First Domestic Decisions on the 2015 Parent-subsidiary Directive GAAR Implementation

Guiding Principles for EU Member States?

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COUNTRY NOTES

First Domestic Decisions on the 2015 Parent-Subsidiary Directive GAAR Implementation: Guiding Principles for EU Member States?

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Guidelines regarding the interpretation and the scope of the new Parent-Subsidiary Directive general anti-avoidance rule (GAAR) have been awaited ever since the implementation in 2015. Two recent decisions by the Danish Tax Board involving the application of the new Parent-Subsidiary Directive GAAR may contribute towards establishing such interpretation guidelines. The decisions appear to be neither of a principled nature nor sufficiently well justified by the Danish tax administration. No thorough assessment of the individual conditions of the GAAR seems to have been undertaken, as the Danish tax authorities in each decision appear to engage in GAAR considerations solely by arguing that a tax advantage is obtained which would not otherwise have been obtained, had the arrangement or series of arrangements not been put into place.

1 Introduction

The general anti-avoidance rule (GAAR) in Article 1(2) of the Parent-Subsidiary Directive[1] was transposed into section 3 of the Danish Tax Assessment Act two years ago. The Danish tax authorities and the Tax Board[2] have published two decisions (SKM2017.333.SR and SKM2017.626.SR) involving the GAAR.[3] This article provides some insight into the administrative interpretation of the Parent-Subsidiary Directive GAAR in light of these recent decisions. Moreover, the article examines whether these decisions could provide some guidance for practitioners other Member States with regard to understanding the scope of the Parent-Subsidiary Directive GAAR.

2 The Danish transposition of the Parent-Subsidiary Directive GAAR

The Parent-Subsidiary Directive GAAR was transposed into Danish tax law with the adoption of section 3 of the Tax Assessment Act.[4] This provision took effect on 1 May 2015, and applies to arrangements and series of arrangements regarding benefits under the EU directives on direct taxation, as well as benefits under tax treaties, regardless of when such tax treaties entered into force. Consequently, the provision implemented the amendment of the Parent-Subsidiary Directive, but the GAAR was extended to apply also to the Interest and Royalties Directive[5] and the Merger Directive,[6] as well as to tax treaties.

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1 EU Amending Directive to 2011 Parent-Subsidiary Directive: Council Directive (EU) 2015/121 of 27 Jan. 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L21/1 (Jan. 2015), at 2.

2 The Tax Board is the highest authority inside the Danish tax authority, and is empowered to issue administrative rulings, cf. DK: Tax Administrative Act ss 2–4. These rulings can be challenged before the Danish Tax Tribunal or ultimately the courts. Due to the placement of the Tax Board in the legal hierarchy, issued rulings only carry limited precedential weight. The rulings are, however, binding on the Tax authority and the Tax Board and thus set a precedent, as they related to the administrative interpretation of the GAAR.

3 Both decisions concern Danish exit-taxation, i.e. a deemed liquidation proceeds distribution to the parent entities. Under the Danish special anti-avoidance rule in DK: Tax Assessment Act s. 16 A (3), it is a prerequisite for such liquidation proceeds not to be reclassified as dividend payments, and thus subject to Danish withholding tax that the taxpayers had been eligible to claim the benefits of the Parent-Subsidiary Directive, i.e. had the payment in question been a dividend, Denmark should have waived the right to impose withholding tax on such payment. While liquidation proceeds are not per se covered by the Parent-Subsidiary Directive, Denmark nevertheless presupposes the applicability of the directive before conceding the right to tax liquidation proceeds as dividends.

4 S. 1, no. 2 Law 540 of 29 Apr. 2015.

5 EU Interest & Royalties Directive (2003): Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States, OJ L157/49 (26 June 2003).

6 EU Merger Directive (2009): Council Directive 2009/133/EC of 19 Oct. 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States (Codified Version), OJ L310/34 (25 Nov. 2009).

The provision regarding the directives on direct taxation is worded as follows:

> **Section 3** Taxpayers shall not be granted the benefits of [the Directives] to 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 Directives], are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
>
> (2) For the purposes of paragraph (1), an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality (authors' translation).

It is explicitly stated in the preparatory remarks to section 3 of the Tax Assessment Act that the transposition of the Danish GAAR is intended to correspond accurately to the wording of the Parent-Subsidiary Directive GAAR.[7] For this reason, Danish tax literature has previously asserted that the Danish provision should be interpreted strictly in accordance with the provisions of the Parent-Subsidiary Directive and the case law of the European Court of Justice (ECJ).[8] These features make Danish administrative decisions of potential interest to a broader audience.

Article 1(2) of the Parent-Subsidiary Directive and section 3(1) of the Tax Assessment Act both contain the following five cumulative conditions, which are explained below:[9]

– an arrangement or series of arrangements
– that, having been put into place for the main purpose or one of the main purposes
– of obtaining a tax advantage
– which defeats the content or object or purpose of [the Parent-Subsidiary Directive], and
– are not genuine having regard to all relevant facts and circumstances.

