



Application of anti-abuse rules in the context of cross-border transactions – the global approach

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Panel members

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Summary

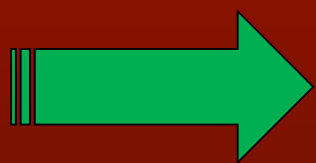
1. OECD approach (action 6 BEPS)
2. GAAR – country implementation
3. Practical approach: Relevant cases
4. Conclusions

1. OECD APPROACH

BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances)

Trigger situations of double non-taxation

The report recognizes that the adoption of anti-abuse rules in tax treaties is not sufficient to address tax avoidance strategies that seek to circumvent provisions of domestic laws; these must be addressed through domestic antiabuse rules, (...)



- GAAR
- SAAR

1. OECD APPROACH

OECD Multilateral Instrument (MLI)

- Article 7 – Prevention of Treaty Abuse
 - ***A BEPS Minimum Standard*** anti-abuse rule

- ***Options available:***
 - **Option 1:** Principal purpose test (PPT) [default]
 - **Option 2:** Limitation on benefits (LOB) provision (Simplified version) [*supplements PPT*]
 - **Option 3:** LOB provision (Detailed version)

1. OECD APPROACH

OECD Multilateral Instrument (MLI)

- **Option 1: Principal purpose test (PPT) [default]**
 - *a benefit shall not be granted if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless the granting that benefit was accordance with the object and purpose of the [DTT]*
 - **Compatibility:** ‘
 - » *applies in place or in the absence’ of existing PPT provisions*

1. OECD APPROACH

The report recognizes that the adoption of anti-abuse

- **Option 2:** Limitation on benefits (LOB) provision (Simplified version) *[supplements PPT]*
 - See paragraphs 8 – 13
 - **Compatibility:** ‘
 - » *[generally] applies only where all Contracting Jurisdictions have chosen to apply it*
- **Option 3:** LOB provision (Detailed version)
 - Opt-out of PPT
 - No model text
 - Bilateral negotiations necessary

– Reservations available



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2. GAAR country implementation. UK

- UK GAAR introduced in July 2013.
- Contains “double reasonableness” test:
 - Can the relevant arrangements be reasonably regarded as a reasonable course of action in light of the relevant tax provision.
- Tax arrangements that are considered GAARable can be referred to an independent GAAR Advisory Panel for review.
- Aimed at driving behavioural change, rather than prolific enforcement. [To date no actions have brought under GAAR.]
- GAAR can apply to cross-border transactions as well as wholly domestic arrangements.

2. GAAR country implementation. Denmark

- GAAR targeting abuse of EU directives and Danish tax treaties implemented in Danish law, effective as of May 2015
 - The tax treaty GAAR resembles the PPT rule as set out in BEPS Action Point 6 recommendation
 - No court or administrative practice yet
- Prior to the GAAR – test of beneficial ownership generally applied as an anti-abuse test
 - Numerous administrative cases
 - One leading High Court case (“ISS Case”)
 - Five Danish cases referred to EUCJ on 25 February 2016 by the Danish Eastern High Court (Cases C-115/16, C-116/16, C-117/16, C-118/16 and C-119/16)
- No GAAR applicable to purely domestic situations
 - Substance over form court precedence
 - Supreme Court case (forward contracts case) ~ “principal purpose test”

2. GAAR country implementation. Germany

How to guide your client through the minefield of anti-abuse rules

- Status quo: Domestic Levels of anti-abuse provisions
 - Attribution of Assets: Beneficial Ownership (Sec. 39 GTC)
 - Technically not an anti-abuse rule
 - Used to attribute assets to other person than legal owner
 - GAAR : applicable to domestic and cross-border cases alike (Sec. 42 GTC)
 - Special anti-abuse rules (**SpAAR**) for domestic and cross-border cases, e.g. LoB-clauses (withholding tax on interest and dividends), TP
 - Relation of GAAR and SpAAR
 - If the special rule is not applicable, Revenue may apply GAAR
 - Order of precedence secured by provisions in GAAR and SpAAR
 - Highly controversial
 - Definition of SpAAR unclear
 - Breach of legal principle: A special rule blocks the general rule ?
 - BEPS measures to be introduced via the GAAR?

