General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS Tax World? Spanish Report.

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1. GAARs – an emerging trend in the tax landscape and in the political debate of many countries.

Not perhaps when compared with other European countries, but statutory GAARs count on a relevant tradition in Spain. Disregarding some distant and rather primitive records, it was the *Ley General Tributaria*[1] from 1963 (GTC 1963, hereinafter) the first statute to introduce, in its article 24.2[2], a GAAR in Spain. Clearing up the reasons for the introduction of this provision might prove a difficult task, especially if one takes into account that it is only since 1978 that Spain has a genuine system of direct taxes. It is not self-evident or even explicitly declared in official documents, but the influence of compared legislation – distinctly the German *Reichsabgabenordnung*- might have been crucial for the inclusion of the GAAR[3].

In what everyone seems to agree is in the fact that the GAAR contained in the GTC 1963 was hardly applied in its forty years of existence. Even after a deep reform of the provision in 1995 – aimed at curbing the inclination of the Spanish Tax Authorities to face tax avoidance by means of a classical economic interpretation[4]- the application of the GAAR remained a *rara avis* in the Spanish practice. Nevertheless the causes for this lack of practical application remain contended in the academic debate. Whilst some scholars considered the subjective construction of the GAAR 1963 – the requirement of a *proven aim of avoiding tax liabilities*- as the main cause of its failure, others, whose arguments seem more persuasive, put the blame on the existence of easier ways to fight tax avoidance[5] in the Spanish legal order. Whatever the reasons were, the truth is that the deep reform of the Spanish GAAR was in the political agenda when a new *Ley General Tributaria* was enacted in 2003 (GTC 2003 hereinafter)[6]. Article 15 of the GTC 2003 -labeling it with the legally inexpressive term "Conflict in the application of tax rules"- codifies the GAAR currently in force in Spain. The provision reads as follows:

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[1] General Tax Code.
[2] According to that provision: "*In order to avoid fraus legis, in relation to article 24.1* (that prohibited analogy in tax matters), *the taxation of facts performed with the proven aim of avoiding tax liabilities if they generate equivalent effects to the taxable event will not be considered an analogic extension of the taxable event*".
[3] Palao Taboada, C., "El fraude a la ley en Derecho tributario", 63 *Revista de Derecho Financiero y Hacienda Pública* (1966), p. 688.
[4] Labeled graphically by Spanish scholars as a *fraus* of the *fraus legis* (Palao Taboada, C., "¿Existe el fraude a la ley tributaria?, 182 *Estudios Financieros. Revista de Contabilidad y Tributación* (1998), p. 7).
[5] These alternative ways, that will be explained in detail in paragraph 8 of this report, and were initially identified with the so-called economic qualification (a strange version of the classical economic interpretation) did not only report material advantages –it was not necessary to consider the difficult undetermined concepts upon which the GAAR 1963 was built- but also allowed tax authorities to ignore the special (and complicated) proceeding required by the GTC 1963 to apply the General Ant-Avoidance Rule.
[6] In fact, the statement of intents of the GTC 2003 refers the deep reform operated in the Spanish GAAR mentioning the traditional problems to apply the GAAR 1963.

1. A conflict in the application of tax rules will arise when the taxpayer succeeds in total or partially avoiding the taxable event, or obtains a tax base or tax due reduction through acts or arrangements in which both the following circumstances occur: (a) Individually considered or, as a group, such acts are clearly artificial or improper for attaining the pursued objective; (b) That no other legal or economic relevant consequences, on the fringes of the tax saving- arise from the adoption of this legal form or arrangement as would have arisen had the normal, proper form be used.[7]

2. For the Tax Administration to declare a conflict in the application of tax rules a special report of the Advisory Commission regulated in article 159 of the GTC will be required.

3. In the tax assessments issued as a result of this provision the tax will be determined according to the rule that would have been fitting for the usual or proper acts or arrangements or eliminating the obtained tax benefits; late payments interest will be also issued but never tax penalties.

Even if some scholars have indicated that nothing has actually changed in the GTC 2003 in relation to the Spanish GAAR[8] –a position that we do not share- it must be recognized that certain traditional defects have been maintained[9], although the limited use of the GAAR 2003 in these last ten years is perhaps owing to different reasons that will be considered in further paragraphs of this report.

The chronology of the introduction and following reform of the Spanish GAAR(s) makes it evident that the BEPS Report(s) did not have any influence neither in its introduction nor in its 2003 reform. Nevertheless it would not be accurate to deny BEPS Report(s) a significant influence in the application and the future drafting of the Spanish GAAR.

Like the vast majority of the OECD technical products – and in general all soft law devices- BEPS Report(s) are somehow "in the air". Of course *soft law* generates *soft consequences* that are *per se* difficult to identify and describe. Nevertheless typical expression of the BEPS approach seem to be more and more frequent in the Spanish legal literature and have been recently incorporated to internal legal documents managed by the Spanish Tax Authorities. In fact the 2013 National Tax and Customs Control Plan incorporated a priority action against *aggressive tax planning* used by "*…resident corporations, specially MNEs, with the aim of artificially reduce tax bases generated in Spain*". In the Plan there is also a very general reference to the BEPS Project without further details. To what extent this momentum effectively instills the behavior of the Spanish Tax Authorities and Courts, especially when it comes to the application of the GAAR, is as uncertain and imprecise as the very statements contained in the Plan. What is more than evident is the fact that the whole BEPS Project embodies

[7] The translation of this paragraph is taken (with some nuances) from: Ruiz Almendral, V. "Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?" 33 *Intertax* (2005) 12, p. 560.

[8] Palao Taboada, C. "La norma anti-elusión del proyecto de nueva Ley General Tributaria" in *La aplicación de las normas tributarias y la elusión fiscal* (Valladolid: Lex Nova, 2009), p. 167.

[9] We refer to the special proceeding now contained in articles 15.3 and 159 of the GTC 2003 that will be analyzed in paragraph 2 of this report. This has been even criticized by the Courts like in the recent Decision of the *Audiencia Nacional* of February 7th 2013.

de facto a new weapon in the hands of the Spanish Tax Authorities whose primary effect would be an increasing flexibility in the consideration of the legal requirements upon which the application of the Spanish GAAR is based or, even, a disregard of the very GAAR provision in favor of easier and quicker instruments in the fight against double non-taxation. In our opinion this phenomenon appears clearly in the new approach of the Spanish Tax Authorities and Courts to hybrid mismatch arrangements[10].

2. Requirements for the application of GAARs.

When dealing with the requirements on which the application of the Spanish GAAR depends, several questions will be considered separately for the sake of clarity.

2.1 The scope of the Spanish GAAR. According to its letter – article 15 of the GTC 2003 refers generally to tax payers, taxable events, tax bases and tax due reductions- the Spanish GAAR is applicable to all areas of tax law (direct and indirect taxation, pure domestic and cross-border situations) irrespective of its national, regional or local scope[11]. Being its scope clear on the face, some details remain uncertain in relation to this issue.

Regarding the scope of the GAAR (either GAAR 1963 or 2003) there is phenomenon that has been hardly ever mentioned by scholars and represents, in our opinion, a deep and worrying silent reform of the Spanish anti-avoidance rules system. As a direct consequence of the implementation of the Mergers Directive in Spain, the existence of *valid commercial reasons* (*motivos económicos válidos*) was introduced as a pre-requisite for the application of the deferral regime in the Spanish Corporate Income Tax Act (CITA hereinafter). Leaving its imperfect and staggered implementation apart[12], the truth is that over the last ten years the so-called *valid commercial reason clause* has expanded in the Spanish direct tax legislation (especially in the CITA)[13]. But the uncontrolled growth of the *valid commercial reason* in Spanish Tax Law, as anti-voidance device, has come from the hand of the administrative practice and the tolerant attitude of the Courts. At the beginning of the past decade some authors started to criticize the indiscriminate use of the *valid commercial reason* approach for Corporate

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[10] This approach will be further described in paragraph 2 of this Report.

[11] This idea is reinforced by the fact that the GTC, according to its article 1, is applicable to all Spanish Tax Administrations and therefore to all Spanish Taxes. Nevertheless and even if this could have generated discussions, the very GTC 2003 excludes its application (and therefore the application of the GAAR) to levies and contributions related to the Spanish Public Social Security System.