Having established a baseline understanding of the Danish transposition of the Parent-Subsidiary Directive GAAR, the following is a brief explanation of the requirements of the provision.[10]

An arrangement or series of arrangements. There is hardly any doubt that the phrase 'an arrangement or series of arrangements' should be interpreted broadly, and thus includes any agreement, common understanding, transaction or series of transactions, whether or not they are legally valid.[11] This includes – in particular – any foundation, transfer, acquisition or transfer of income, assets or rights relating to the creation of income. The phrase also includes arrangements regarding establishment and classification. An arrangement may further comprise several steps or parts.[12]

That, having been put into place for the main purpose or one of the main purposes. This condition can be regarded as the subjective element of the GAAR. It is immediately discernible from reading the provision that obtaining a tax advantage need not be the sole purpose, nor does it entail that obtaining such tax advantage must constitute *a dominant, principal, essential or main purpose.* Indeed, it is sufficient that just one of the main purposes be to achieve a tax advantage.[13] Unfortunately, there are currently no guidelines for making the distinction between what constitutes the main purpose and secondary purposes.[14]

Of obtaining a tax advantage. When making this determination, it must be the benefits provided for by the Parent-Subsidiary Directive that form the basis for the applicability of the GAAR. In addition, parallel to the judgment of the ECJ in *Zwijnenberg* (Case C-352/08),[15] the tax savings must concern the taxes covered by the directive in question.

The Danish Minister of Taxation has stated that in a specific Danish context, the GAAR may be applied only

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[7] Denmark has also implemented a domestic version of the OECD principal purposes test, cf. s. 3(3) of the Tax Assessment Act, targeting benefits unduly obtained under a Double Tax Convention. Interestingly, the Danish legislator is of the opinion that the Parent-Subsidiary Directive GAAR and the principal purpose test must be interpreted identically, despite the different wording. Consequently, it is expected that the outcomes of the decisions analysed in this article would obtain a similar outcome under the Danish principal purpose test implementation.

[8] *See* e.g. J. Bundgaard, *Internationale omgåelses- og misbrugsklausuler i national skatteret – om den EU-retlige GAAR og OECDs Principal Purpose Test som bestanddele af dansk skatteret*, in *Den evige udfordring: Omgåelse og misbrug i skatteretten* 239 et seq. (J. Bundgaard, D. Ramsdahl Jensen & N. Winther-Sørensen eds, Ex Tuto 2015).

[9] These conditions are already thoroughly treated in the published tax literature. F. Debelva & J. Luts, *The General Anti-Abuse Rule of the Parent-Subsidiary Directive*, 55 Eur. Tax'n 6 (2015); Bundgaard, *supra* n. 8, at 239 et seq.; D. Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44 Intertax 2 (2016), at 98–129; O. Marres & I. de Groot, *The General Anti-Abuse Clause in the EU Parent-Subsidiary Directive*, in *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (D. Weber ed., IBFD 2017), at 225–247; C. Brokelind, *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-up of the BEPS Project*, 43 Intertax 12 (2015), at 186 et seq. Furthermore, s. 3 (1) of the Tax Assessment Act is now superficially treated in JV C.I.4.1.1 (2018-1).

[10] For a similar approach to the analysis of the Anti-Tax Avoidance Directive (ATAD) GAAR, *see* e.g. L. De Broe & D. Beckers, *The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law*, 26 EC Tax Rev. 3 (2017), at 141, ss 4.3 et seq.

[11] *See* e.g. Debelva & Luts, *supra* n. 9, at 224 (stating that it is likely that the phrase should be broadly interpreted).

[12] Proposed Bill L 167 2014/15, at 18, bottom right column.

[13] *See* e.g. Debelva & Luts, *supra* n. 9, at 224 (which refers to the parallels with the OECD principal purpose test provision in this regard).

[14] *See* e.g. Debelva & Luts, *supra* n. 9, at 225, and Bundgaard, *supra* n. 8, at 250.

[15] NL: ECJ, 20 May 2010, Case C-352/08, *Zwijnenberg*, ECLI:EU:C:2010:282.

to the extent that a tax advantage is obtained in Denmark.[16] Consequently, situations where a directive on direct taxation or a tax treaty is used to obtain tax benefits outside of Denmark are not covered by the Danish implementation of the GAAR.

Which defeats the content, object, or purpose of this Directive. This condition can be regarded as the objective test of the GAAR, which seems to be inspired by the doctrine of abuse, as developed by the case law of the ECJ.[17] When making this determination, it is therefore necessary to determine whether a given result defeats the content or purpose of the directive.

The purpose of the Parent-Subsidiary Directive is stated in bullet 3 of the preamble. Specifically, it is stated that: 'The objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.'