2. GAAR country implementation. Germany

- Reaction on ATAD
 - GAAR so far not amended
 - Structure of domestic GAAR very similar to Art. 6 ATAD
- BEPS I – Act (in force as of Dec. 20th 2016)
 - Transfer price documentation: overview on global business operations
 - Country-by-Country-Reporting
 - Double dip in partnerships: no deduction of personal business expenses if already deducted in foreign jurisdiction
 - Treaty override: application of exemption method vs. credit method
 - General idea: all parts of the income must be taxed once
 - Exemption not granted as far as the other state exempts the income or applies a special withholding tax rate
 - Cum-ex-Trade: minimum holding period of 45 days

2. GAAR country implementation. Spain

- Full implementation of BEPS rules
- General Tax law provides for GAAR in twofold:
 - Art. 15 GTL: *Fraude legis* / conflict to the application of the tax law
 - Art. 16 GTL: Simulation
- SAAR
 - Parent-Subsidiary Directive. Extensive Case Law
 - Tax neutrality regime

2. GAAR country implementation. Belgium

- Partial implementation of BEPS rules
 - ATAD directive (31 December 2018)
 - Adapted PID on the basis of “modified nexus approach”
 - Introduction of PPT test and amended preamble (MLI)
 - TP documentation: introduction of transfer pricing documentation requirements (master file and local file) and CbC reporting
- New domestic GAAR provision in income tax code (since 2012)
 - Legal definition of tax abuse (aim of the law?)
 - Counterproof (other reasons than tax reasons)
 - Attacks “artificial constructions”

2. GAAR country implementation. Belgium

- Treaty abuse?
 - Is the domestic GAAR applicable to Belgian tax treaties?
 - Specific anti-avoidance provisions in treaties
 - LOB clauses in certain treaties
 - Beneficial ownership test (focus in the past on legal dimension of the ownership) but Belgian ruling commission applies broader economic interpretation
 - Subject to tax test
- SAAR
 - Introduction new SAAR of Parent-Subsidiary Directive (targets also purely domestic situations)

3. Practical approach: Relevant cases

- UK: Indofoods
- Swiss Supreme Court
- Spain: Participation exemption on real estate companies.

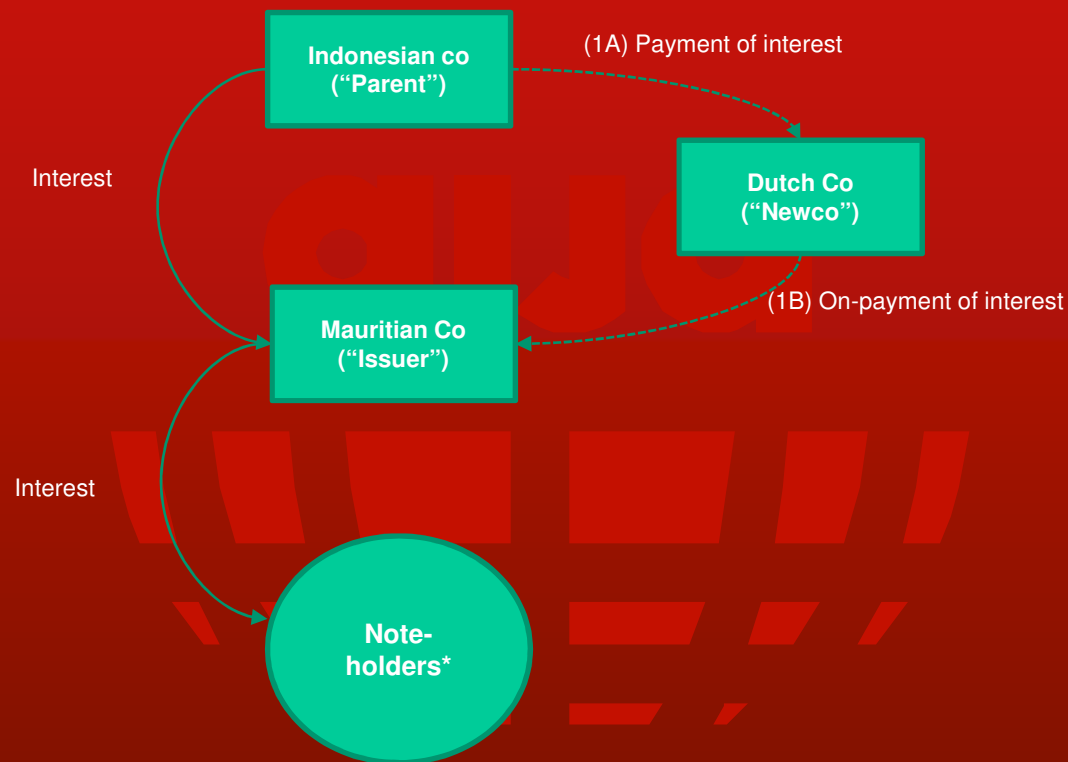
Case Study 1: Indofoods



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UK Case Study: Indofoods



*Loans from Noteholders actually made via JP Morgan acting as trustee for the Noteholders