[12] Palao Taboada, C. "Los <<Motivos Económicos Válidos >> en el régimen fiscal de las reorganizaciones empresariales", 235, *Estudios Financieros. Revista de Contabilidad y Tributación* (2002), p. 63-110.

[13] The existence of *valid commercial reasons* might result in: Non application of a Spanish residence presumption for companies resident in a EU Tax Haven owing significant assets in the Spanish territory (art. 8.c.3 of the CITA); non-application of the interest deduction barrier for the acquisition of subsidiaries (art. 14.1 h CITA); Non-application of the transfer pricing documentation duties for SME resident in EU Tax Havens (Art. 16.2.2 CITA); application of the participation exemption for dividends distributed or capital gains when the non-resident company performs the same economic activity as a lquidated company previously integrated in the group that performed that activity previously in Spain (art. 21.3.b CITA), application of the patent box regime when the licencee is a resident in a EU Tax Haven (art 23.1.c CITA); non-application of the special tax deferral regime for mergers and restructurings (art. 96.2 CITA), non-application of CFC rules for subsidiaries that are resident in EU Member States (art. 107.15 CITA).

Tax purposes (normally to deny tax benefits for reinvestment[14]), obviously at the expense of the GAAR; it might well be stated that in 2014 the *valid commercial reason doctrine* has become the anti-avoidance *mantra* of Spanish Tax Authorities and Courts. If the GAAR and this judicial developed doctrine had the same requirements and effects, the phenomenon would be harmless. But they do not and this double standard seems to be beyond any logic generating, in our opinion, serious constitutional and European legal concerns[15].

2.2. The legal requirements of the GAAR. The position of the Spanish legal literature on the requirements for the application of the GAAR swings back and forth between two extremes. On the one side, what could be labeled as "*intuitive*" or "*extra positive*" approach to tax avoidance, that merely focuses on "non-acceptable[16] tax savings" and as a result the specific legal drafting of the GAAR seems irrelevant being simply disregarded[17]. The other extreme suggests a strict literalistic approach to the GAAR attributing a crucial importance to every word or expression contained in it deriving normally in a very restrictive scope of the rule[18]. As usual, this debate has not influenced the Spanish practice but if one should describe the position of the Spanish Tax Authorities and Courts it would be closer to an intuitive approach[19]. The fact that this approach, as will be shown in further paragraphs, severely undermines legal certainty does not mean that we adopt the previously described literalistic approach[20]. To this respect this report should be considered as the search of a "happy medium".

a) The existence of a tax saving. It is quite obvious that the existence of a tax saving must be a prerequisite for the application of whatever anti-avoidance device. The Spanish GAAR is not an exception as far as it requires the *avoidance of the taxable event*, or the *obtaining of a tax base or tax due reduction.* The fact that the elected formulation merits criticism[21] does not contradict the existence of this quasi-universal element of any GAAR. Nevertheless the existence of a tax saving, being an indispensable element of the GAAR, might not by itself trigger the application of the anti-avoidance rule. Resorting to the example of double non-taxation generated by

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[14] Normally questioning the assets in which the benefits had been reinvested (*i.e.* financial instruments): Durán-Sindreu Buxadé, A. *Los Motivos Económicos Válidos como Técnica contra la Elusión Fiscal: Economía de Opción, Autonomía de Voluntad y Causa en los Negocios* (Pamplona: Aranzadi, 2007), p. 121-127.

[15] Especially if one takes into account that cross-border transactions either performed by resident companies abroad or non-resident companies in Spain seem to be the preferent target of this approach.

[16] Off course there are more and less sophisticated approaches in relation to this position that normally depend on the grounds according to which a tax saving must not be accepted.

[17] This approach has been frequently criticized by tax lawyers in Spain: Marín Benítez, G. *¿Es lícita la planificación fiscal? Sobre los defectos de neutralidad y consistencia del ordenamiento tributario,* (Pamplona-Valladolid: Thomson Reuters Lex Nova, 2013), p. 329.

[18] In our opinion the most evident example of this approach is contained in: García Novoa, C. *La cláusula antielusiva,* (Madrid: Marcial Pons, 2004), 452 p.

[19] The Decision of the Spanish Supreme Court of May 11th 2004 (*Austrian bonds*) has been considered as the starting point of this exchangeable approach to different anti-avoidance measures.

[20] In this paragraph we will try to describe the excess into which the formalistic approach has fallen.

[21] The formulation of article 15 GTC 2003 is at the same time complex and incomplete. It does not describe the two main strategies by means of which abuse is performed in Tax Law (*abuse through avoidance* and *abuse through capture,* see Zornoza, J.J. and Báez, A. "The 2003 Revisions to the Commentary to the OECD Model on Tax Treaties and GAARs: A Mistaken Starting Point", in *Tax Treaties: Building Bridges between Law and Economics* (Amsterdam: IBFD, 2010), p. 133). Moreover its reference to the avoidance of the taxable event gives rise to some formalistic interpretations according to which the GAAR could not be applied to certain withholding liabilities.

hybrid mismatch arrangements, if domestic law provisions prevent exemption for payments that are deductible by the payer in its residence state it is evident that we face a tax saving but, off course, further elements must meet in order to apply the GAAR[22].

This also seems to be the position of the Spanish Tax Authorities and Courts as far as the GAAR has not been used to correct situations of double non-taxation generated by several hybrid financial instruments[23]. But this does not mean that the Spanish Tax Authorities have assumed – according to BEPS Action 2- that the correct approach for the neutralization of the effects of hybrid mismatch arrangements lies in new model treaty provisions or new domestic rules that will solve the problem *pro futuro*. The "solution" has been more twisted and cynical. Being aware of the fact that certain hybrids (Brazilian *juros sobre capital próprio* or australian *preferent shares*) will never meet the requisites of artificiality laid down in the regulation of the GAAR, the Spanish Tax Administration decided to challenge the application of the Participation Exemption (art. 21 CITA) qualifying the generated income as interests[24]. These administrative decisions, whose recognition by the Courts has not been consistent[25], show that the mere tax saving does not involve immediately the application of the GAAR and, for the same reasons, that certain tax arbitrages match hardly in the traditional logic of GAARs. Unfortunately it also shows that sometimes the Tax Administration is not willing to lose the battle even if the victory requires an unnatural use of interpretation techniques[26].

b) A tax saving obtained through artificial or improper arrangements. The line between tax savings obtained as a result of legitimate tax planning and those that merit correction by means of the GAAR, is built in article 15 of the GTC 2003 based on two cumulative requirements: the arrangement(s) must be *artificial or improper for attaining the pursued objective* (artificiality test) and *no other legal or economic relevant consequences, on the fringes of the tax saving, arise from its adoption* (effects test).

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[22] This must be our opinion in all "double non-taxation" cases unless we decide to definitely blur the line between tax planning and tax abuse in international tax law.

[23] In fact the non-application of the Spanish GAAR as an immediate reaction to international double non taxation cases had been previously suggested by the Spanish Supreme Court in the *Austrian Bonds saga*. Interests generated by bonds issued by the Austrian Government were exempt in Spain according to article 11 of the Spain-Austria DTC and also exempt in Austria according to Austrian domestic Law. Even if this generated a huge problem in Spain, due to some deficiencies of the Spanish domestic regulation of capital gains and losses, the Supreme Court was categorical by stating (Decision may 11th 2004): "*The lawfullnes of tax planning strategies that do not affect the ability to pay principle or in general the tax justice is beyond any doubt. It would be different if an abnormal business would appear in the guise of a legitimate tax planning; but this is obviously not the case when the tax payer in Austrian bonds obtains the exemption of the interests according to the DTC and any other applicable tax benefits*". For the sake of clarity it must be remembered that the taxpayer lost the case at the end but due to reasons totally alien to the problem of double non-taxation.

[24] The reasoning followed by the Spanish Tax Administration (Decisions of the *Tribunal Económico Administrativo Central*, TEAC hereinafter of April 13th 2011 and April 26th 2012) are certainly not easy to be understood from a legal perspective but the fact that the payments have been deductible by the payer seems to have been crucial for the decisions. Needless to say that the decisions have been merciless criticized by Spanish scholars: Martín Jiménez, A; Calderón Carrero, J.M. " El Plan de Acción de la OCDE para eliminar la erosión de bases imponibles y el traslado de beneficios a otras jurisdicciones ("BEPS"): ¿el final, el principio del final o el final del principio?", 1 *Quincena Fiscal* (2014).