Further, in bullet 4, it is stated:

> The grouping together of companies of different Member States may be necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations should not be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

In tax literature, it is argued that the latter better expresses the true actual purpose of the Parent-Subsidiary Directive; thus, dividends distributed between EU-wide intra-community groups of companies are treated equally to domestic distributions.[18] It is further argued that this criterion is strange and problematic, as very few arrangements defeat the purpose of the Parent-Subsidiary Directive, as there would otherwise be no avoidance arrangement that immediately meets the objective conditions set by the Parent-Subsidiary Directive. Overall, this determination seems difficult to make.[19]

Are not genuine having regard to all relevant facts and circumstances. The concept of *genuineness* is hitherto unknown within EU law; rather, the concept of *artificiality* has played a significant role.[20] The Danish Minister of Taxation has stated that the focus should be on whether the individual steps or parts of an arrangement are put into place for valid commercial reasons, i.e. reflecting the economic reality.[21] Furthermore, it is stated that when making the determination as to whether an arrangement is genuine, all relevant facts and circumstances must be taken into account, including the overall group's facts and circumstances.[22]

In addition, there are currently no guidelines, consensus, or jurisprudence on what constitutes a (non)*genuine* arrangement. The wording could invoke *substance-over form*-like considerations, known from the domestic legal system of many Member States. Thus, tax authorities may interpret the condition in accordance with such case law that exists internally in their respective Member States.[23]

The concrete meaning of the criterion is difficult to assess. In light of the above, however, the criterion does not appear to be particularly efficient, as the invention of new terminology requires the courts – at both the national and community level – to develop case law encompassing the concept of (non)*genuine arrangements.*[24]

The obvious example (using holding companies to control the flow of dividends and interest) is probably at the core of the scope of the proposed amendment of the Parent-Subsidiary Directive.[25] Nevertheless, one cannot prima facie conclude that a holding company does not meet the *genuine* requirement, due to a lack of involvement in daily management, the absence of its own physical facilities,

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16 Skatteudvalget 2014–2015 L 167 Bilag 1, j. 14-5030259, at 27.

17 *See* e.g. Debelva & Luts, *supra* n. 9, at 224.

18 Debelva & Luts, *supra* n. 9, at 226.

19 *See* Bundgaard, *supra* n. 8, at 254.

20 *See* e.g. Debelva & Luts, *supra* n. 9, at 227.

21 *See* the comments to s. 1, no. 2 in law proposal L 167 2014–2015. This view is in line with that of the European Council. *See* recital 6 of the preamble to the Council Directive (EU) 2015/121, *supra* n. 1.

22 The Danish Minister of Taxation explicitly does not consider minimizing tax payments as a legitimate commercial reason in relation to the GAAR, as is evident by the answer to FSR in the public hearing summary, Skatteudvalget 2014–2015 L 167 Bilag 1, j. 14-5030259, at 28. This view is not in line with ECJ case law which accepts minimizing such payments as a legitimate commercial interest; *see* UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes v. Commissioners of Inland Revenue*, ECLI:EU:C:2006:544, paras 36 & 37.

23 From a Danish perspective, *see* Bundgaard, *supra* n. 8, at 255.

24 *See* e.g. Bundgaard, *supra* n. 8, at 239 et seq.

25 Juridisk Vejledning C.I.4.1.6. (2018-1).

equipment, and personnel, etc.[26] as the pure holding function per se does not require extensive operational activities for the company that performs this function.[27]

Burden of proof. It is the obligation of the tax authorities of each Member State to determine whether an arrangement constitutes abuse.[28] In this determination, the tax authorities must carry out an objective analysis of all the relevant facts and circumstances, while complying with the principle of proportionality. Additionally, the tax authorities must demonstrate that granting a given benefit based on a directive would be contrary to the purpose of that directive which – in view of the somewhat broad and diffuse purpose of the Parent-Subsidiary Directive – does not seem to be an easy task.[29] The Council addressed this issue during the discussions preceding the adoption of the final text, and required the tax administrations of the Member States to assess whether an arrangement in its entirety is genuine and whether the individual parts of the arrangement on a stand-alone basis are genuine.[30] Only when the tax authorities can provide evidence establishing an intent of abuse, will the taxpayer be obliged to prove that the arrangement or series of arrangements are set up for valid commercial reasons which reflect the economic reality. However, the final text of the Parent-Subsidiary Directive does not entail such rule.

The question regarding the burden of proof was explicitly discussed during the Danish legislative process and was included in the remarks to the proposed bill.[31] It follows that the Danish GAAR also entails that the Danish tax authorities must demonstrate that there is an arrangement which meets all five cumulative conditions – as discussed above – before the arrangement may be set aside. Only then will the taxpayer have to prove that the arrangement is set up for valid commercial reasons.

3 The first Danish decision: SKM2017.333.SR

3.1 *Facts of the Case*

The first case was a request for an advance binding ruling. The binding ruling concerned a holding company (H1) based in Denmark which intended to migrate to Luxembourg for both company law and tax law purposes. The migration was notified to the Danish Business Authority (*Erhvervsstyrelsen)* subject to confirmation of the following question: *Can it be confirmed that there is no Danish tax liability for H1's shareholders under section 2 (1)(c) of the Danish Corporate Tax Act when moving to Luxembourg?*

Since the establishment of the group, the corporate structure has been as follow (Figure 1):

H1 was established as a joint venture between the companies H2 and H3. The holding companies only owned shares of other Group companies, and there had been neither any distribution of dividends nor any intercompany finance activity. The activity in the companies had thus been limited to the activity that would ordinarily be present in pure holding companies, e.g. accounting, as well as preparation of tax accounts and tax returns. As such, the activity had exclusively been of an expense nature, and was carried out using local consultants and accountants.

