LOYENS LOEFF

Brochure of anti-abuse measures in domestic laws and tax treaties

Overview of EU Member States and Switzerland

Update January 2016

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“ What countries deserve special attention? ”

Definitions

BEPS	Base erosion and profit shifting
BEPS Action Plan	Action plan on BEPS published by the OECD on 19 July 2013
CIT	Corporate income tax
CITA	Corporate Income Tax Act
DTT	Double Tax Treaty
GAAR	General anti-abuse rule
LOB Rule	Limitation-on-benefits rule
OECD	Organization for Economic Cooperation and Development
PPT	Principal purpose test
PSD	EU Parent-Subsidiary Directive
PSD GAAR	Mandatory general anti-abuse rule in the EU Parent Subsidiary Directive to be implemented by Member States by 31 December 2015
SAAR	Specific anti-avoidance rule

“ How does the PSD GAAR affect me? ”

1 Introduction

The European Union (EU) is actively involved in developing proposals to address perceived inappropriate tax avoidance, i.e. Base Erosion and Profit Shifting (BEPS). According to the European Commission, a new approach to taxation is needed within the EU, with a strong focus on preventing profits generated in the EU from being shifted elsewhere without being taxed anywhere in the EU. This is a very current topic within the EU and heavily debated by the Member States.

An important reference for the EU's proposed actions on perceived inappropriate tax avoidance is of course the OECD BEPS action plan covering 15 actions, including among others international (hybrid) mismatches, transfer pricing issues, harmful preferential tax regimes and the effectiveness of anti-avoidance measures in both domestic laws and in tax treaties. The OECD BEPS measures will need to be implemented in domestic laws or tax treaties in order to have effect. Both the EU and the OECD BEPS measures are expected to have considerable impact on international business.

Likely the most noticeable, recent and concrete BEPS measure taken within the EU is the introduction of a mandatory general anti-abuse rule (PSD GAAR) in the EU Parent Subsidiary Directive (PSD), as approved by the ECOFIN Council in January 2015, Directive 2015/121/EU. The PSD GAAR requires that the Member States refrain from granting the benefits of the PSD (i.e. a dividend withholding tax exemption and possibly also a corporate income tax exemption of the dividend at the EU parent level), if (one of) the main purpose(s) of an arrangement is to obtain a tax advantage that would defeat the object or purpose of the PSD and such arrangement lacks economic reality, i.e. is not 'genuine'.

Member States had to implement the PSD GAAR by 1 January 2016 at the latest. It is now clear that not all countries have met the deadline. Some countries have indicated that they will not make changes to domestic legislation to implement the PSD GAAR. For some countries it remains unclear.

The idea for the PSD GAAR is to achieve that all Member States combat abuse of the PSD benefits in a consistent manner. Currently, there is however much uncertainty on the exact interpretation of the PSD GAAR. We fear that the uncertainty about the exact scope of the PSD GAAR will create more issues with tax authorities of source countries denying the exemption from withholding tax. That is why we developed this brochure to monitor the way in which the various Member States are implementing and applying the PSD GAAR in practice.

We are pleased to offer you this brochure which provides a concise overview of the implementation of the PSD GAAR and of similar anti-abuse measures in domestic laws and tax treaties adopted by the 28 Member States and Switzerland that are aimed at limiting (withholding) tax relief on outbound payments of passive income (i.e. dividends, interest and royalties). Furthermore, some countries also introduced the PSD GAAR for CIT purposes to limit application of the participation exemption for inbound dividends, despite the European Commission's statement of 5 December 2014 (16435/14 FISC 221 ECOFIN 1157) that the PSD GAAR is not intended to intervene in domestic participation exemption regimes. The PSD GAAR for participation exemption purposes is addressed in this brochure for the countries for which this is relevant.

In addition, the brochure provides a short description of the main requirements that taxpayers should meet in order to avoid exposure to such rules.

" Can I still distribute a dividend without triggering dividend withholding tax? "

“ Do I have sufficient substance? ”

Loyens & Loeff

Loyens & Loeff is a leading firm and a natural choice when selecting a legal and tax partner if you are doing business in or from our home markets of the Netherlands, Belgium, Luxembourg and Switzerland. Our expertise includes the tax and legal aspects of mergers & acquisitions, restructurings, IPOs, structured and project financing, private equity investments, real estate investments, leasing transactions, intellectual property rights, and much more. With a 100-year-old track record of international (corporate) (re) structuring, today our team consists of high-level specialists including 350 international tax lawyers and 500 corporate/regulatory lawyers working from our offices in all the major global financial centres in the world.

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This makes Loyens & Loeff the logical choice for larger and medium-size enterprises, as well as banks and other financial institutions who operate on the international stage. The evidence is clear, with Loyens & Loeff coming out top for tax advice in the 2015 editions of Legal 500, Chambers Global, Chambers Europe and World Tax.

Loyens & Loeff BEPS team

The dedicated Loyens & Loeff BEPS team is closely monitoring and involved in the BEPS developments, as initiated by the G20 and OECD member states and now also actively followed up with EU proposals and measures. This puts us in a strong position, together with other law firms and tax consultants in Europe, to proactively advise a diverse client base and their various stakeholders on how best to deal with (future) changes to domestic laws and tax treaties aimed to address perceived inappropriate tax avoidance. This brochure has been developed by the Loyens & Loeff BEPS team as a tool to enhance our proactive advice on the numerous BEPS developments.

Acknowledgment of contributing firms

We gratefully acknowledge the contributions of each firm (listed below) who provided information on the various jurisdictions.

Additional information regarding the implementation of the GAAR and the tax regimes in the selected jurisdictions may be obtained by contacting the undersigned or the contributing firms via their websites shown below.