[25] In the case of Australian Preferent Shares the Decision of the *Audiencia Nacional* April 18th 2013 has confirmed the position of the Tax Administration. Nevertheless the Decision of the *Audiencia Nacional* February 27th 2014 annulled the assessment of the Tax Administration in the case of the *Juros sobre Capital Próprio* and applied the Spanish Participation Exemption.

[26] This problem will be further considered in paragraph 8 of this Report.

First and foremost it must be stated that the Spanish legislator added in the same rule two conceptual elements (tests) rooted in two different legal traditions[27], that perhaps were not that different in practice. The idea is quite simple: if an arrangement turns out to be artificial it is difficult other legal or economic consequences to arise; if no other legal or economic consequences arise from its adoption it is normally because the arrangement is artificial[28]. As a result, and for the sake of simplicity, this report will focus on artificiality as the key issue of the Spanish GAAR. Article 15 of the GTC 2003 requires for the application of the GAAR the scrutinized arrangements to be *individually considered or, as a group, clearly artificial or improper for attaining the pursued objective.* Several consequences arise from this legal formulation:

1) The infrequency or non-usual character of an arrangement is excluded for the construction of the concept of artificiality. Even if the term "usual" was rescued when drafting the effects test in article 15.1.b) GTC 2003 and the consequences of applying the GAAR in article 15.3 GTC 2003, it is uppermost that this very term disappeared of the first draft version of article 15 GTC 2003. The initial project referred to ***unusual*** *or improper* arrangements and, due perhaps to heavy criticism in the Spanish literature[29], was finally replaced by the expression now in force. Therefore, according to article 15.1.a GTC 2003 and the very logic – using frequency as a test would pose and important obstacle for contractual freedom and innovation[30]- how often a certain (tax planning) arrangement is used in the practice is totally irrelevant for the application of the GAAR. Nevertheless since 2005 the Spanish *Audiencia Nacional* refers to the *unusual or unheard* character of an arrangement as a sign for the application of the GAAR[31] in its both versions of 1963 and 2003. Even if these terms have become omnipresent in recent case law – *e.g.* the *debt push down saga* that will be described later- its importance should not be overvalued as far as the mere repetition of previous decisions is frequent in the Spanish case law without implying the creation of a solid line of reasoning; moreover it was just used by the case law as an additional element to strengthen the arguments for the application of the GAAR.

2) The meaning of clearly artificial or improper. The fact that the Spanish legislator has used two different adjectives to characterize abusive arrangements has generated a great amount of academic interest; and just academic as far as these discussions have not emerged in the practice of the Tax Administration or the Courts. Weather or not *artificial* and *improper* are to be attributed different legal meanings will, in our opinion, remain unresolved. The truth is that the GAAR 2003 seems to have resorted to the traditional legal German concept of inadequacy (*Unangemessenheit*) that will arise either in the form of a discrepancy between the typical cause of an arrangement

[27] The eclecticism of the Spanish GAAR 2003 –(ingrained at the same time in the German *Missbrauch von Gestaltungsmöglichkeiten des Rechts* and the Anglo-Saxon *business purpose test*) has been already described by Spanish scholars: Palao Taboada, C. "La norma anti-elusión del proyecto de nueva Ley General Tributaria" in *La aplicación de las normas tributarias y la elusión fiscal* (Valladolid: Lex Nova, 2009), p. 168.

[28] This redundancy was very soon revealed by Spanish practitioners: López Tello, J. "La cláusula antiabuso del Anteproyecto de Nueva Ley General Tributaria", 5 *Actualidad Jurídica Uría & Menéndez* (2003), p. 51.

[29] López Tello, 5 *Actualidad Jurídica Uría & Menéndez* (2003), p. 49-50.

[30] López Tello, 5 *Actualidad Jurídica Uría & Menéndez* (2003), p. 50.

[31] This expression has been used at least 48 times in the case Law of the *Audiencia Nacional* according to the official records of the Spanish Courts.

(according to private law) and the objective for which tax payers use that arrangement or in the form of a group of arrangements considered *improper* for attaining the pursued objective. The first acceptation of the very meaning of artificiality is well known in our legal tradition, having Spain a causal contractual system[32], and has been traditionally used to face simple isolated arrangements used by the tax payer to obtain tax savings[33]. In these cases, an arrangement will be labeled as artificial if used for an objective different from its typical cause according to Private Law. Things become more difficult when it comes to determine weather a set of transactions might be considered artificial or improper. The *step transactions doctrine*, that Spanish scholars consider embedded in article 15.1.a) GTC 2003, has not been seriously analyzed by the Courts yet, but several decisions foresee a topical or circumstantial approach. In this regard in a recent set of cases, related to so-called *debt push down* transactions, the Spanish Courts just referred to a group of circumstances that rendered the whole set of transactions artificial.

The facts can be easily described. A resident subsidiary of a MNE (enjoying exemption for foreign dividends[34]) acquires significant participations of non-resident subsidiaries of the same group, financing the acquisitions by means of loans granted by other subsidiary of the same group. As far as its income is tax exempt and interest paid for the loan is deductible, the (holding) company generates important tax losses. If additionally one takes into account that since 2000 the Spanish Holdings (*ETVEs*) are also allowed to consolidate for tax purposes with other subsidiaries of the group one might understand the important erosion of Spanish Tax Bases these transactions have generated.

Instead of conceptualizing artificiality for groups of transactions –like it has been made in other jurisdictions [35] reaching valuable concepts as *circularity* or *internal contradictivity*- the Spanish Tax Administration, and also the Courts[36], have dealt with these groups of transactions by merely accumulating pretended circumstantial evidences of artificiality (the acquired participations belonged to the group before the transactions and after them; there has not been a significant change in the management of the acquired subsidiaries; the loans have been granted by companies also integrated in the group). This "topical approach" severely undermines legal certainty as far as the very concept of artificiality remains unknown besides the fact that the specific weight of each circumstance is not determined. To this respect future decisions become impredectible as far as consequences of the lack of one of these circumstances is not known – *e.g.* the existence of extra-group loans [37]- and other circumstances, that might never be

[32] As opposed to an abstract (non-causal) contractual system.

[33] A good index of these cases in: Durán-Sindreu Buxadé, *Los Motivos Económicos Válidos como Técnica contra la Elusión Fiscal: Economía de Opción, Autonomía de Voluntad y Causa en los Negocios* (2007), p. 227-291.

[34] Due to a special holding regime or due to the application of the Spanish Participation Exemption.

[35] For Germany: Schön, W. "Legalität, Gestaltungsfreiheit und Belastungsgleichheit als Grundlagen des Steuerrechts" in *Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht* (Köln: Otto Schmidt, 2010), p. 60-61.

[36] Several decisions of the Spanish *Audiencia Nacional* of February 7th 2013 (*IFF Latin),* November 7th 2013 (*Cimpor Inversiones S.A.*), November 14th 2013 (*GE* Plastics), February 13 th 2013 (Accenture), December 16th 2013 (*Mann Hummel*) and January 16th 2014 (*Hanson Pioneer*).

[37] To this respect the Spanish legislator introduced in 2012 a SAAR denying deduction of interests paid due to intra-group loans for the acquisition of subsidiaries that already belonged to the group. The relevance of this restriction to intra-group interest of the new SAAR for previous debt-push down arrangements with external loans remains uncertain. Some authors, linked to the Tax Administration,

considered as a sign of artificiality, are added in order to "reinforce" the application of the GAAR[38].