Immediately before the request for a binding ruling was submitted, H3 migrated to Luxembourg from the Bahamas, and was considered a Luxembourg resident for both corporate law and tax law purposes at the time the of the request.

The taxpayer claimed that the migration of H1 from Denmark to Luxembourg was motivated by a wish to simplify the corporate structure and achieve greater transparency. Furthermore, such reorganization through the assigning of a group of holding companies in only one country would generate cost savings in administration, maintenance and compliance.

3.2 *Decision of the Tax Board*

The Tax Board (*Skatterådet* initially reviewed the tax consequences of the proposed migration of H1 and found that the migration would result in exit taxation pursuant to section 5(5) of the Corporate Tax Act. Accordingly, assets and liabilities that would cease to be subject to Danish taxation are deemed sold under section 5(7) of the Corporate Tax Act.

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26 *See* e.g. Debelva & Luts, *supra* n. 9, at 227; H. van den Hurk, *Proposed Amended Parent-Subsidiary Directive Reveals the European Commission's Lack of Vision*, 68(9) Bull. Int'l Tax'n 495 (2014) ('the author fails to envisage how this situation could be captured and dealt with by the revised text').

27 DE: ECJ, 20 Dec. 2017, Joined Cases C-504/16 & C-613/16, *Juhler Holding* and *Dreisler Holding*, ECLI:EU:C:2017:1009, e.g. para. 73 ('The fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries' assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality. In that context, the fact that the management of assets is not considered to constitute an economic activity for the purposes of value-added tax is irrelevant, since the tax at issue in the main proceedings and value-added tax are governed by distinct legal regimes, each pursuing difference objectives.').

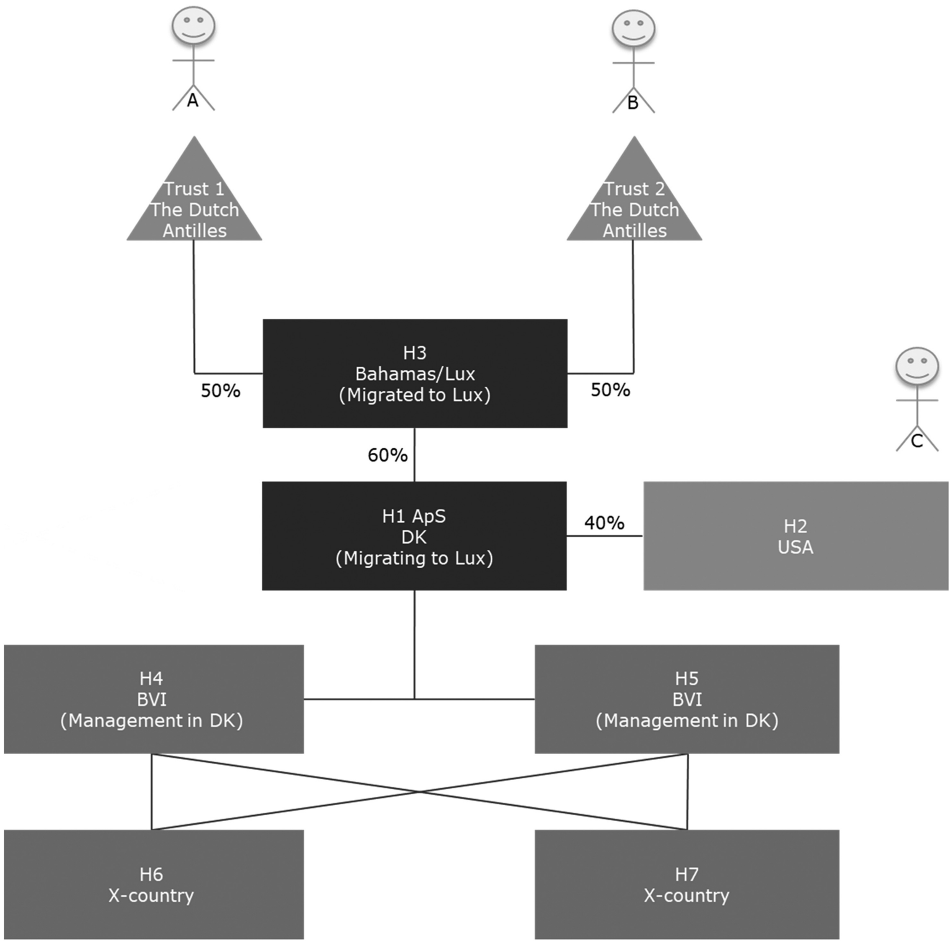
28 The Council of the European Union, *Proposal for a Council Directive Amending Directive 2011/96/EU on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States*, document no. 16435/14, 2013/0400 (CNS) (5 Dec. 2014), addendum 1, preamble point 7.