Indofoods: Summary of facts

- Mauritian Co (the Issuer) issued \$280m loan notes to lenders.
 - Notes guaranteed by Parent (Indonesian Co).
 - Issuer on-lent the proceeds of the note issue to its Parent at the same rate of interest and on substantially the same terms.
- The interest payments were made so that:
 - On interest date -2, the Parent had to pay the interest to the Issuer.
 - On interest date -1, the Issuer passed the same sum to the Trustee of the Noteholders.
 - In practice, the Parent paid the Trustee directly.
- Under the terms of the Issuer/Parent loan, the Parent could set off any amount paid by it as guarantor of the notes against the loan.

Indofoods – Introduction of Dutch Co

- Indonesia announced its intention to terminate its double tax treaty with Mauritius. This would result in increased withholding on the interest payment.
- Could a Dutch Co be inserted to fix this problem?
- Dutch advice recommended Dutch Co comply with local requirements:
 - Equity equal to the lesser of 1% of loans or €2m.
 - Records in the Netherlands.
 - Subject to audit/registration in the Netherlands.
 - Dutch directors.
 - Incoming interest should exceed outgoing interest. This advice was not followed, although the proposal was that Dutch Co would impose “handling charges”.

Indofoods: Court of Appeal

- The Court of Appeal considered that:
 - Beneficial ownership should be given its “international fiscal meaning” rather than domestic meaning (despite the wording of Article 3 of the Model Convention).
 - “International fiscal meaning” was incompatible with an owner who does not have “full privilege to directly benefit from income.”
 - Given the chain of payment, Dutch Co could not derive any “direct benefit” from the payment of interest and the Issuer’s only benefit was discharging its obligation to noteholders, which did not amount to enjoying “full privilege”
- Issuer/Dutch Co should be viewed as “a mere administrator of the income”.

Treaty shopping

- On the basis of the proposal how might the insertion of the Dutch Co be counteracted in your jurisdiction:
 1. Using the concept of beneficial ownership
 2. Under existing Domestic GAARs
 3. Under the new EU GAAR; and
 4. Under the new multi-lateral instrument?

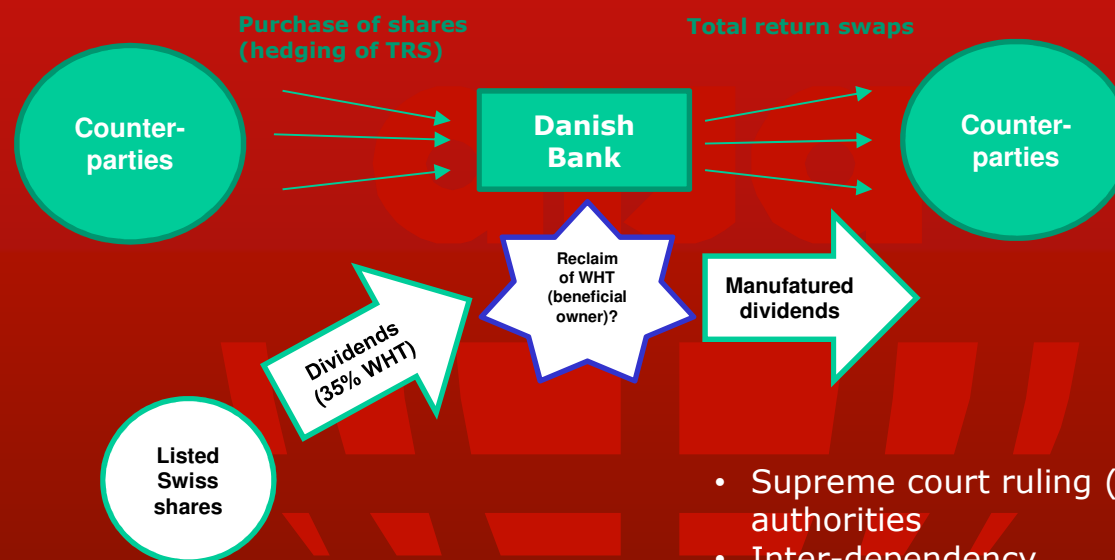
Case Study 2: Swiss withholding tax arbitrage cases