3) Despite of the reported uncertainty, the new drafting of the Spanish GAAR in GTC 2003 has reported considerable advantages when compared with the GAAR 1963: a) The reference to artificial arrangements and the lack of other legal or economic relevant consequences have definitely removed subjective elements from the conditions upon which the application of the GAAR is based. Some scholars have praised this change[39], as far as the *proven aim of avoiding tax liabilities* contained in the GAAR 1963 was considered one of the main obstacles for its application[40]. b) The object and purpose of the circumvented or captured law (that happened to be crucial under the authority of GTC 1963[41]) is disregarded according to the GAAR 2003. As stated before, article 15 GTC 2003 merely focuses on the artificiality of the executed arrangements eliminating the traditional purposive approach to tax avoidance (embedded in the traditional *fraus legis* 1963). In our opinion this reports enormous advantages. Sometimes the Spanish Courts have improperly exacerbated this purposive approach to tax avoidance by making a reference to the *ethical content* of the circumvented provision infringed in cases of tax abuse[42]. It goes without saying that confusing the objective purpose of a provision with a pretended "ethical content" is a clear technical mistake that might well degenerate into a replacement of the law by the personal approach to ethics and justice of every judge. But even if a proper and technical concept of purpose of the law is managed, this approach keeps on proving problematic. Any tax expert knows that many tax provisions lack the teleological design needed for a purposive interpretation. It is not just the frequent chaotic, opportunistic and contradictive design of the tax system that generates this phenomenon but also, and specially, the fact that certain rules are *per se* unsuitable for a purposive interpretation[43] and, last but not least, that some tax rules

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have suggested that even with exclusive extra-group financing, debt push down transactions could be faced by means of the GAAR (Sanz Gadea, E. "Dos sentencias decisivas en materia de gastos financieros", in https://blogmastercaf.wordpress.com/2012/10/19/dos-sentencias-decisivas-en-materia-de-gastos-financieros/ (last visit April 4th 2014).

[38] This is the case of low or no taxation of the interests received by the lender in its Residence State. The previous reported decisions, even recognizing that double non-taxation of the interests is not crucial for the application of the GAAR, consider low taxation of the interests at residence as a "*plus that increases the effectiveness of the strategy*". And, what is even worse, in the most recent decision of the *Audiencia Nacional* of January 16th 2014 (*Hanson Pioneer*) non-taxation of the interests is labeled as an "*essential piece of information for the application of the GAAR*".

[39] Simón Acosta, E, 568 *Actualidad Jurídica Aranzadi* (2003), p. 3. García Novoa, C., 8 *Quincena Fiscal* (2003), p. 13.

[40] Palao Taboada has suggested an objective approach to the GAAR 1963 deducted from other elements of its regulation different from the mere *proven aim of avoiding tax liabilities* (Palao Taboada, C. "La norma anti-elusión del proyecto de nueva Ley General Tributaria" in *La aplicación de las normas tributarias y la elusión fiscal* (Valladolid: Lex Nova, 2009), p. 153). We totally share this opinion in theoretical terms but the truth is that in the practice the Spanish Tax Administration frequently resorted to internal tax planning documents elaborated by the tax payers (describing tax savings opportunities) as the effective proof of the aim of avoiding tax liabilities, even in the absence of further evidence.

[41] The GAAR 1963 (at least since its reform in 1995) required that the tax saving had been obtained *sheltering in the wording of a provision enacted with a different purpose.*

[42] This is not exceptional. Starting with a decision of the *Audiencia Nacional* dated July 6th 2005 this reference has appeared in at least 76 decisions of this Court.

[43] We have already made a reference to this phenomenon in relation to distributive rules in DTCs and cases of so called rule-shopping: Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 157.

cannot be attributed a different goal than raising revenue[44]. If this is the case, the risk of *Cash-Justice*, according to which the correct interpretation would be that which leads to the higher tax collection, seems unavoidable. This risk becomes extreme when the very GAAR and the requirements for its application are simply replaced, in an explicit or implicit way, by teleological considerations[45]. In short, if the new GAAR is properly understood it might report significant advantages in comparison to the teleological approach embedded in the *fraus legis* clause 1963[46].

2.3 The burden of proof in the Spanish GAAR. Article 15 GTC 2003 does not depart from the general rules on burden of the proof generally regulated for tax law purposes in article 105 GTC 2003 according to which a person who desires to make a right effective must prove the facts underlying this right. The truth is that both provisions must be read together resulting in the Tax Administration being allocated the burden of the proof of those facts upon which the artificiality test and effects test is conditioned[47].

Nevertheless, and as already mentioned, SAARs linked to the existence of valid commercial reasons have proliferated, especially in the area of cross-border transactions. These rules normally shift the burden of proof to tax payers as regards the existence of valid commercial reasons for the affected transactions. This shifting might be problematic when contrasted with European fundamental freedoms[48]. Nevertheless, the most worrying phenomenon in this area is again the already described proliferation of the *valid commercial reason* as administrative and judicial anti-avoidance doctrine that implies shifting the burden of proof to the taxpayer without a legal basis (the general applicable rule is that contained in article 105 of the GTC in relation to article 15).

3. Legal consequences of applying the GAAR.

As already mentioned in previous publications[49], anti-avoidance rules are not part of the rules set by domestic tax laws for determining which facts give rise to a tax liability. This position -implicitly suggested in the questionnaire- seems to be inspired in the so called *factual approach*, embedded in the Commentaries on article 1 of the OECD

[44] In relation to limited exemptions in VAT: Báez, A., *Bad Laws Make Hard Cases: Halifax and the avoidance of inconsistent tax rules,* in http://e-archivo.uc3m.es/bitstream/handle/10016/18830/bad_baez_2008.pdf?sequence=1 (last visit April 25, 2014).

[45] This is in our opinion the position defended in Spain by Ruiz Almendral, V. *El Fraude a la Ley Tributaria a Examen* (2006).

[46] As already reported by practitioners: Marín Benítez, G. *¿Es lícita la planificación fiscal? Sobre los defectos de neutralidad y consistencia del ordenamiento tributario,* (2013), p. 331-332.

[47] Even if some scholars have defended that this might prove problematic when it comes to the abusive enjoyment of tax benefits. It has been stated that the special rule on the burden of the proof contained in the special tax deferral rule for mergers is in line with the general rule as far as the taxpayer bears the burden of the proof of the cost-side of taxes (expenses and tax benefits) (Reyero, R. *Et al.* "Régimen de las reorganizaciones empresariales" in *Impuesto sobre Sociedades. Regímenes especiales y especialidades territoriales. Tomo III* (Pamplona: EY Abogados-Thomson Reuters-Aranzadi, 2013), p. 939. This statement confuses the facts upon which the application of a tax benefit is based with the facts that underlay the artificiality and effects tests contained in article 15 of the GTC 2003.

[48] This will be analyzed in paragraph 6 of this report. Some reflections might be found as regards Spanish SAARs in: Rodríguez-Bereijo León, M. "La carga de la prueba en el Derecho Tributario: su aplicación en las normas tributarias anti-abuso y en la doctrina del TJUE" in 344 *Estudios Financieros. Revista de Contabilidad y Tributación* (2011), p. 32-46.

[49] Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 132 ff.

Model Tax Convention; without questioning the extraordinary technical authority of the Commentaries, it must be recognized that GAARs are not rules dealing with the real fact pattern underlying a transaction or set of transactions but actually legal devices that embody a process of legal application as the very consequence of tax avoidance. In this sense the question is not to determine weather or not some facts actually occurred, but if that factual pattern was displayed so that that a rule either could not be applied (*abuse through avoidance*) or was applied even if not intended for cases of the kind (*abuse through capture*).

Descending to Spanish domestic law this was clearly the solution in the GAAR 1963 and even after some changes, which have turned the rule more ambiguous in this respect, in the GTC 2003. Leaving apart the controversy on weather the GAAR 2003 actually contributes a new point of view, the truth is that article 15.3 GTC 2003 refers to the application of the rule "*…that would have been fitting for the usual or proper acts or arrangements*" or the elimination "*…of the obtained tax benefits*". Unlike in sham transactions, for which according to article 16 of the GTC 2003 the legal consequence is the mere assessment of the actually performed facts and the application of the corresponding tax rule, the GAAR requires a strict legal reasoning in which facts are not discussed but just weather or not the avoided or captured provision might be applied to them[50]. Therefore just in sham cases can be properly stated that the actual fact pattern has been replaced by the "appropriate" one. And this kind of "fiction" has its effects "exclusively" for tax purposes, as clearly stated in art. 16.2 of the GTC. This means for example that if a transaction is considered as a sham for tax purposes there will be a mismatch between the "tax" and the "commercial accounting" truth of the tax payer; and even if there is no case-law to this respect, these mismatches should be taken into account for future transactions purposes if double-taxation wants to be eliminated. This can be easily illustrated resorting to the decision of the *Audiencia Nacional of* October 16th 2013 referred to a *Leveraged buy-out and Dividend recap. transactions* that the Court considered as a sham hiding a distribution of dividends. The decision recharacterized capital gains as dividends and, leaving other questions apart, this provokes that the commercial value of the shares differs from its tax value; if this difference is not taken into account in future transactions double taxation might arise if the already taxed dividends are not considered when calculating the capital gain originated by the sale of the shares.