29 *See* e.g. Debelva & Luts, *supra* n. 9, at 227 and Bundgaard, *supra* n. 8, at 254.

30 Council of the European Union, *supra* n. 28, addendum 1, recital 8.

31 *See* e.g. A. Møllin Ottosen & S. Andersen, *Danmark implementerer EU-omgåelsesklausulen*, Skat Udland (2015), at 203, and the remarks on s. 1, no. 2 in L 167 2014–2015 which reads: 'it is the responsibility of the tax authorities to determine, whether an arrangement's main purpose, or one of the main purposes, is to obtain a tax advantage, running counter to the contents, or purposes of [the direct tax directives]' (authors' translation).

Figure 1: Illustrates the corporate structure in the first Danish decisions (SKM2017.333.SR)



Under domestic tax law, liquidation proceeds are initially classified as capital gains which do not trigger any withholding tax, as long as the liquidation proceeds are paid within the year of final dissolution of the liquidated company. However, this (and thus capital gains treatment) does not apply in the following situations:

(1) The receiving non-resident company owns at least 10% of the share capital of the liquidated company, and the distribution is subject to withholding tax under section 2(1)(c) of the Corporate Tax Act.
(2) The receiving company (i) owns less than 10 pct. of the share capital, (ii) is generally subject to Danish withholding tax on dividends and (iii) has control over the liquidated company. This does not apply if the receiving company is a resident in an EU/EEA Member State, and if the dividend withholding tax should be waived under the [Parent-Subsidiary Directive] or a tax treaty, if the shares were so-called subsidiary shares.
(3) The receiving individual is resident outside of the EU/EEA and controls the liquidated company.
(4) The receiving company owns tax-exempt portfolio shares in the liquidated company, and at least 50% of the assets of the liquidated company consists of directly or indirectly held subsidiary shares or group shares, or if such shares within the previous three years prior to the liquidation have been transferred to any direct or indirect shareholder of the liquidated company or a group related company.[32]

According to the Tax Board, the Danish special anti-avoidance rules on reclassification of capital gains from the sale of shares into dividend did not apply, as such dividend would be covered by the Parent-Subsidiary Directive. This was based on the fact that H1 could not be regarded as a flow-through company, according to the Tax Board, as the company – in accordance with the dividend policy practiced so far – did not intend to distribute dividends to the shareholders, i.e. H1 was

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[32] S. 16A (3) of the Tax Assessment Act (authors' translation).

the beneficial owner of the liquidation proceeds and thus met the criteria for obtaining advantages under the Parent-Subsidiary Directive.[33]

However, the Tax Board considered that the arrangements were covered by the Parent-Subsidiary Directive GAAR, as the main purpose of relocating the holding company H3 from the Bahamas to Luxembourg, prior to the relocation of H1, was to obtain a tax benefit through the location of H3 in an EU country, with the subsequent result that the liquidation proceeds would be tax-exempt under the Parent-Subsidiary Directive. Furthermore, the Tax Board did not find that the taxpayer had explained or documented that the relocation of the two companies to the same country was carried out for valid commercial reasons by actually resulting in any cost savings.

Furthermore, the Tax Board stated that EU case law on the freedom of establishment (Article 49 of the TFEU) does not prevent the GAAR from being applicable to the situation in question. The Tax Board argued in this regard that under the general principle of EU law (as governed by the ECJ), EU law cannot be relied upon to obtain advantages to the extent that abuse of law – in the form of purely artificial arrangements without economic reality and the purpose of which is to circumvent the law – is relied upon to obtain such advantage.[34]

According to the Tax Board, the legal effect of the above is that the company structure, company activities etc. are deemed to be as they were before the relocation of H3, thus making H3 ineligible to claim the benefits of the Parent-Subsidiary Directive, as H3 was not considered a Luxembourg company. However, the Tax Board did note that it did not dispute that H3 had moved to Luxembourg, but that the GAAR can be used to counter specific steps or parts without its affecting the other (genuine) steps or part in the arrangement.

The case has subsequently been appealed to the Tax Tribunal (*Landsskatteretten*), where it is currently pending.

4 The second Danish decision: SKM2017.626.SR

4.1 *Facts of the Case*

In this case, a Dutch industrial group wanted to restructure the legal ownership of the group and in this respect wanted to ascertain whether liquidation proceeds distributed from a Danish entity to a Dutch holding company – which was introduced in the structure as part of the restructuring – would avoid Danish withholding tax by claiming the benefit of Article 5 of the Parent-Subsidiary Directive.

Figure 2 depicts the intended restructuring.

The Danish entity (H3 ApS) was the immediate holding company of H4, which in turn was the parent company of a group of production companies located in the Netherlands. The ultimate owner of the group (a Jersey-based trust transparent for Dutch tax purposes) wanted to simplify the holding structure and remove all non-Dutch companies by means of liquidation. The restructuring can be described as follows:

- Step 1: establishment of a new Dutch holding company (NewCo B.V.);
- Step 2: transfer of all shares in H1, H2, and H6 from the Jersey trust to NewCo B.V.;
- Step 3: liquidation of H1, H2 and H6; and
- Step 4: liquidation of H3 ApS.