Austria	LeitnerLeitner	www.leitnerleitner.com
Belgium	Loyens & Loeff CVBA/SCRL	www.loyensloeff.com
Bulgaria	DGKV	www.dgkv.com
Croatia	LeitnerLeitner	www.leitnerleitner.com
Cyprus	Andreas Neocleous	www.neocleous.com
Czech Republic	White & Case	www.whitecase.com
Denmark	Kroman Reumert	www.kromanreumert.com
Estonia	Sorainen	www.sorainen.com
Finland	Krogerus	www.krogerus.com
France	Hoche	www.hoche-avocats.com
Germany	Flick Gocke Schaumburg	www.fgs.de
Greece	Zepos & Yannopoulos	www.zeya.com
Hungary	Tandax	www.tandax.com
Ireland	AL Goodbody	www.algoodbody.com
Italy	Maisto	www.maisto.it
Latvia	Sorainen	www.sorainen.com
Lithuania	Sorainen	www.sorainen.com
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Romania	NNDKP	www.nndkp.com
Slovakia	PRK Partners	www.prkpartners.com
Slovenia	LeitnerLeitner	www.leitnerleitner.com
Spain	Cuatrecasas	www.cuatrecasas.com
Sweden	Mannheimer Swartling	www.mannheimerswartling.se
Switzerland	Loyens & Loeff N.V.	www.loyensloeff.com
United Kingdom	Joseph Hage Aaronson	www.jha.com

The information contained in this publication is based on the applicable laws in effect and the proposed legislation as per 1 January 2016. The aim is to update this publication regularly.

We hope that this publication will find its permanent place on the desks of practitioners involved in international tax (re)structuring.

Yours sincerely,

Bartjan Zoetmulder (Partner)
bartjan.zoetmulder@loyensloeff.com

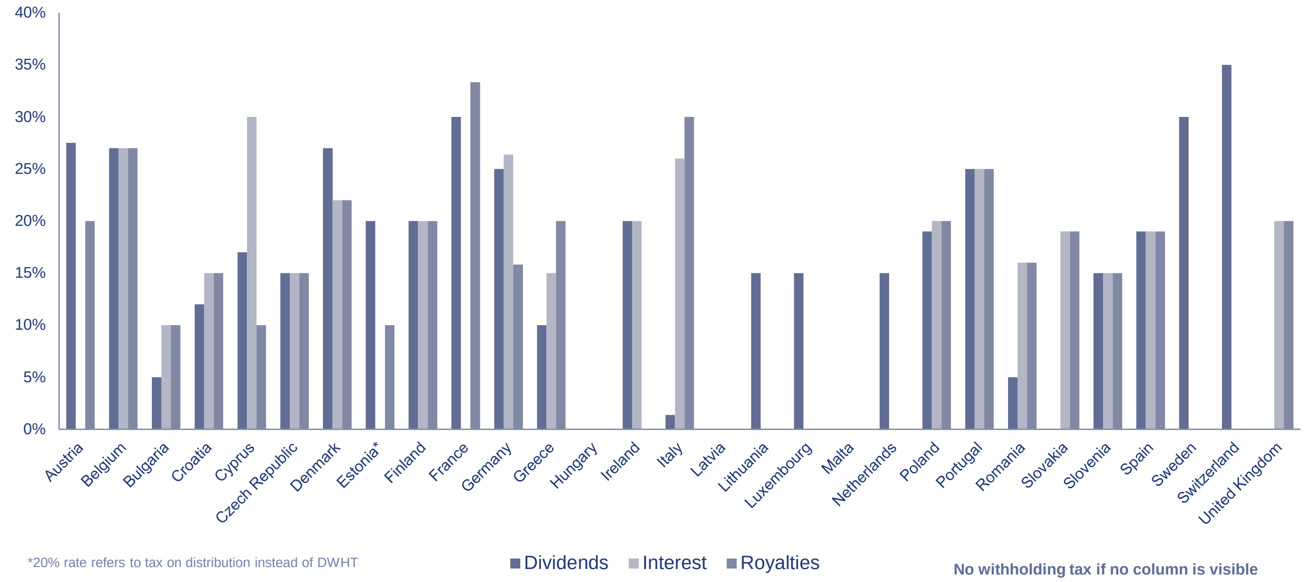
Prof. Dr. Dennis Weber (Of counsel)
dennis.weber@loyensloeff.com

Margriet Lukkien (Senior associate)
margriet.lukkien@loyensloeff.com

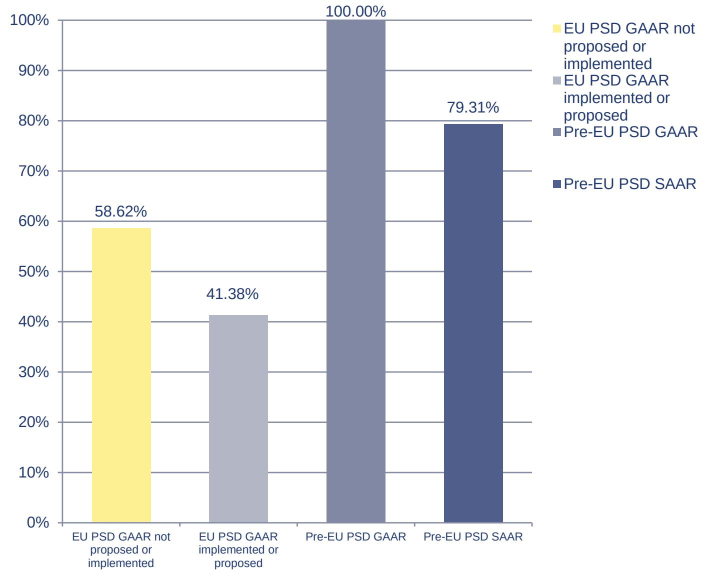
Pepijn Pinkse (Associate)
pepijn.pinkse@loyensloeff.com

2 Charts of content

Domestic withholding tax rates



Domestic anti abuse measures



EU PSD GAAR not proposed / implemented:
Austria, Belgium, Bulgaria, Croatia, Czech Republic, Germany Greece, Hungary, Italy, Latvia, Malta, Portugal, Slovakia, Spain, Sweden, Switzerland*, United Kingdom