When it comes to the application of the GAAR the situation seems identical at first glance; nevertheless, at least in layman´s terms, the application of a GAAR generates effects just for a certain tax and transaction and therefore without a projection on other possible arrangement(s) and tax(es). Even if not mentioned in article 15 of the GTC 2003 there are clear signs of this approach in other legal provisions. When the legislator pretends a far-reaching fiction it is explicitly declared as is the case for example in the secondary adjustment derived from transfer pricing rules. Article 16.8 of the Spanish CITA imposes legal consequences (adjustments) for all intents and tax purposes. If a similar statement is not contained in article 15 GTC 2003 it might well be deducted *a contrario* that the legal consequences of the GAAR are pretended to be more modest.

[50] On this nature Marín Benítez, G. *¿Es lícita la planificación fiscal? Sobre los defectos de neutralidad y consistencia del ordenamiento tributario,* (2013), p. 242-256. To this respect the decision of the *Audiencia Nacional* February 21st 2013 when confirming the application of the old *fraus legis* rule to a debt push down transaction does not does not change the qualification of the interest as such but just denies its deductibility.

Notwithstanding, when it comes to a complex artificial set of transactions avoiding collateral effects seems difficult. Let us take the decision of the Supreme Court of February 21st 2013[51], in which the necessity of additional adjustments for other taxes and taxpayers seems evident in order to avoid not pretended double taxation. In the absence of a specific legal regulation, the Tax Administration can be required a coherent performance in order to avoid non-pretended double taxation generated by the asymmetrical valuation of the same reality.[52] This might generate difficulties especially if formal ownership of assets or items of income is concerned; but again coherence must prevail particularly as it concerns third parties to the abusive arrangement[53].

Obviously this generates particular concerns in cross-border transactions in which the effects generated by the application of the GAAR do not need to be accepted by third countries. This explains that in these cases, from which *debt push down transactions* are outstanding examples, double economic taxation arises frequently[54]. Even if not accepted by the Spanish Tax Administration –as shown in the December 13th Decision of the *Audiencia Nacional*- this phenomenon should be corrected by means of the mutual agreement procedure. What is even worse, the Spanish domestic regulation of the mutual agreement procedure (Royal Decree 1794/2008 of November 3rd) seems to protect this approach as far as the procedure might be closed in cases of tax avoidance inasmuch as it can be rejected by the tax authorities if the taxpayer "*tried to avoid taxation in one of the two Contracting States".*

Therefore the application of the GAAR might generate significant uncertainty which by the way does not seem to be easily counteracted by rulings which have been rather frequent in the specific area of the special tax merger regime but not when it comes to the application of the GAAR[55]. Even if there is not a specific ruling regime for the application of the GAAR, it is also true that no legal obstacle exists in order to apply the general procedure on rulings according to articles 88 and 89 of the GTC[56].

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[51] A case in which two natural persons acquire an immovable property using a Company whose shares could be sold tax free; later the shares are sold to a third Company which was actually interstesd in the acquisition of the immovable property from the beginning. The Court considers the whole transactions as abusive and applying the GAAR labels the benefit generated in the transactions as a dividend for personal income tax purposes of the natural persons.

[52] To make a reference to the case described before the adjustment made in relation to the natural persons should have affected also the tax base of the two companies taking part in the arrangements. If the benefit is considered a dividend for the shareholders the companies should receive a coherent treatment. This was requested to the Supreme Court that dismissed the appeal in its September 16th 2013 Decision just on formal arguments (this was a new claim).

[53] This explains that in the February 21st Decision of the Supreme Court the GAAR does not generate a single consequence for the taxpayer acquiring the shares of the Company which owns the immovable property.

[54] As far as the interests whose deductibility is denied in Spain are paid to a non-resident taxpayer and consequently subject to Spanish withholding taxes as referred in the 21st February Decision 2013 of the Audiencia Nacional. The same should be reported in relation to the Decision of December 13th 2013 as far as the interests were incorporated to the Tax Base of the lender in the UK even if those were exempted in that country according to the so called Group Relief.

[55] No Rulings appear at least in the database of the General Taxes Directorate in http://petete minhap.gob.es/Scripts/know3.exe/tributos/CONSUVIN/consulta.htm (last access 28/04/2014).

[56] Nevertheless according to article 15.2 and 159 GTC a special Board must confirm weather or not the GAAR is applicable. There is no reference to this special "intervention" in the provisions of the GTC dedicated to rulings something that adds further uncertainty to its application.

4. GAARs and SAARs.

Like in other systems, several SAARs have been introduced in Spain especially during the last ten years. Even if SAARs can be found all along the Spanish Tax System, the fact is that they have proliferated in the area of cross-border income taxation either in outbound or inbound situations. Spain counts on typical and internationally standardised SAARs such as CFC rules, thin cap rules[57] and transfer pricing rules, also on treaty SAARS and finally on special anti-abuse provisions implemented according to tax directives. A long list of own inventing SAARs even if projected on cross border transactions and built upon International/European standards have been introduced in recent times. There is no recognizable policy approach on this issue and there is not even a clear case law on the relationship between GAAR and SAARs. Therefore the following reflections are based upon discussions at an academic level and vested with certain ill founded administrative and court decisions.

In order to give an answer to the relation between GAAR and SAARs when it comes to the application of the law, SAARs cannot be considered as a unique concept; they must be rather categorized in "proper SAARs" and "improper (general/sectorial) SAARs. "Improper or sectorial SAARs" might be labeled those rules that referred to special transactions in particular taxes – as proper SAARs do- follow nevertheless the typical conceptual approach of GAARs rejecting the transaction for tax purposes according to general concepts such as artificiality or business purpose test. The paradigmatic example would be the *valid commercial reason* requirement for the application of the Merger Tax Deferral regime (contained in article 96.2 of the CITA)[58]. Proper SAARs define the transactions that merit a tax correction without resorting to general concepts and defining in a closed way –normally referred to time or quantitative limits- what is considered abusive in advance. According to this classification, the relation between those kinds of rules seems easy at first glance.

If on the face both rules are applicable –the specific requirements contained in the SAAR and in, a first approach, the general concepts upon which the GAAR is based- we are facing a typical *lex specialis derogat generali* situation and the SAAR should be applied. The only problem in this evident solution is that sectorial SAARs are in many cases designed with different consequences of those that would arise in case of applying the GAAR (procedural requirements, administrative fines or tax crimes, rules on burden of the proof) even if its requirements for application are identical or very similar to those of the GAAR. In short: does it make any sense that the application of the valid commercial reason SAAR for mergers does not require a special procedure, might result in tax penalties or crimes or shifts the burden of the proof to the tax payer (all different requirements and consequences to that previously described in relation to the GAAR) even if the event(s) that trigger(s) its application is(are) not different from those contained in article 15 GTC 2003? The proliferation of sectorial GAARS, especially dealing with cross-border transactions, has generated great concern in the Spanish

[57] Thin cap rules were abrogated in 2012 and a new interest deduction barrier was introduced.

[58] As already stated this sectorial SAAR has been introduced in many CITA rules in Spain and even applied as a judicial GAAR without legal basis by Spanish Courts.

literature[59] and with good reason, if one takes into account this disparity might generate discrimination problems at a Domestic, European and International level.