The result was that NewCo B.V. became the direct owner of H4, although, the Jersey trust would still remain the owner of the group, as the Dutch owner wanted to maintain discretion regarding the wealth of his family. Furthermore, the only beneficiary of the trust would be a charitable organization and, as such, the Dutch owner had never been – and would never be – a beneficiary of the Jersey trust. Furthermore, no liquidation proceeds or dividends would be distributed from NewCo B.V. to the Jersey trust, as this would result in the ultimate owner being taxed on such dividends or liquidation proceeds, because the Jersey trust – from a domestic Dutch tax perspective – was considered transparent. However, as the ultimate owner would not be a beneficiary of the Jersey trust, the ultimate owner would in fact not receive any dividends or liquidation proceeds.

4.2 *Decision of the Tax Board*

As in the previous decision, the question was whether liquidation proceeds distributed from H3 ApS to NewCo B.V. would qualify as capital gains from the sale of shares and consequently not be subject to Danish withholding tax, or whether the liquidation proceeds would be reclassified into dividends that would be subject to Danish withholding tax. As NewCo B.V. owned 100% of the shares, the payment objectively qualified for protection under the Parent-Subsidiary Directive insofar as NewCo B.V. was considered the beneficial owner of the liquidation proceeds *and* the GAAR could not be

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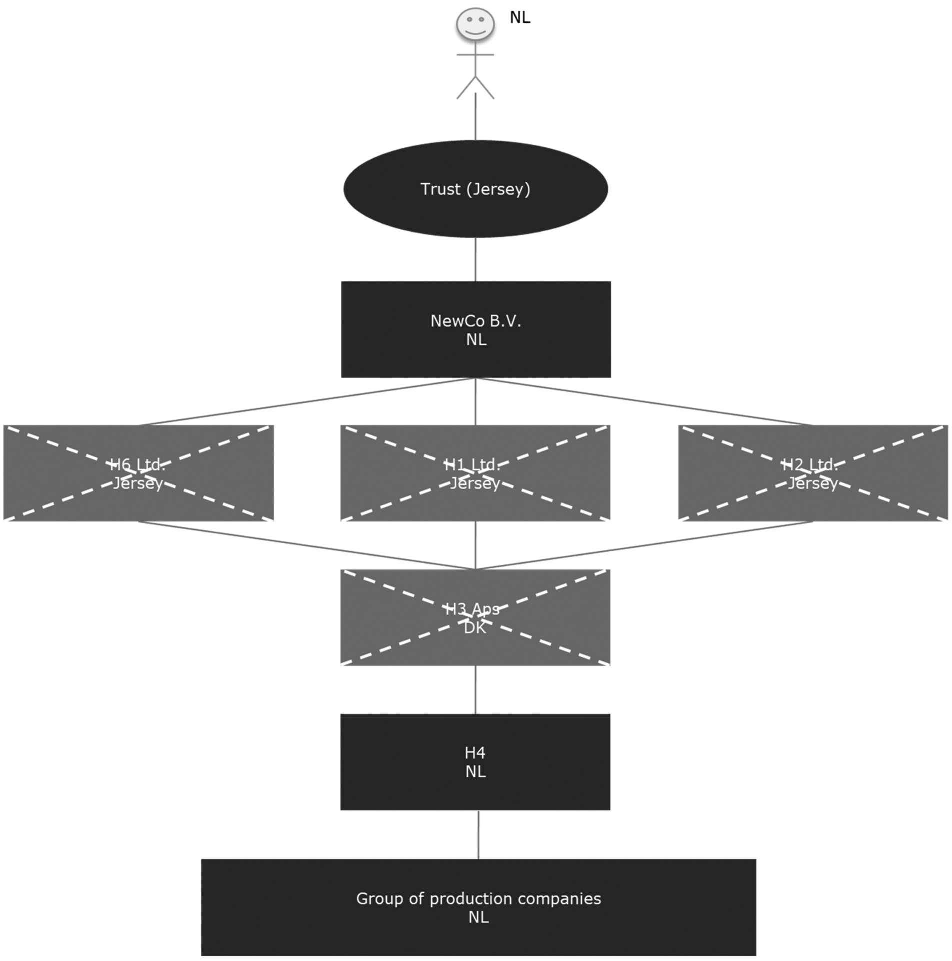
[33] The Danish tax authorities have been arguing for a number of years that the Parent-Subsidiary Directive contains an implicit beneficial owner requirement. This view has been challenged in court, and a string of cases are currently pending before the ECJ. Attorney General Kokott recently filed her opinion in *T **Danmark*** and *Y **Denmark.*** DK: Opinion of AG Kokott, 1 Mar. 2018, Joined Cases C-116/16 and C-117/16, *T **Danmark*** and *Y **Denmark***, ECLI:EU:C:2018:145. The actual rulings are still awaited.

