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The implementation of the General Anti-Avoidance Rule (Art. 6 of the ATAD) in Sweden

Legal and economic consequences of tax avoidance
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EU corporate taxation legal framework and hierarchy

- No harmonised EU corporate taxation regime – 27 tax systems
- Corporate taxation falls within the competence of the Member States, however that competence has to be exercised consistently with EU law
- Historically, EU law has mainly influenced income taxation through the jurisprudence of the CJEU in cases dealing with restrictions of the four freedoms caused by national legislation
- In the last few years, however, the new focus on prevention of ’aggressive tax planning’ has resulted in several legislative measures at EU level, such as the ATAD

EU corporate taxation legal framework and hierarchy

- There is no separate legal basis in the TFEU for harmonisation of income taxation, but directives on income tax can be adopted if they concern laws that directly affect the establishment or functioning of the internal market (cf. Art. 115 TFEU)
- The purpose of the ATAD is to create a minimum level of protection for national corporate tax systems against tax avoidance practices across the EU
- The ATAD does not preclude the application of domestic rules aimed at safeguarding a higher level of protection for domestic corporate tax bases (Art. 3 of the ATAD)

EU corporate taxation legal framework and hierarchy

- National legislation and secondary EU law such as directives must comply with primary EU law
- It follows from the case law of the CJEU that in situations where a freedom of the TFEU may be triggered, national anti-avoidance measures shall be allowed effect only if they specifically relate to wholly artificial arrangements aimed at escaping the national tax normally payable
- Furthermore, if such measures are implementing EU law they must comply with the fundamental rights of the CFR and with general principles of EU law

EU corporate taxation legal framework and hierarchy

Primary EU law

EU law compliant national anti-avoidance measures

Minimum requirements set by the ATAD

The GAAR of the ATAD

- A Member State shall, for the purposes of calculating the corporate tax liability, “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 having regard to all relevant facts and circumstances” (Art. 6.1)
- 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” (Art. 6.2)
- Where an arrangement is ignored in accordance with Article 6.1 the tax liability shall be calculated in accordance with national law (Art. 6.3)

The Swedish GAAR

- The current Swedish GAAR – *Lag (1995:575) mot skatteflykt* – entered into force on 1 January 1998
- A transaction shall be disregarded for tax purposes if
  - (i) it is part of an arrangement that results in a substantial tax benefit for the taxpayer,
  - (ii) the taxpayer has, directly or indirectly, participated in the transaction,
  - (iii) the obtaining of the tax benefit, taking into account the circumstances, can be assumed to have been the main purpose of the arrangement, and
  - (iv) an assessment on basis of the arrangement would be contrary to the purpose of the tax legislation, determined on basis of the formulation of the tax legislation as a whole and the provisions that are applicable or have been circumvented in the particular case.

The GAARs Compared

- Several differences exist, e.g.
  - The Swedish GAAR applies to income tax in general, whereas the GAAR of the ATAD applies to taxpayers that are subject to corporate tax – in this regard the Swedish GAAR is wider in scope
  - There is a procedural requirement for the Swedish GAAR that has no equivalent under the ATAD – the Swedish Tax Agency may submit an application to an Administrative Court concerning the application of the GAAR, but it is the Court which decides whether to apply it
  - The GAAR of the ATAD provides that the arrangement shall be ignored, whereas the Swedish GAAR also provides for other outcomes such as taxation based on alternative transactions

The GAARs Compared

- There are also differences in wording that may result in differences in the application, e.g.
  - The GAAR of the ATAD applies to arrangements that are *not genuine*, whereas no such requirement follows from the wording of the Swedish GAAR – in this regard the threshold for applying the Swedish GAAR seems to be lower
  - the GAAR of the ATAD applies to arrangements that have been put into place *for the main purpose or one of the main purposes* of obtaining a tax advantage, whereas the Swedish GAAR requires that the obtaining of the tax benefit can be assumed to have been *the main purpose* of the arrangement – in this regard the threshold for applying the Swedish GAAR seems to be higher

The Swedish Government’s Assessment

- The Government presented its view on the implementation of the GAAR of the ATAD in a Government Bill concerning implementation of the CFC rules of the ATAD (prop. 2017/18:296)
- The Government points out differences, e.g. that the GAAR of the ATAD applies only to non-genuine arrangements and that it may apply even though the purpose of obtaining a tax benefit is merely one of the main purposes and does not outweigh all other purposes, but concludes that the GAAR of the ATAD is covered by the Swedish GAAR and that no new legislation is needed

The future application of the Swedish GAAR

- According to the CJEU, national laws shall be interpreted as far as possible in a manner that is consistent with the provisions of EU law – thus, legislation that implements a directive must be interpreted in light of the directive's wording and purpose to ensure that the result sought by the directive can be achieved
- This obligation also exists when a national legislative act predates the directive and has no specific connection to it – as is the case with the Swedish GAAR
- However, national laws do not have to be interpreted contrary to their wording or in a way that violates a fundamental principle of domestic law

Conclusions

- If the Swedish GAAR is applied in a way that makes its threshold for application lower than that of the GAAR of the ATAD, it will not conflict with the ATAD (but possibly with primary EU law) as the ATAD does not preclude a higher level of protection for domestic corporate tax bases
- If the Swedish GAAR is applied in way that makes its threshold for application higher than according to the GAAR of the ATAD, this would amount to an underimplementation
- However, as the Swedish GAAR (like any GAAR) contains vague criteria and is inherently subjective it leaves a lot of room for interpretation – in my view it will be possible in most cases to interpret it in a way that is consistent with EU law

Conclusions

- Although in principle there is no obligation to interpret the Swedish GAAR consistently with EU law in a purely internal situation that falls outside the scope of the ATAD (e.g. when it is applied to an individual without any cross-border element being present), EU law is likely to have an impact on the Swedish GAAR in such cases too, as the courts would otherwise have to apply the same legislation differently depending on the situation and who the taxpayer is, potentially conflicting with provisions of the Swedish constitution
- It follows from the case law of the CJEU that the court may give a preliminary ruling in a purely internal situation, when the same legislation (i.e. the Swedish GAAR) applies in a cross-border situation

Conclusions

- If the CJEU clarifies the interpretation of the GAAR of the ATAD, this may influence the interpretation of the Swedish GAAR (but e.g. not if the Swedish GAAR is already sufficienty strict or if such an interpretation would be contrary to a fundamental principle of Swedish domestic law)
- On the other hand, EU primary law may affect the interpretation of the Swedish GAAR in a way that limits its previous application
- The existing case law on the Swedish GAAR may become partly obsolete