Nevertheless bigger legal problems arise in those cases in which SAARs are not applicable as far as the Tax Administration might be tempted to apply the GAAR. Off course this will just happen in those cases in which the SAAR would be applicable at first sight but the facts are out of its scope due to different circumstances: the tax payer makes use of the safe-harbor contained in the SAAR, the tax payer abuses the very SAAR either for its application or non-application or the SAAR is not applicable for certain tax payers or transactions, *i.e.* EU Law constraints[60]. In these cases it seems evident that the *lex specialis* principle does not come into play as far as we do not face a situation in which two rules are applicable to the same facts, but rather one (the GAAR). Nevertheless, deducting from the mere non-application of the SAAR the applicability of the GAAR would be, in our opinion, less than persuasive. This would mean a limited approach to the two-faced reality of SAARs as far as this kind of rules describe what is abusive according to the legislator but, at the same time, clarify *a contrario* what arrangements might not be considered abusive. Applying the GAAR in this context would be hardly reconcilable with the principle of legal certainty and a *bona fide* application of tax law provisions. Being more precise, one could think that the GAAR is applicable but just to conclude that, when the tax payers is within the legal limits of the SAAR, the arrangement can never be considered artificial. With a substantial lack of legal reasoning this seems to be the approach of the Spanish Tax Administration and Courts in certain really old decisions[61]. This is also the unanimous position of Spanish scholars even if sometimes grounded mistakenly on the *lex specialis* principle[62].

The solution turns out to be more complicated in certain cases in which the non-applicability of a SAAR is not originated by a use of the taxpayer of the “safe harbors” contained in the very SAAR. Perhaps the typology might be broader, but we have identified at least two groups of cases in relation to this issue: the tax payer artificially avoids the application of a SAAR or provokes its application[63] (abuse of SAARs); and second a SAAR is not applicable due to an eventual infringement of fundamental freedoms when affecting cross-border (European) transactions. These problems have arisen in Spain when applying the Old Spanish Thin-capitalization rule built upon a fixed 3:1 ratio.

[59] Soler Roch, M.T. “Las normas antiabuso generales y especiales” in *VII Jornada Metodológica de Derecho Financiero y Tributario Jaime García Añoveros* (Madrid, Instituto de Estudios Fiscales, 2011), p. 189.

[60] When the abusive behavior is radically different from that enshrined in the SAAR, the problem does not arise. It does not arise either when a sectorial or improper SAAR is not applicable as far as being its structure identical to that contained in the GAAR the non-application of the former would make the application of the later logically impossible.

[61] The decision of the TEAC of April 26th 1989 in relation to a Spanish SAAR referred to the transfer of immovable property for indirect tax purposes is frequently quoted as the leading case on this problem.

[62] For a really complete reference to the Spanish academic approach to this issue: Marín Benítez, G. *¿Es lícita la planificación fiscal? Sobre los defectos de neutralidad y consistencia del ordenamiento tributario,* (2013), p. 283.

[63] This strange case was rather common in Spain in relation to the domestic controlled corporations regime (anti-deferral rules) applicable in Spain untill 2003. These rules were designed in a manner that sometimes opened interesting tax planning opportunities. The case was not conceptually different of the problem that will be analyzed in the text in relation to thin-cap rules.

In relation to the first issue, a Spanish Company received loans of associated US resident companies that could have triggered the application of the Spanish thin-capitalization rules. Nevertheless the loans were issued to a Company resident in Luxemburg that on its turn issued loans to the final Spanish borrower. As far as the Spanish Thin-Cap rules were not applicable when the lender was a resident in an EU country and as far as they were drafted in a rather formalistic way the rules could not be applied. After a strange approach of the Spanish Tax Administration, the *Audiencia Nacional* in its July 4th 2013 decision (*Colomer Group case*) decided that the GAAR could have been applied in order to correct the avoidance of the thin-cap rules[64]. The decision lacks technical explanations but in any case it seems reasonable to apply the GAAR in cases of the kind as far as the legal certainty and the *bona fide* application of the SAARs might never justify its very abuse. In short if the SAAR is not applicable due to an artificial arrangement settled by the taxpayer it could never be argued that the legislator considered that arrangement as non-artificial *a contrario*.

A similar solution would be correct in our opinion if the SAAR is not applicable due to EU-Law requirements. Taking again the example of the Spanish Thin-Cap rules, the fact that the legislator, starting 2004, declared the fix ratio approach non applicable in an EU context, does not mean that any capitalization structure must be admitted for tax purposes when the lender is a European resident. The only explicit (and implicit) statement of the legislator in this case is that fixed-ratios run contrary to the fundamental freedoms but of course this does not exclude an arm´s length analysis of the debt-equity ratio in a European context, based on the Spanish GAAR[65]. This does not mean of course, as pretended sometimes in the Spanish administrative practice, that fixed ratios might be reintroduced through the back door by using the 3:1 ratio implicitly in the analysis of the Spanish GAAR.

5. GAARs and Tax Treaties.

Despite the 2003 revision to the Commentary on Art. 1 of the OECD Model Tax Convention (OECD Commentary, hereinafter), it is still doubtful whether or not the application of a domestic GAAR in a DTC context could be in breach of the *pacta sunt servanda* principle[66]. Probably for this reason, certain states -and among them Spain[67]- have decided to expressly allow, in a tax treaty context, the application of domestic anti-avoidance rules, with different nuances in its wording[68].

Even if some scholars have criticized this kind of provision, it obviously allows going beyond the possible sense(s) of the treaty wording and, therefore, prevents an eventual breach of the *pacta sunt servanda* principle. On the contrary, the situation turns problematic in those cases in which tax treaties are silent on the application of GAARs

[64] Even if finally, due to procedural reasons, it was not applied in the case.

[65] A possible application of transfer pricing rules is a more complicated issue that will not be dealt with in this contribution.

[66] In this sense Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 151.

[67] Tax treaties with Armenia, Barbados, Bosnia and Herzegovina, Costa Rica, Georgia, Jamaica, Kazakhstan, Kuwait, Moldova, Pakistan, Serbia, Singapore, Trinidad and Tobago and Uruguay, all of them signed after 2004.

[68] For different models of this provision see: De Broe, *International Tax Planning and Prevention of Abuse*, p. 462 et seq.

in a treaty context. Even if a vast majority of scholars show a different position [69], the administrative practice and the Courts, at least in Spain, do not consider the relationship between GAARs and DTCs as problematic.

The question has been posed for the first time, at least explicitly, in the so-called *debt push down* saga, a kind of transaction that the Spanish Tax Administration has faced by means of the GAAR 1963 without being the Spanish DTC network a serious obstacle. The fact that in those cases the lenders were companies resident in DTC countries has not posed a problem. The Tax Administration and the Courts[70] have simply ignored the troublesome coexistence of domestic GAARs and treaties by merely stating that non-resident taxpayers are not affected –and therefore the DTC is not applicable- as far as the only concerned company is that paying the interest not admitted in deduction. In short as far as the application of the GAAR displays effects just in relation to the taxation of a Spanish resident the application of a DTC is not affected. So, being as this is true, it is by no means less true that the non-deductibility of paid interests and its taxation in the country of residence of the lender according to the DTC subjects those interests to a higher effective taxation than the one established in the treaty generating an evident economic double taxation[71]. Moreover this approach will probably entail a violation of article 24.4 of the OECD Model according to which "*interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State*". In relation to this, the Tax Administration and the Courts have alleged that the reason to deny the deduction of the interests is not that they have been paid to non-resident companies of the group but the fact that these interests lack a genuine and well-founded commercial reason; therefore -the reasoning is followed- those interests would have been treated identically if paid to a resident parent company. This approach shows the already mentioned inclination of the Spanish tax authorities to introduce the *valid commercial reason* approach when dealing with the application of the GAAR; but even accepting that deviated approach, the reasoning seems less than persuasive: when it comes to the discrimination the key point is where the lender (not the parent company) is a resident. And, additionally, had the group been entirely resident, the GAAR would have never been applied due to the eliminations imposed by the domestic tax-consolidation regime.

In any case, this is just a sample of the trivial approach of Spanish Tax authorities and Courts to the issue of GAARs in a DTC context. This might be explained by the "reverential respect" showed to the OECD Commentary that is frequently used by the Tax Administration and also attributed by the Courts a legal value, in the absence of reservations, equivalent to the very DTC provision and, in any case, considered a

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[69] Martín Jiménez, The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?, Bulletin of International Fiscal Documentation 58, no. 1 (2004) p. 17 et seq.; García Prats, The "Abuse of Tax Law": Prospects and Analysis, in *Essays in International and European Tax Law* (Bizioli ed.), (2010), p. 49 (p. 86); Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 150 et. seq.