[34] E.g. FR: ECJ, 7 Sept. 2017, Case C-6/16, *Eqiom*, ECLI:EU:C:2017:641, para. 26, with reference to FR: Opinion of AG Kokott, 19 Jan. 2017, *Eqiom*, ECLI:EU:C:2017:34, para. 24 with further reference to DK: ECJ, 5 July 2007, Case C-321/05, *Kofoed v. Skatteministeriet*, ECLI:EU:C:2007:408.

Figure 2: Illustrates the intended corporate structure in the second Danish decision (SKM2017.626.SR)



invoked. According to the Tax Board, both requirements were considered fulfilled.

With respect to the GAAR, the Tax Board stated that it is up to the Danish tax authorities to undertake an objective analysis of all relevant facts and circumstances in order to assess whether the arrangement was put into place with the main purpose – or one of the main purposes – of obtaining a tax benefit which defeats the content, object or purpose of the Parent-Subsidiary Directive.

Furthermore, it was stated that – as the establishment of NewCo B.V. resulted in the liquidation proceeds being within the scope of the Parent-Subsidiary Directive – and consequently should not be reclassified from the capital gains which arose from the sale of shares into dividend payments under the Danish special anti-avoidance rule (*see* the explanation *supra* section 3) – the arrangement resulted in a tax benefit. This tax benefit would not have been obtained had the restructuring not been put in place. Therefore, the Tax Board proceeded with assessing the proposed restructuring in light of the Parent-Subsidiary Directive GAAR.

Based on a given assessment, the Tax Board found that the GAAR was *not* applicable in this specific case. Initially, it was mentioned that the establishment of NewCo B. V. – and subsequently the obtained tax benefit by virtue of the Parent-Subsidiary Directive – could not be interpreted as defeating the purpose of the Parent-Subsidiary Directive. This result was primarily based on the fact that all group companies, save the Jersey trust, were tax resident in the Netherlands after the intended restructuring. Furthermore, it was emphasized that the Dutch owner was neither currently a beneficiary of the trust, and nor would the owner be a beneficiary in future. Instead, all future proceeds from the Jersey trust were intended for the only beneficiary of the Jersey trust, namely a charitable organization.

The Tax Board then made reference to the above-mentioned first decision, and emphasized that in the first case, the taxpayer had no previous connection to Luxembourg, and that the corporate structure would be entirely the same after the relocation, as before exit. This, combined with the fact that the relocated companies in the first decision were pure holding companies – which per se are devoid of economic reality – effectively meant that the taxpayer in the first decision had engaged in abusive behaviour. As such, the cases were not comparable – as the group in the latter decision already had a significant relationship to the EU country in which the entity obtaining the benefits of the Parent-Subsidiary Directive was to be located – and the GAAR was therefore not considered applicable in this case.

The Tax Board (like the Danish tax authorities) therefore answered that the *liquidation* proceeds from H3 ApS to NewCo B.V. would not be subject to Danish withholding tax.

5 Comments on the decisions

Scholars and practitioners alike have awaited guidance concerning the interpretation and scope of the Parent-Subsidiary Directive GAAR. Unfortunately, the published decisions do not provide much actual guidance towards understanding the GAAR, as none of the decisions seems to be based on any fundamental considerations. Furthermore, one can criticize that the Tax Board – as well as the tax authorities – have not systematically analysed the cases in relation to each of the cumulative conditions set forth by the ECJ in its case law on abusive practices.

The preliminary finding of each decision was that the taxpayer obtained tax benefits under the Parent-Subsidiary Directive which it would not have been eligible for, had the multilayered restructuring not been put into place. The obtaining of such benefits seems to have been the trigger point for engaging in GAAR considerations in both cases, as is explicitly indicated by the Tax Board in both instances.

Furthermore, both cases revolved around the same situation, i.e. the potential reclassification of Danish liquidation proceeds under a domestic special anti-avoidance rule. The two cases differ materially in that the taxpayer in the first decision contemplated the migration of the company to Luxembourg, and was thus subject to exit taxation, whereas the taxpayer in the second case contemplated a liquidation with no remaining activity in Denmark. Under Danish tax law, it is a prerequisite for being outside the scope of the special anti-avoidance rule under section 16A(3) of the Tax Assessment Act that the taxpayer which receives the liquidation proceeds, would have been eligible to obtain the benefits of the Parent-Subsidiary Directive, had the payment been characterized as a dividend payment. This means that the applicability of the Parent-Subsidiary Directive in relation to both taxpayers was considered which, in turn, placed both taxpayers within the scope of the GAAR.

Considering the factual circumstances of the cases, it should have been expected that the taxpayers would face a certain reluctance, based on the company structure deployed by both – in particular the use of low-tax jurisdictions (i.e. Jersey, Bahamas, and the British Virgin Islands) and – in the first case – double-domiciled corporations – as these factors to some extent could be assumed to lead the Danish (or any) tax authority towards establishing a presumption of abuse. While such a general presumption of abuse can in itself lead to an infringement of the EU freedoms,[35] it should nevertheless be taken into account by taxpayers when assessing how contemplated (tax-motivated) restructurings could be construed by the tax authorities.