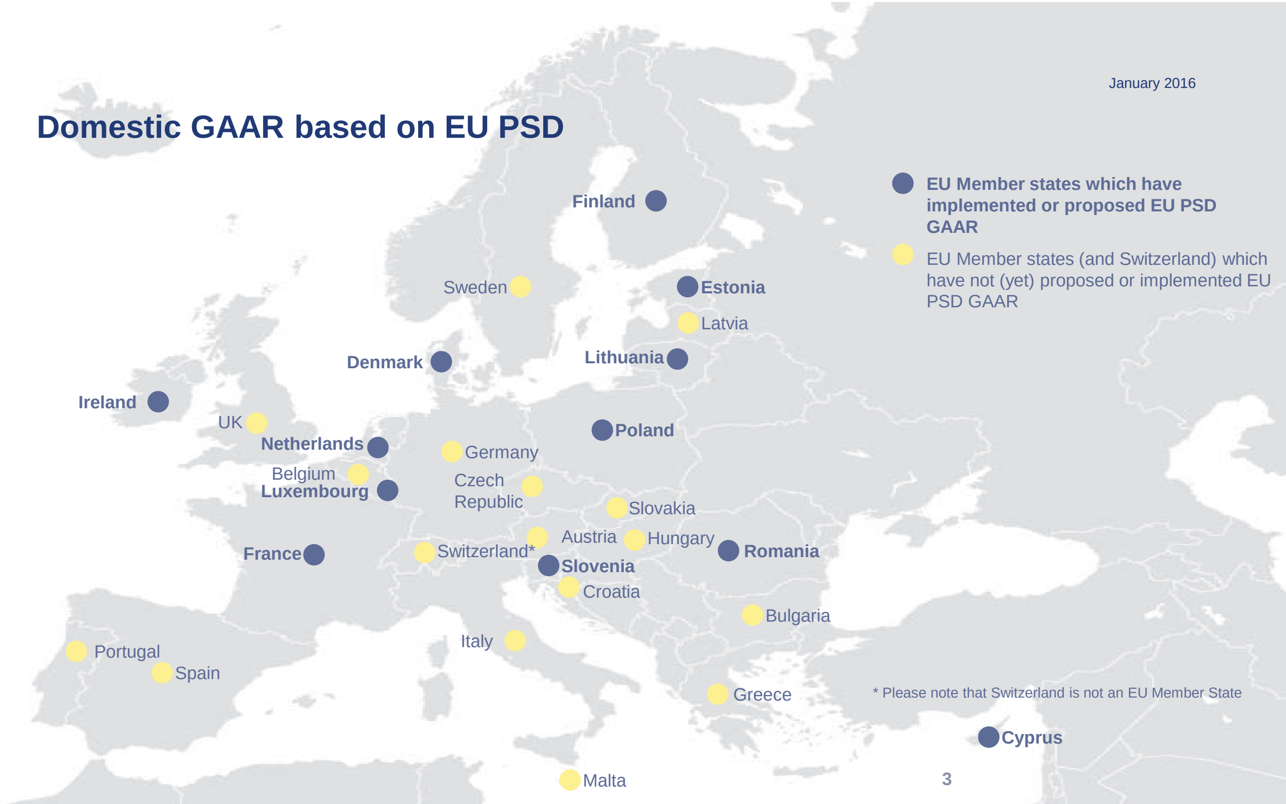
EU PSD GAAR proposed / implemented:
Cyprus, Denmark, Estonia, Finland, France, Ireland, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovenia

Pre-EU PSD GAAR:
Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland*, United Kingdom

Pre-EU PSD SAAR:
Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Romania, Spain, Sweden, Switzerland*, United Kingdom

* Please note that Switzerland is not an EU Member State

Domestic GAAR based on EU PSD



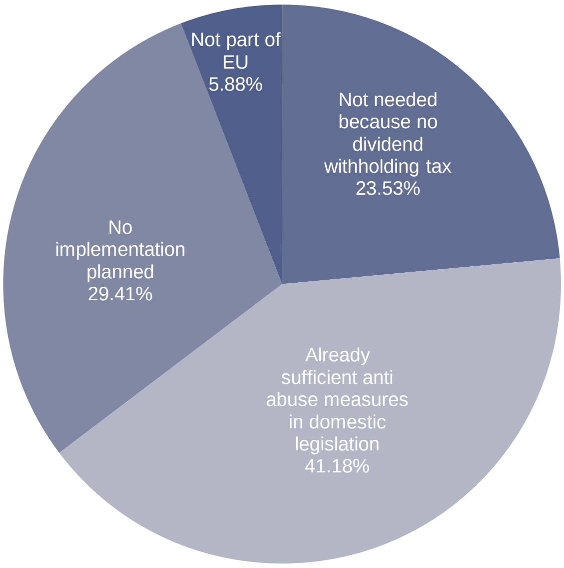
Implementation of EU PSD GAAR

Cyprus, Denmark, Estonia, Finland, France, Ireland, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovenia

Austria, Belgium, Bulgaria, Croatia, Czech Republic, Germany, Greece, Hungary, Italy, Latvia, Malta, Portugal, Slovakia, Spain, Switzerland*, Sweden, United Kingdom

* Please note that Switzerland is not an EU Member State

Reasons for not implementing the EU PSD GAAR



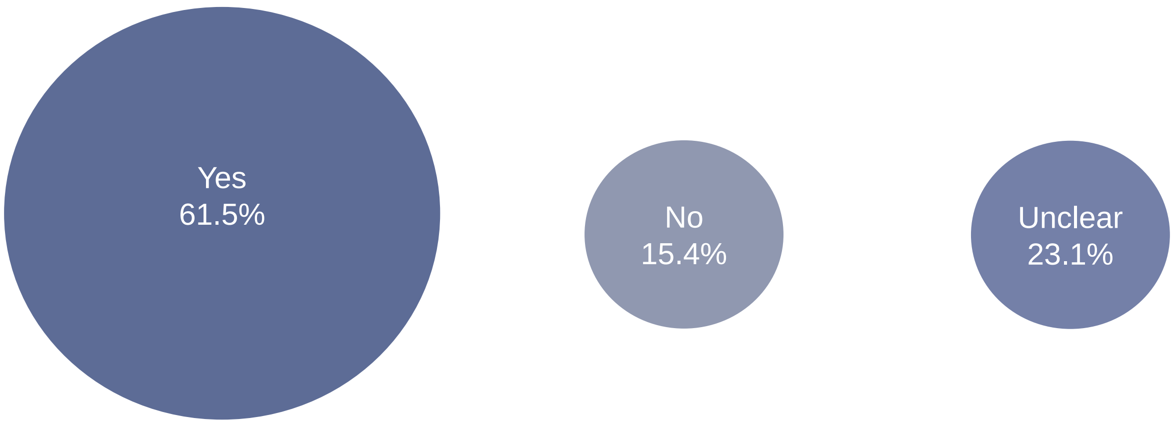
Not needed because no dividend withholding tax:
Latvia, Malta, Slovakia, United Kingdom