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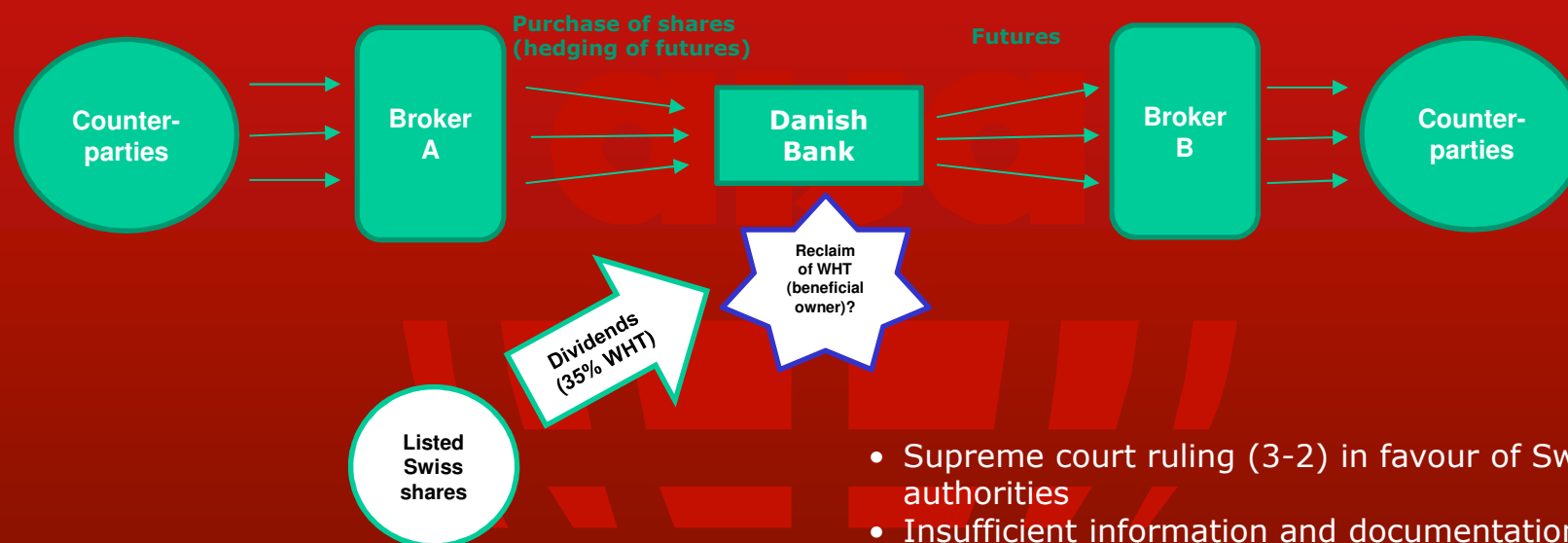
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Swiss withholding tax arbitration cases – Total return swap



- Supreme court ruling (4-1) in favour of Swiss tax authorities
- Inter-dependency
- The Danish bank was effectively deprived the freedom to dispose of the dividends and relieved of virtually all risks
- Lack of beneficial ownership disqualified the Danish bank from applying the DTT even though beneficial ownership requirement was not an explicit requirement under the DTT

Swiss withholding tax arbitration cases – Futures



- Supreme court ruling (3-2) in favour of Swiss tax authorities
- Insufficient information and documentation to establish the facts of the case with certainty
- The volume of the futures and the few parties involved in the transactions was, however, sufficiently circumstantial evidence to conclude that the bank was not the beneficial owner and had to pass on the dividends or the greater part thereof

Swiss withholding tax arbitration cases

- Have any of you come across similar structures in your jurisdiction ?
- Would either case likely have had a different result in your jurisdiction if determined by a court in your jurisdiction, assuming your tax treaty with Denmark resemble the OECD model and allowed for a full withholding tax refund ?
 - If not, why so ?
 - If same result: Would either case likely be based on a different reasoning in your jurisdiction, e.g. a “GAAR approach” rather than a “beneficial ownership approach” ?

Case Study 3: Real estate structuring in Spain



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3. Practical approach: Relevant cases

- New participation exemption on real estate resident companies. Spain



3. Practical approach: Relevant cases

- When would GAAR be expected to apply?
- Would the double tax treaty be relevant?
- How would your tax authorities react?

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