. Instead, the public interest represented by the tax authorities is heavily favoured. Indeed, the Polish GAAR sends such strong deterring signals to taxpayers not to enter into any arrangement or transaction that may result in tax advantages that this rule endangers the pivotal purpose of the EU: the establishment and development of an internal market. The protection of individual economic freedoms and the freedom of business initiatives within the EU is certainly undermined by the Polish GAAR.

The Polish legislature is an example of the extreme use of Articles 6 and 3 ATAD. As a result, the implementation of the EU GAAR by Poland has led to the protection of the Polish tax base at the cost of constitutional and EU principles. Perhaps, *de lege ferenda*, the EU should have taken a different approach to the EU standard for abuses of tax law in order to reduce the risk of EU Member States breaching the fundamental rights set out by the EU and originating in constitutional laws.

You can read the full version of this article in the policy note section of Intertax, vol. 49, 2021, issue 3.

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