Not needed because already sufficient anti abuse measures in domestic legislation:
Austria, Bulgaria, Czech Republic, Hungary, Italy, Spain, Sweden

No domestic implementation planned but still under consideration:
Belgium, Germany, Greece, Croatia, Portugal

Not needed because not part of EU:
Switzerland

Treaty fallback position of countries with EU PSD GAAR implementation

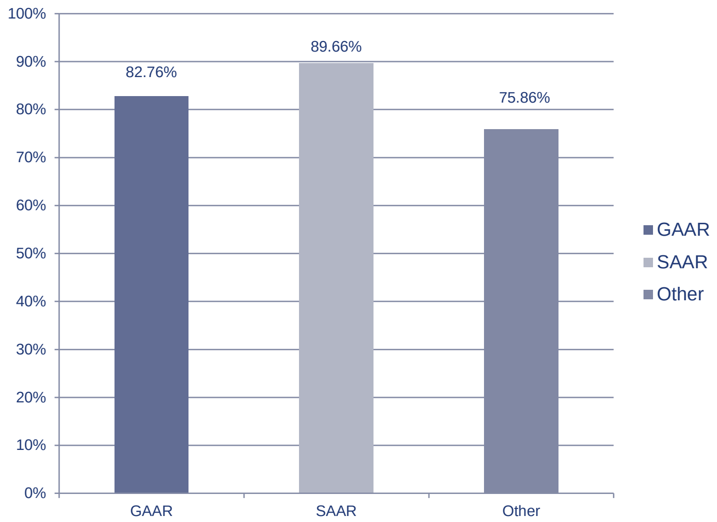


Treaty fallback
Cyprus, Estonia, France, Ireland, Luxembourg, Netherlands, Poland, Slovenia

No treaty fallback
Denmark, Lithuania

Unclear
Finland, Romania, Sweden

Tax treaty anti-abuse measures



GAAR:
Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, United Kingdom

SAAR:
Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, United Kingdom

Other:
Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, United Kingdom

“ Do I have treaty protection as fall-back? ”

3 Austria

Domestic withholding tax rates

Dividends: 25% for corporations; 27.5% for individuals

Interest: 0% for corporations; 25% or 0% for individuals*

Royalties: 20%

* Interest payments pursuant to the EU Savings Directive made to non-resident individuals are only subject to 25% tax in Austria if paid out by certain financial institutions.

Requirements for withholding tax exemption

Dividends: 0%

Domestic requirements*: shareholder must be EU-resident corporation; minimum threshold of 10%; minimum holding period of 1 year; no abuse of law (PSD)

Interest & Royalties: 0%

Domestic requirements*: shareholder must be EU resident affiliated corporation; i.e. minimum threshold of 25%; minimum holding period of 1 year; no abuse of law. There is only a very restricted scope for interest as, in general, there is no domestic withholding tax.

* Please note, that these requirements (especially the minimum threshold) are based on domestic law and might be reduced by Tax Treaties.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR, SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: SAAR and other

Austria

Description

GAAR description

A GAAR may apply in case of abuse of law or sham transactions. The onus of proof for the existence of such a transaction lies with the tax administration. Case law shows that in practice it is rather difficult to demonstrate this. If the GAAR applies, the tax administration assesses the amount of tax due as if the abusive transaction had not occurred.

PSD GAAR

No implementation planned / required.

The PSD GAAR should not have an impact on the participation exemption for corporate income tax purposes. Austria has already implemented provisions which include anti-abuse measures in domestic law. Sec 10/4 of the Austrian Corporate Income Tax Act provides a switch- over-clause from the exemption to the credit method specifically for the purpose of avoiding abuse. Furthermore, a domestic regulation specifying such switch-over-rule includes Sec 22 of the Austrian Federal Fiscal Code (BAO) which has a very broad scope. As Sec 10/4 of the Austrian Corporate Income Tax Act has the same requirements as the PSD with regard to participations, it should already cover the adopted anti-abuse measures.

SAAR description

Firstly, a withholding tax on dividends and royalties may apply in case of tax avoidance/abuse of law. However, the rule does not apply if the receiving company submits a written form to the paying company stating that it complies with certain substance criteria (e.g. derives its income from active business, employs own personnel, maintains own business facilities etc.).

Secondly, a withholding tax may apply in case of so-called constructive dividends. In general, a constructive dividend distribution is assumed if the paying company grants to its shareholders a benefit it would not have granted to an independent third party when applying the diligence of a prudent businessman. This may also include royalty payments that exceed an arm's-length amount.

Thirdly, deductibility of intra-group interest and royalty payments may be limited if this income is subject to an effective taxation lower than 10% at the level of the receiving company.

General tax treaty position of the country

Newer DTTs grant e.g. dividend exemptions dependent on domestic anti-abuse provisions. Older DTTs typically do not refer to domestic Austrian anti-abuse provisions. Scholarly literature gives precedence of treaty-law over domestic law. However, tax authorities and courts do not share this view and affirm a treaty override if domestic anti-abuse measures are applied.

Different type of anti-abuse provisions included in treaties

PPT clause

N/A

LOB clause

Only a few treaties contain an LOB clause.

Other anti-abuse provisions

The vast majority of Austrian treaties contain the concept of beneficial ownership. Only a few treaties contain specific exclusions from residency status.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
In general sound business reasons are necessary for the transactions undertaken. This especially includes personnel in Austria. Moreover, day-to-day management shall effectively take place in Austria. Appropriate documentation is in practice vital.	Place of effective management shall be in Austria. This includes board decisions taken in Austria, local address/ real office space, board members, personnel, bookkeeping, bank accounts and business activities carried out in Austria.

4 Belgium

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 27% Interest: 27% Royalties: 27%	Dividends: 10% participation held uninterruptedly for a period of 12 months Interest & Royalties: 25% direct or indirect participation held uninterruptedly for a period of 12 months. In addition, interest is exempt from withholding tax if paid by a Belgian company on registered bonds issued to non-residents or if paid by a Belgian company to a EU credit institution or to a credit institution located in a country with which Belgium has concluded a tax treaty

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR and SAAR, other

Description

GAAR description

In 2013 a new GAAR was introduced. The provision specifically targets wholly artificial arrangements that lack economic substance and do not take place under “normal” economic or financial conditions.