[70] Similar arguments in the Decisions of the *Audiencia Nacional* of February 7th and December 13th 2014 and January 14th 2014.

[71] Implicitly admited by the Decisions of the *Audiencia Nacional* of February 7th and December 13th 2013 and January 14 th 2014, stating nevertheless: "*This double taxation would be alien to this procedure as not generated by the contended assesment and in any case should be examined in a different appeal*".

necessary and authentic interpretation element of a DTC[72]. For that reason it is extraordinarily surprising that no single decision can be found quoting the position of the OECD Commentary on Art.1 of the Model on this issue; interpreting a silence might always be dangerous but it seems as if the Spanish Courts took the legal value of the Commentary as a given.

In relation to the allocation of an item of income to a different taxpayer as a result of the application of the GAAR, the Spanish experience is rather limited. A possible ground for this is the tendency of the Courts to treat artificial management of the rules on attribution of income to tax payers, resorting to the sham transaction doctrine and the subsequent disregard of treaty issues in these cases. The leading case to this respect, at least in the international tax arena, is the Decision of the Spanish Supreme Court of September 25th 2009 (*Stroh Brewery Company-Cruzcampo case)*[73]. Applying the sham transaction doctrine, as it would probably happen if the GAAR were applied, the Spanish Tax Authorities adjust taxation for Spanish purposes, getting totally out of consequences, in terms of double taxation, it might generate for other taxpayers.

6. GAARS and European Union law requirements (the Freedoms, directives).

Despite the interest showed by Spanish scholars in the antiabuse case law of the ECJ [74], the application of the GAAR to EU cross-border transactions has not generated significant problems. This does not mean that the Spanish practice might be considered satisfactory, but rather that the analysis of the GAAR under a EU Law perspective has been simply set aside. A clear example might be found again in the *debt push down saga* in several decisions of the *Audiencia Nacional* that tiptoes through the European side of the controversy by merely stating that no discrimination issue might arise in relation to the fundamental freedoms as far as the GAAR would have been applied exactly in the same way had the case been purely domestic.

By means of this simple argument the Courts left apart the more difficult question on weather the transactions could be considered wholly artificial, following the expression contained in the ECJ Cadbury Schweppes Decision. It seems evident that *debt push down* transactions pursue a tax objective inasmuch as they are performed in Spain for the purpose of benefiting from more favorable tax legislation; but according to the ECJ

[72] Using the expression in quotes the Decisions of the Supreme Court of July 29th 2000, July 15th 2002, December 15th 2005, July 4th 2006 and February 6th 2008 Pueden citarse como representativas de esa jurisprudencia las SSTS de 29 de julio de 2000 y 15 de julio de 2002, de la que se toma el entrecomillado, o las posteriores de 15 de diciembre de 2005, 4 de julio de 2006 y 6 de febrero de 2008. See Serrano, F. La interpretación de los Convenios de doble imposición internacional en la jurisprudencia del Tribunal Supremo: la función de los Comentarios del Modelo de Convenio de la OCDE para evitar la doble imposición internacional en materia de renta y patrimonio, Estudios Financieros, Revista de contabilidad y tributación 341-342 (2011), p. 127 et seq.

[73] A company resident in the USA owns all the shares of a Spanish Company. Instead of selling the shares directly to the buyer (Guiness) they are contributed to the capital of two US subsidiaries that sell the shares to Guiness avoiding thereby taxation at source.

[74] See Ruiz Almendral, Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?, Intertax vol. 33, (2005), p. 560 et seq.; Zornoza Pérez Las normas anti-abuso frente a la competencia fiscal en en marco comunitario, in Labeaga Azcona, Chico de la Camara and Ruiz Garijo (ed.) *Repercusiones tributarias de la ampliación de la Unión Europea*, Madrid (2010), p. 351 et seq.

doctrine this does not in itself suffice to constitute abuse[75]. Especially if one takes into account that even accepting its labeling as aggressive tax planning schemes[76], in some cases one can doubt if those structures are in itself "*wholly artificial arrangements which do not reflect economic reality*". It is true that the described transactions do not modify the property of the shares by the group. But it is no less true that the attribution of the shares to a Spanish subsidiary might have economic substance and this cannot be simply rejected treating MNEs as a single taxpayer. Therefore if the appeals finally reach the Spanish Supreme Court one might expect a preliminary ruling that might well be crucial for the solution of the problem.

In a nutshell a dissociation appears between a GAAR that seems at first glance totally in line with the case law of the ECJ on domestic antiavoidance measures[77] and an administrative and judicial practice that interprets the GAAR in a rather rigorist way that might well contravene that case law[78]. And even if the drafting of the Spanish GAAR has not been inspired in the case Law of the ECJ this does not mean it must not be interpreted according to that case law in order to properly comply with the fundamental freedoms.

The situation does not seem to be better when it comes to the interpretation of other anti-avoidance rule, especially the valid commercial reason rule contained in the merger tax regime. There are certainly causes for concern: i) Starting with the Decision of the *Audiencia Nacional* of May 7th 2007 the Spanish Courts started an autonomous interpretation of the valid commercial reason clause dissociated from the concept of artificiality and focused on the subjective intentions of the tax payers (not on the objective effects of the transactions)[79]. ii) The valid commercial reason clause is analyzed as if the very restructuring business (e.g. merger) could be isolated from the remaining circumstances of the whole set of transactions. This approach might be seen in the Decisions of the Audiencia Nacional of January 24th and March 9th 2011 on *Management and Leveraged Buy Out* transactions. The Court recognizes the financial function of the transaction – it could hardly have been different as far as these transactions are explicitly regulated in commercial law- but denies the existence of valid commercial reasons as far as "*there is neither sign of benefits reported by the transactions to the general running of the company*" "*nor of a financial optimization*". The evident contradictions in these statements render further criticism unnecessary. iii) Finally, the valid commercial reason approach is becoming an increasing importance in the Spanish anti-avoidance culture. The phenomenon has been already described; now we should just mention it has acquired such an importance that the *Audiencia Nacional* (in its Decision of February 16th 2011), normally so indulgent with the tax authorities, has stated "*...there is a worrying tendency of the Spanish Tax Administration to use EU-Law rooted anti-avoidance techniques to face artificial arrangements*".

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[75] See Centros (C-212/97) para. 27, Inspire Art (C-167/0) para. 96, and Cadbury Schweppes (C-196/04) para. 37.

[76] As such is described in OECD (2013) *Addressing Base Erosion and Profit Shifting*, Paris p. 79 et. seq.

[77] As is unanimously recognized; see for example the Commentaries of the Comission to adapt Spanish Tax Law to EU Law requirements: *La adaptación de la regulación del Derecho Tributario general al Ordenamiento Comunitario*, IEF Madrid (2010), pp. 64-65 y 91.

[78] The Comission had already reported on this risk: *La adaptación de la regulación del Derecho Tributario general al Ordenamiento Comunitario*, IEF Madrid (2010), p. 65.

[79] An autonomous interpretation which, by the way, is difficult to bring together with the decision of the ECJ in *Kofoed* (C-321/2005).

7. GAARS and recent European developments (CCCTB, recommendation of the Commission).

The proposal for a CCCTB Directive[80] (hereinafter, the CCCTB Directive) is the first normative text in the EU that includes a supranational definition of abuse and a GAAR, supplemented by two ad hoc anti-abuse clauses, or SAARs. Unlike all other Directives, the goal here does not to merely allow EU Member States to apply their anti-abuse clauses, or to counter abuse solely within the specific boundaries of *ad hoc* provisions, but rather to provide a comprehensive framework within which the benefits of secondary Union law apply to genuine transactions only.

The first question to be dealt with is off course the very necessity of this provision that being reasonable perhaps just related to transactions with Third States is drafted in fact with a far-reaching scope. In second place even if based-upon the anti-avoidance case law of the ECJ, the proposed GAAR has been drafted in a rather restrictive manner being only applicable to transactions performed "*for the sole purpose of avoiding taxation*"[81]. Third, it is expressly admitted that the GAAR should not be applied to genuine commercial activities. This introduces in the GAAR an *economic/commercial substance test* that implicitly admits tax planning to the extent that the arrangements incorporate elements of a genuine conduct of trade, regardless of whether, or not, they are in essence designed to mitigate tax. Finally the relationship between the GAAR and other SAARs applicable just to Third Countries (disallowance of interest deduction and CFC rules) are not clear.