Conclusively, in the authors' opinion, the first decision, where the GAAR was invoked in order to override the relocation of a holding company from the Bahamas to Luxembourg, is an expression of a broad interpretation of the GAAR. The Tax Board noted that it was not disputed that the Bahamas company had migrated to Luxembourg, but that the GAAR may be applied to counter specific steps or parts without affecting other genuine steps in, or parts of the arrangement. This is in line with the legal effect of the GAAR, where only the benefits from the directive are denied, while the underlying arrangements remain unaffected.[36]

Conversely, in the second decision, the taxpayer demonstrated a significant change in the corporate structure and a significant pre-existing relationship with the EU country (the Netherlands) prior to the envisioned restructuring. Furthermore, it appears to have played a significant part in the reasoning by the Tax Board that the ultimate owner did not stand to benefit from the tax advantage which was obtained.

In summary, the author is of the opinion that the facts of the first decision were always going to meet resistance from the tax authorities based on the corporate structure which de facto was not simplified as a result of the relocations; concerned only pure holding companies; and had no material effect aside from obtaining the benefits of the Parent-Subsidiary Directive. This aggregate of findings could be expected to lead the tax authorities towards establishing a presumption of abuse, as the mere obtaining of a tax advantage without any material differences in the function or structure of a group (i.e. tax optimization) is not recognized as a credible commercial interest in relation to the GAAR.[37]

Notes

35 *Eqiom* (C-6/16), *supra* n. 34, para. 31 ('Therefore, a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive, or a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties.'). Reference is made to BE: ECJ, 26 Sept. 2000, Case C-478/98, *Commission v. Belgium*, ECLI:EU:C:2000:497 and the case law cited therein.

36 The answer of the Danish Minister of Taxation, Skatteudvalget 2014–2015 L 167 Bilag 1, j. 14-5030259, at 29, to the question: 'Can the Minister of Taxation confirm that the use of the proposed general anti-avoidance rule will only result in the taxpayer being denied a benefit derived from a directive or a tax treaty, but that the transaction/arrangement notwithstanding this will be considered to have been undertaken' to which the Minister replied 'Confirmed'.

37 The Minister of Taxations answer to FSR, Skatteudvalget 2014–2015 L 167 Bilag 1, j. 14-5030259, at 29: ('The minimization of tax payments is not considered a credible commercial interest in relation to [the GAAR].'). Some corroboration on this point could maybe be found in European Commission, *Recommendation of 6 December 2012 on Aggressive Tax Planning*, 2012/772/EU, OJ L 338/41 (12 Dec. 2012), s. 4(4)(e).

The result in the first case is achieved by setting a low threshold for what burden of proof the tax authorities must meet before shifting the burden of proof to the taxpayer. Consequently, there seems to be no thorough assessment as to whether the conditions for applying the GAAR are met, as the Danish tax authorities appear to reach their conclusion solely by establishing that there is a tax advantage. Such a handling of the burden of proof does not seem correct, especially in the light of the ECJ decision in *Eqiom* (Case C-06/16).[38] As such, their conclusion to invoke the GAAR was reached without due adherence to the law, as taxpayers must have the right to engage in arrangements which do not meet all of the five conditions *e contrario* the wording of the Parent-Subsidiary Directive GAAR.

However, this laissez-faire handling of the burden of proof is somewhat inconsistent, and is apparently retracted in the second ruling, where the Tax Board found that a tax benefit had been obtained, but established – based on an objective analysis of the facts of the case – that the main purpose, or one of the main purposes, was not to obtain said advantage.[39]

Overall, in the authors' opinion, neither of the decisions can be considered of fundamental importance in determining the scope of the GAAR, and thus neither decision is expected to constitute a significant interpretation for the purpose of defining the scope of the provision. However, the first decision was quoted and referred to in the second decision in order to provide perspective between abusive and non-abusive arrangements.

The Parent-Subsidiary Directive GAAR is still in its infancy, but based on the currently available administrative practice, it would appear that the key to triggering GAAR considerations has been the obtaining of a tax advantage that would not have been so obtained, had the arrangement, or series of arrangements not been put into place. This leaves taxpayers with a presence in Denmark in somewhat of a limbo, as tax optimization is recognized as a credible commercial interest at the EU level, while appearing to be challenged at the domestic level. How this continues to play out will, to a large degree, be defined by the ECJ, which will ultimately have the last say in defining the applicability and scope of the Parent-Subsidiary Directive GAAR.

Notes

38 In *Eqiom* (C-6/16), *supra* n. 34, the ECJ held that Member State tax authorities cannot rely on objective criteria in lieu of a subjective determination of the facts and applicable law. As such, a general presumption of fraud and abuse cannot justify a fiscal measure which compromises the objective of a directive, cf. para. 31 of the ruling. For a more thorough analysis of the *Eqiom* ruling, *see* J. Bundgaard et al., *When Are Domestic Anti-Avoidance Rules in Breach of Primary and Secondary EU Law?: Comments Based on Recent ECJ Decisions*, 58(4) Eur. Tax'n (2018).

39 This approach would also seem to be more in line with the remarks set forth by the legislator in the remarks to the proposed law, cf. at 18 of L 167 2014/15.