Based on the Belgian GAAR, tax abuse would occur when the taxpayer carries out, by means of a legal act or a series of legal acts, one of the following transactions:

- A transaction by which he places himself, contrary to the purpose of a provision of the Belgium CITA or its executory decrees, outside the scope of application of such provision, or
- A transaction by which he claims a tax benefit provided for by a provision of the Belgium CITA or its executory decrees, the aim of which is essentially to obtain such an advantage, when the granting thereof would be contrary to the purpose of the provision.

PSD GAAR

Not yet implemented. It is reportedly currently a point of discussion whether a specific PSD GAAR is needed given the existence of the general GAAR.

Expected impact: N/A

SAAR description

Belgium has implemented the PSD but additionally requires, in order for the withholding tax exemption to apply, that both parent and subsidiary are subject to corporate income tax or similar without benefiting from a tax regime that deviates from the common tax regime.

The withholding tax exemption provided by the PSD also applies to non-EU Member States with which Belgium has concluded a DTT but only if the DTT concerned provides for the exchange of information with such a State.

General tax treaty position of the country

The Belgian DTTs[1] take precedence over domestic law rules.

PPT clause

Included in the DTTs with Estonia, Latvia and Lithuania and, for certain income, in the DTTs concluded with Chile and the UK.

LOB clause

Included in the DTTs concluded with the US, Switzerland and Spain.

Other anti-abuse provisions

Subject to tax clause

Included in the Belgian Model Tax Convention. Belgium has included such clause in its DTTs concluded with: Chile, Ghana, Morocco, the UK, Rwanda, San Marino, Singapore, Taiwan, and Tunisia.

Remittance basis clause

Included in the DTT with Cyprus.

1 Belgium has an extensive tax treaty network covering more than 90 countries which generally follow the OECD model. Under these treaties, the withholding tax rates are usually reduced to 10% for interest, 5%-15% for dividends and 0% for royalty income.

Belgium

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Traditional substance requirements include: - Day-to-day management effectively takes place in Belgium; - Strategic decisions taken in Belgium; - Directors are Belgian residents; - Expenses booked in the accounts of Belgian company; - Presence of qualified personnel in Belgium; - Bank account open in Belgium, and - Accounting held in Belgium. However, in light of the new GAAR, increased substance and sound business reasons are recommended.	N/A

5 Bulgaria

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 5%	Dividends: distribution of dividends to legal entities in EU/ EEA States. Exemption does not apply to dividends which are considered as hidden distribution of profits ("HDP")[2].
Interest: 10%	
Royalties: 10%	Interest & Royalties: 25% participation held for an uninterrupted period of 24 months. Exemption does not apply when the payments are qualified as distribution of profit or capital repatriation, for interest payments under a loan, which allows some form or participation in borrower's profits, or repayment is not due or is due after more than 50 years, or for payments under tax evasive transactions.

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

2 HDP covers (i) any amounts unrelated to the paying entity's business activities or amounts exceeding the normal market rates accrued, paid or distributed in favour of related parties, (ii) interest expense accrued covering either three of the following four conditions a) the debt instrument exceeds payer's equity as of 31st of December of the previous year, b) repayment of interest or principal has no fixed term, c) repayment of the interest or principal is dependent on the debtor's profits and d) repayment is contingent on satisfying requests of the other creditors or on distribution of dividends.

Bulgaria

Description

GAAR description

Under the Bulgarian CITA two principle GAARs are applied: (i) the related parties transactions rule and (ii) the tax evasion rule.

Both GAARs assert application of the arm's length principle, while the tax evasion rule applies in relations between unrelated parties as well. The tax evasion rule also extends to fictitious transactions concealing genuine transactions and also introduces certain statutory assumptions (by way of listing examples) for evasive transactions.

PSD GAAR

On 12 September 2015 the Ministry of Finance released for discussion purposes a draft bill amending and supplementing the Bulgarian CITA. According to the draft bill, the tax evasion rule has a much broader scope than the PSD GAAR. Thus, implementation of the PSD GAAR in Bulgarian tax law is seen as unnecessary at this time. The draft bill was adopted on 25 November 2015, effective as of 2016, which confirmed the position of Bulgaria that adoption of PSD GAAR is not necessary.

Expected impact

No specific impact is expected for EU situations because of the already existing tax evasion rule.

SAAR description

Hidden distribution of profit (HDP)
Payments not related to company's activity or exceeding market levels, as well as certain interest expenses, could be qualified as HDP and thus be disregarded as deductible expense for corporate income tax purposes, treated as taxable dividend (disallowed from Parent-Subsidiary relief from withholding taxation) and subject to a monetary sanction of 20% thereof.

Audit in Specific Cases
In explicitly listed set of circumstances which could be seen to facilitate tax evasion, the tax authorities are entitled to determine the taxable base of a company and assess tax liabilities, for which the burden of proof for challenging such assessment is shifted to the taxable person.

Beneficial Owner Definition
A specific definition for beneficial owner has been introduced for non-resident companies willing to benefit from a double tax treaty exemption or relief pursuant to a tax clearance procedure.

General tax treaty position of the country

The provisions of a ratified, promulgated tax treaty prevail over domestic law[3].

Different type of anti-abuse provisions included in treaties

PPT clause

A PPT clause is included in the dividends, interest, royalties and other income clauses of the new DTTs with UK and Norway which still have not entered in force.
A similar PPT clause is also included in some other DTTs, among which also the DTT with the USA.

LOB clause

It is included in the DTT with the United States.

Other anti-abuse rules

Subject-to-tax clause is included in the DTT concluded with Germany and the new DTT with the UK, where the latter contains limitation of relief clause as well.

3 Bulgaria has entered into some 68 DTTs which generally follow the OECD model.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR

1. Terms and conditions of the transactions between related parties, as well as between unrelated parties, should be set on arm's length basis to avoid adjustments of financial result by auditing tax authorities.
2. The pricing between related parties should be supported by any one of the specific transfer pricing methods under Bulgarian law, fully in line with the OECD Transfer Pricing Guidelines, or otherwise could be challenged via tax litigation. Respective transfer pricing documentation and other related evidences would be also important in defending the pricing of a transaction.
3. The transactions should be also supported with relevant evidence (contracts, invoices, protocols, written communication, deliverables, related accounting actions etc.) in confirmation that they actually took place.