In short the CCCTB GAAR proposal remains an unsatisfactory rule especially as it concerns legal certainty. This might be the reason for the insistence by the EU Commission Recommendation of December the 6th 2012 on Aggressive Tax Planning[82] on a very detailed description of what might be considered an artificial transaction[83]. Off course the topical approach to artificiality contained in the Recommendation[84] provides certainty to the clause but, at the same time, might generate several problems in different Member States as the definition of artificiality is just a list of definitions deliberately elaborated to cover all European traditions and approaches.

But even if these European GAARs were consistent and conceptually similar in different Member States its practical application should be subject to a close surveillance by the ECJ in order to avoid national deviations originated by divergent legal traditions. And if this is true in a mere European area let alone when it comes to a pretended universal harmonization. It is true that the recent codification of anti-avoidance doctrines in the USA or the UK might have supported a globalization of the anti-avoidance reactions, nevertheless the national traditions and peculiarities are so strong that it is still soon to talk about a harmonized global GAAR; to this respect it

[80] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), SEC(2011) 315 final; SEC(2011) 316 final.

[81] Therefore the proposal of the Parliament to extend its scope to transactions "*carried out mainly for the purpose of avoiding taxation*" seems to make sense (European Parliament legislative resolution of 19 April 2012 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011)0121 – C7-0092/2011 – 2011/0058(CNS)), 2013/C 258 E/25)

[82] C(2012) 8806 final.

[83] See point 4.4 of the Recommendation.

[84] Instead of giving one conceptual approach to artificiality, six different definitions are contained in the Recommendation.

might be enough mentioning the strong reaction generated against the main purpose clause drafted in the Public Discussion Draft on BEPS Action 6: *Preventing the grating of treaty benefits in inappropriate circumstances*.

8. Alternatives to GAARs.

The history of the Spanish GAAR is actually the history of its avoidance by the Tax Administration. The Tax Administration has systematically resorted to alternatives to GAARs in order to fight tax avoidance. The reasons for this alternative approach are well known and have been already mentioned in this contribution. At this moment we will just make a reference to the use of purposive interpretation and substance-over form approaches in the Spanish practice and judge it in comparison to the GAAR.

In our opinion, GAARs cannot be replaced by a general recognition of purposive interpretation even if we are conscious of an extended position according to which GAARs would be nothing different from the mere statement of the necessity of an interpretation according to the purpose of the avoided or caught provision[85]. The whole confusion on this issue is generated by the traditional interpretative criteria that have been accepted worldwide. The core of the problem is the distinction between literal and teleological interpretation in relation to the same provision and leading to different results. The solution for this conceptual question might be found in the law theory[86].

The wording of a legal provision might be polysemous in those cases in which it can be attributed different meanings. Interpreting a provision implies the selection of one of its possible meanings according to several criteria among which the purpose of the interpreted rule might be considered crucial. In this context, it is far from clear what "written law", "wording" or "literal interpretation" means. The text of a provision is just the starting point for its interpretation and, at the same time, the limit for this process as the interpreter cannot go beyond the possible meaning(s) given to those words (*Wortsinn* in German legal theory[87]). Thus, every interpretation must be literal as it departs, when determining the possible sense of the words, from written law. At the same time every interpretation must be teleological if we take into account that the selection of the proper meaning must be guided and rational, and that rules must be considered to be instruments to achieve certain goals. If all this is true, it seems evident that considering GAARs as means to go beyond the letter of a tax statute implies a logical contradiction.

In this context, the limits of interpretation must be defined according to the possibility of attributing different meanings to a single legal term. This may not be an easy task in those cases in which private law concepts are used in tax statutes, either by a simple reference or an explicit remission. Even if legal theory states that the same term contained in different rules might be understood differently by following their

[85] The following reflections are just a brief summary of the position defended by these authors in a previous article: Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 138-152.

[86] In this contribution we depart from the classical view of Larenz (Larenz, *Methodenlehre der Rechtswissenschaft* (1969), p. 342) which has been assumed by German scholars and case law. See: Báez, *Los negocios fiduciarios en la imposición sobre la Renta*, p. 31.

[87] As opposed to the words of a provision designated as *Wortlaut*.

respective legal purposes[88], the practice in several countries shows a broad range of approaches in relation to this problem[89]. By contrast, as has been stated, even in jurisdictions with a strict adherence to private law concepts in tax law, there may be concepts in tax statutes that do not correspond to private law concepts or where the legislator has made it clear that the concept should have a different content from private law relations[90]. In these cases the private law meaning is not binding and the possibility of determining several possible meanings from a strict tax law perspective, is certainly easier.

In short, when tax statutes make use of private law concepts it seems difficult to fight tax avoidance by means of a simple interpretation of the provision avoided. Then it is necessary to go beyond the possible senses of the legal wording resorting to GAARs. AS stated by Professor HENSEL 90 years ago *real avoidance starts exactly there where the art of interpretation starts to fail*[91]. The problem might be different when tax laws contain autonomous concepts that are formulated regardless of Private Law concepts[92].

In our opinion substance over form is neither an alternative to GAARs. Even if sometimes considered as a GAAR in itself, the differences must be underlined. Substance over form is just the description of a legal consequence according to which two substantially equal arrangements, regardless of its legal form, must be treated equally for tax purposes. In this approach the technique does not essentially differ from analogy or the general constitutional principle of equality. It does not differ either from the legal consequences of the GAAR as previously described. The difference, and this is the crucial issue, lies in the fact that substance over form lacks legal conditions of application; formulated as a question: what must happen in order to disregard the legal form and tax the arrangement according to its substance? Substance over form works more as a principle than as a rule. Therefore, and unless we identify implicit legal conditions similar to those previously described in relation to GAARs, the principle generates an unacceptable level of uncertainty that seems difficult to reconcile with Domestic, European[93] and even with International legal standards[94].

In a nutshell GAARs imply uncertainty *per se* inasmuch as they are built on vague concepts such as artificiality. Nevertheless the uncertainty, and therefore its possible

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[88] This is in fact an old idea frequently named as "legal concept's relativity". See: Engisch, *Die Einheit der Rechtsordnung*. Unveränd. reprograf. Nachdr. d. 1935 (1987) p. 45.

[89] In relation to this see: Zimmer, General Report, in *Form and Substance in Tax Law*, p. 25 et seq.

[90] Zimmer, General Report, in *Form and Substance in Tax Law*, p. 27.

[91] Hensel, A. "Zur Dogmatik des Begriffs "Steuerumgehung", in *Bonner Festgabe für Ernst Zittelmann zum fünfzigjährigen Doktorjubiläum*, (1923), p. 244.

[92] In relation to attribution of income for tax treaty purposes: Zornoza & Báez, in *Tax Treaties: Building Bridges between Law and Economics* (2010), p. 143-150.

[93] Especially if we take into account the insistence of the ECJ on legal certainty as a requisite of anti-avoidance rules in order to be consistent with the Fundamental Freedoms: ECJ 3 October 2013, C-282/12, *Itelcar – Automóveis de Aluguer Lda*. Para. 44; ECJ 5 July 2012, C-318/10, *SIAT*, Paras. 58-59.

[94] Case Law on Human Rights and Taxation is certainly in an embrionic state. Nevertheless it should not be discarded that in a near future tax provisions might be judged effectively confronting its (unclear) design with article 1 of the First Protocol of the ECHR. Some Scholars and practitioners have already made some usefull reflections on anti-avoidance measures: Zalasiński, A. "Case Law-Based Anti-Avoidance Measures and Principles of Human Rights Protection" in G. Kofler et al., Human Rights and Taxation in Europe and the World (G. Kofler, M. Poiares Maduro & P. Pistone eds., IBFD 2011), Online Books IBFD (accessed 25 April 2014).

degeneration into a pure arbitrary instrument, makes substance over form an unsuitable device to face tax avoidance.