Recommendations / substance requirements to prevent application of the SAAR

Hidden distribution of profit

1. In case of interest payments under a loan, the loan should not satisfy at least two of the following conditions:
- the loan amount exceeds the own equity of the borrower as of 31 December of the previous year;
- repayment of the loan or the interest thereof is not limited in time;
- repayment of the loan or the interest thereof is dependent on the borrower's profits;
- repayment of the loan is dependent on satisfaction of other creditors' requests or payment of dividends.

2. Intragroup services should have been actually provided and should have not been duplicated with services already provided by third parties, as well as should not fall within the business activities of the recipient company.
3. The 20% sanction could be avoided if the hidden distribution of profit is declared in the annual tax return.

Audit in Specific Cases

The company should ensure:

- full and diligent book-keeping in compliance with all applicable laws and regulations;
- compliance and reporting within statutory deadlines;
- its financial and property status to correspond to its revenues, own equity and received donations;
- reliable contact and address for communication with tax administration.

6 Croatia

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 12% Interest: 15% Royalties: 15%	Dividends: 10% participation held for an uninterrupted period of 24 months Reduction (or exemption) under an applicable tax treaty Interest & Royalties: 25% participation held for an uninterrupted period of 24 months

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR

Description

GAAR description

- According to General Tax Act (hereinafter: GTA) parties of the relationship regulated by tax legislation are obliged to act in good faith, meaning conscientious and fair conduct in accordance with the law;
- Tax facts will be determined according to their economic essence (substance-over-form). If revenue, income, profit or other assessable benefit was acquired w/o a legal basis, the TA shall determine the tax liability;
- if a sham transaction conceals another legal transaction, the basis for the assessment of the tax liability is that concealed legal transaction;
- further, a special procedure for “piercing the corporate veil” in tax matters for shareholders, board members and executive directors of a company as well as persons associated with them can be declared to be liable for a company’s tax debt by the TA, under condition that they committed a criminal offense of tax evasion or were engaged in tax evasion or they illegally exercised a tax relief or other tax benefits.

SAAR description

- According to the CITA, the withholding tax shall be paid at a higher rate – 20% for all services paid to persons having their PE or HQ in the countries (except the EU), in which a general or average nominal tax rate is lower than 12,5% and the countries listed by the TA;
- As regards the taxation on distribution of dividends and shares of profit between parent companies and subsidiaries of different Member States, a withholding tax shall not be paid if dividends and shares are distributed to a company having one of the forms subject to the common taxation system provided that the recipient is holding a minimum of 10% in the capital of a company distributing dividend or share of profit, and this percentage is held for an uninterrupted period of 24 months. These provisions shall not apply when it is obvious that tax fraud or tax evasion is the main goal or one of the main goals of the distribution of dividends or shares of profits;

General tax treaty position of the country

DTT have precedence over domestic law rules. If the DTT puts a party in a better position, it can be applied under prescribed criteria, if domestic law has some more beneficial provisions, domestic law is applied.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in certain DTTs

LOB clause

N/A

Other anti-abuse provisions

N/A

Croatia

PSD GAAR Not yet implemented. Croatia only has general anti-abuse provisions. The applicable provisions of the tax law regarding dividend withholding tax (see second bullet point under SAAR) shall not apply when it is obvious that tax fraud or tax evasion is the main goal or one of the main goals of the distribution of dividends or shares of profits. **Expected impact** N/A	- interest on loans granted by shareholders or company members – thin capitalization rule (4:1 ratio) . The minimum calculated interest rate shall be the rate which would apply to non-associated persons at the time of granting the loan. At this moment interest rate is discount interest rate prescribed by the Croatian National Bank and amounts to 7%.	

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	**Recommendations / substance requirements to prevent application of the SAAR**
The general principles apply, the business purpose of transaction needs to be proved, the aim should not be tax evasion or tax avoidance.	Our regulations prescribe formal requirements that need to be fulfilled in order to prove the fulfillment of the certain conditions (certificate of residence, different declarations, transfer pricing documentation, ownership structure and similar). Also, same as for the GAAR, the economic purpose and intention of transaction needs to be proved.

7 Cyprus

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0% Interest: 0% Royalties[4]: 10% (or 5% in case of cinema films)	Royalties: No tax need be withheld if rights are used exclusively outside Cyprus. Relief may also be available under any applicable double taxation treaty or EU directive.

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

4 Paid to a non-resident holder of intellectual property rights for the use of those rights in Cyprus.

Cyprus

Description

GAAR description

Cyprus legislation contains a general anti-avoidance clause, allowing the Director of Inland Revenue to disregard any transaction through which the taxation of any person is reduced in case the Director deems such transaction to be artificial or fictitious. There is no significant jurisprudence or published policy regarding the application of this article.

PSD GAAR

The CITA has been amended to incorporate the latest changes to the PSD by providing that after 31 December 2015 the current exemption from Cyprus income tax on dividends received by Cyprus-resident companies will not be available in cases where the arrangement under which they are paid is not based on valid commercial reasons that reflect economic reality. The amending law has come into effect as of 1 January 2016.

Expected impact

It may be more difficult to apply the exemption.

SAAR description

There are two anti-abuse provisions regarding SDC tax:

- Tax authorities may disregard the interposition of a company without any real business or economic purpose between an individual and a company making profits, with the principal objective of reducing or deferring the payment of SDC tax.

- Tax authorities may disregard transfers of assets from any person domiciled in Cyprus to an individual who is not domiciled in Cyprus, and who is a spouse or relative within the third degree of kindred of the transferor.

General tax treaty position of the country

DTT’s prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

DTTs with the US and the Czech Republic.

LOB clause

DTTs with Belgium, Kuwait and Romania.

Other anti-abuse rules

All tax treaties concluded by Cyprus apart from the very oldest are based on the OECD Model and limit relief for double tax to tax that would actually be payable on the profit or income concerned.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
There are no explicit substance requirements set out in domestic legislation which will be applied within the context of the GAAR contained in article 33 of the ACTL. The usual practice of the Cyprus tax authorities is to consider the substance and commercial justification for the transaction or arrangement. For determining residence of companies the key test is the locus of management and control, and the specific factors the tax authorities take into account in assessing this include: - Are strategic decisions taken in Cyprus? - The extent to which the directors are resident in Cyprus. - Expenses booked in the accounts of the Cyprus company. - Presence of qualified personnel in Cyprus able to conduct the business of the company. - Location of accounting records.	N/A

8 Czech Republic

Domestic withholding tax rates[5]	Requirements for withholding tax exemption
Dividends: 15% Interest: 15% Royalties: 15%	Dividends: 10% participation held for an uninterrupted period of 12 months Interest & Royalties: 25% participation held for an uninterrupted period of 24 months[6]

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR	Tax treaty anti-abuse measures: YES Types: GAAR and other

5 Dividends, interest and royalties paid to a non-EU or non-EEA country with whom the Czech republic does not have a (DTT or TIEA (bilateral or multilateral)) tax treaty in place or to an entity whose tax residency is not ascertained, are subject to withholding tax of 35%.

6 The withholding tax exemption applies only if the interest payment (income) is not attributable to a Czech or non-EU permanent establishment of the recipient. Prior decision of Czech tax authorities is necessary for application of the exemption.

Description

GAAR description

In the Czech Tax law basically the following general concepts of combating potential abuse of tax rules apply: (i) substance over form principle; and (ii) abuse of law concept.

The substance over form principle was included in the tax law from 1992, i.e. for its entire modern existence. Pursuant to this rule, the Tax Authorities are entitled to assess tax based on factual merits of an operation (actual intentions of the parties) regardless of how the operation is organized from a formal legal perspective. The case law gradually limited the actual usage of this principle in favor of the abuse of law concept.

The abuse of law concept generally originates from Czech constitutional law and started to be adopted to the tax cases by the Czech Supreme Administrative Court since approx. 2004. The concept is applied[7] on a strictly case-by-case basis, However, in general to operations without sound non-tax business motivations predominantly designed to derive tax benefits (including, as the case may be, reduction of WHT rate under DTT or tax exemption under the EU Parent-Subsidiary Directive).

SAAR description

N/A

General tax treaty position of the country

- DTTs prevail over domestic law
- DTT rules generally apply alongside the general anti-abuse rules pursuant to the Czech law. However, only limited case law is available.

Different type of anti-abuse provisions included in treaties

PPT clause

N/A

LOB clause

An LOB clause is included in the tax treaty concluded with the US.

Other anti-abuse rules

Some newer (concluded after 2008) DTTs contain explicit anti-abuse clause (e.g. Luxembourg, PLC and Panama).

7 The application is generally in line with the case law on abuse of law applied by the Court of Justice of the European Union.

Czech Republic

PSD GAAR

The Czech tax law will not be amended as to explicitly include the new PSD GAAR. Czech tax law is generally considered to already include sufficient GAAR (see the abuse of law concept above) and no additional GAAR is required.

Expected impact

We do not expect any material changes in application of the participation exemption for corporate income tax purposes and the dividend withholding tax.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Traditional substance requirements need to be met to defend the tax residency and beneficial ownership status and resulting in preferential treatment under a DTT or EU Parent-Subsidiary Directive. Generally, the following should effectively happen in the claimed country of residence (but in each case the whole set-up should be examined): - Day-to-day management and the board meetings; - Strategic decision-making; - Qualified personnel present and available; - Bank account open in the Czech Republic; - Accounting. As regards the general anti-abuse provisions, the tax-payer should carefully document non-tax business reasons of the transactions he is involved in. In general it should be accepted that where a transaction as such is commercially justified, the parties are free to structure it to achieve also optimal tax treatment (e.g. lower tax payable), without that being abusive. Where, on the contrary, a transaction as such is not commercially justified, e.g. where it is being carried out only to achieve a tax benefits, then it would be regarded as abusive and the tax benefits denied.	N/A

9 Denmark

Domestic withholding tax rates	**Requirements for withholding tax exemption**
Dividends: 27%, 22%, 15% or 0%	Dividends: 10% [8]
Interest: 22% or 0%	Interest: N/A [9]
Royalties: 22%	Royalties: N/A [10]

Domestic anti-abuse measures	**Tax treaty anti-abuse measures**
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

8 Provided that the withholding tax shall be reduced or waived under an applicable DTT and/or the PSD
9 No withholding tax applies, unless debtor and creditor are associated and, in that case, provided also that the withholding tax shall not be reduced or waived under an applicable DTT and/or the EU Interest-Royalty Directive
10 Under most Danish DTTs, royalties can only be taxed in the state of residence

Description

GAAR description

On 21 April 2015 a bill was adopted to enact (among others) a GAAR into Danish law, which entered into force on 1 May 2015 without a grandfathering rule. The proposed GAAR is composed of two parts, relating to respectively abuse of:

- the PSD, the Interest-Royalty Directive, and the Merger Directive, and
- tax treaty provisions.

If a taxpayer could apply both the PSD and a double taxation treaty, the proposed PSD GAAR can be used to deny the benefits. Consequently, a taxpayer would not be able to apply double tax treaties as a fall back option.

PSD GAAR

See above. The proposed PSD GAAR reflects the wording in the approved amendment to the PSD.

Expected impact: The impact is expected to be significant. Moreover, although near-verbatim implementation into Danish law, the PSD GAAR in itself is open-ended and thus creating uncertainty for taxpayers.

SAAR description

Beneficial ownership

On 14 December 2012 an anti-abuse bill was introduced into Danish law, introducing a beneficial ownership test for Danish dividend withholding tax purposes. The provision aims to prevent Danish companies being used as flow-through entities. The provision does not apply if a transaction is covered by the PSD.

General tax treaty position of the country

There is no general statutory anti-avoidance rule to prevent fraud and abuse under Danish law. However, a so-called substance-over-form principle has developed in case law. Taxation must be based on a specific assessment of the actual course of events. Accordingly, empty and artificial tax-related transactions may be set aside in the circumstances in which case, taxation will instead be based on the facts.

Tax treaty GAAR

With the bill, Denmark unilaterally makes a GAAR applicable to all its tax treaties. The proposed wording of the tax treaty GAAR deviates from the PSD GAAR (see below). However, no specific difference in its content is envisaged. The proposed GAAR should deny tax treaty benefits if it is reasonable to assume that, taking into account all facts and circumstances, obtaining the benefit(s) is one of the most significant purposes of the transaction or arrangement, unless this is in accordance with the content and purpose of the tax treaty provision.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in some DTTs.

Denmark

		LOB clause Included in some DTTs. **Other anti-abuse provisions** Some DTTs include general subject to tax clauses while others refer to specific types of income (.e.g. offshore income or income exempt in the state of source)

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	**Recommendations / substance requirements to prevent application of the SAAR**
If abuse is established, the *taxpayer* needs to demonstrate valid commercial reasons which reflect economic reality. However there is considerable uncertainty as to exact requirements. According to Danish legislator, the PSD GAAR is to "some degree" based on EU case law on abuse, e.g. "valid commercial reasons", "reflect economic reality", similar line of thought in C-126/10, Foggia (merger). Taxpayers can obtain binding rulings on the Danish PSD GAAR application, if requests concern genuinely contemplated dispositions, and if all relevant facts and circumstances are disclosed.	N/A

10 Estonia

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0% (however, note that dividends paid by an Estonian company are subject to distribution tax at the gross rate of 20% [11]) Interest: 0% Royalties: 10%	Dividends: N/A Interest: N/A Royalties: Royalties are exempt from withholding tax if the recipient is an associated company resident in another Member State or Switzerland. Two companies are associated if - one of them holds directly at least 25% of the capital of the other or - if a third EU or Swiss company holds directly at least 25% of the capital of the two companies. In both cases, a minimum holding period of 24 months is required. The exemption is not granted to the amount which exceeds the sum that would be paid to a non-associated party.

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

11 Please note that redistribution of dividends is not taxed if dividend is received from DTT countries or from Swiss confederation and hold at least 10% of the shares/votes at the time of deriving of dividend; or other countries (exc low tax territories) hold at least 10% of shares/votes and dividend is taxed or income tax is charged form the share of profit which is the basis thereof.

Estonia

Description

GAAR description

Estonian legislation provides for a GAAR stating that if it is evident from the content of a transaction or act that the transaction or act is performed for the purposes of tax evasion the conditions that correspond to the actual economic content of the transaction or act apply upon taxation. Ostensible transactions shall not be taken into account upon taxation. If an ostensible transaction is entered into in order to conceal another transaction, the provisions concerning the concealed transaction apply upon taxation.

PSD GAAR

Estonia provides a unique CIT system as resident companies do not pay tax on retained or reinvested earnings. The tax obligation is deferred to the moment of distributing profits. Estonia has proposed but not implemented yet the rules for the PSD GAAR. Based on the draft proposals, the dividend tax exemption for CIT purposes may be denied by the tax authorities if it is established that the main reason or one of the main reasons of the transactions is to obtain a tax advantage. According to the plan, the implementations should come into force from 1st of July 2016.

SAAR description

The following measures address base erosion regarding payments to low-tax jurisdictions:

- Resident companies, except credit institutions, shall pay income tax on payments not related to business, unless income tax has been withheld on such payments e.g. various payments made, or benefits provided, to recipients situated in low-tax territories.
- Income tax is charged on all income derived by a non-resident legal person located in a low tax rate jurisdiction from services provided to Estonian residents, irrespective of where the services were (actually) provided or used.

General tax treaty position of the country

When laws or other legislation of Estonia are in conflict with an international treaty ratified by the Riigikogu, provisions of the international treaty apply.

Different type of anti-abuse provisions included in treaties

PPT clause

DTTs with Lithuania, Latvia, Singapore, Italy, UK, Ukraine, Belgium, Malta and Kazakhstan include the MPT clause

LOB clause

Several DTTs include LOB clause e.g. with United States, Belgium, Lithuania, Singapore, Italy, Kazakhstan, Latvia, United Arab Emirates, Uzbekistan and Malta.

Other anti-abuse rules

The DTT with Spain includes a look-through provision.
There is a limitation of relief clause in the DTT with UK and exclusion of certain companies in the DTTs with Luxembourg and Sweden.

There is a limitation of the source state's taxing right in the DTT with United States.

Expected impact		
The PSD GAAR will have an impact on the participation exemption for CIT purposes as the proposed amendments to the CITA will require additional proof that there is actual economic reason for the use of specific chain of transactions.		

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should ensure that there are commercial reasons for the transaction.	A legal person is not deemed to be located in a low tax rate jurisdiction if more than 50 per cent of its annual income is derived from actual economic activity or if the state or territory of location of the legal person provides the Estonian tax authority with information concerning the income of a person controlled by Estonian residents.

11 Finland

Domestic withholding tax rates

Dividends: 30%, 20% for corporate shareholders

Interest: 30%, 20% for corporate lenders

Royalties: 30%, 20% for corporate recipients

Requirements for withholding tax exemption

Dividends: 10%, in EU, no other simple exemption based mostly on ownership percentage.

Interest & Royalties: 25% in EU, no other simple exemption based mostly on ownership percentage.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and other

Description

GAAR description
Based on the Finnish GAAR, if a circumstance or an action has been given legal form, which does not correspond with the true nature or purpose of the matter, and with the evident aim of tax avoidance, taxation should be carried as if the correct form had been used.

PSD GAAR
Implemented by the parliament and has been in force as of 1 January 2016. According to the provision, rules regarding CIT exemptions of dividends received by corporations do not apply if it is a question of an arrangement, which main purpose or one of the main purposes is to achieve a tax benefit contrary to the aim of the rule and provided the arrangement is not genuine, taking into account all the facts and circumstances. The provision does not, however, have an effect on the general rules on dividend withholding taxation, which accordingly remain subject to the “ordinary” GAAR.

Expected impact
It is difficult to predict how the Tax Administration will start to apply the new PSD GAAR. Likely, the impact is not very wide as the “ordinary GAAR“ already is deemed to cover the same matters.

SAAR description
Exit tax provisions:
(i) for shareholders having benefited from tax neutral share exchanges and for cross-border mergers, demergers, business asset or domicile transfers should the formerly Finnish located assets not remain in a Finnish PE.
(ii) Tax exemption on mergers, divisions, partial divisions, transfers of assets, exchanges of shares and the transfer of the registered office of a SE or a SCE, covered also by the EU Merger Directive, do not apply, if it is evident that the only or one of the main purposes of the reorganization was to avoid tax.

TP correction provision
Outbound payments made by Finnish companies to their parents or subsidiaries may be subject to tax, if they differ from what would have been agreed with third parties.

Hidden and manufactured dividend provision
Outbound payments made to the shareholders by Finnish company may be deemed, if they differ from fair valuation due to the shareholder status of the recipient, hidden dividends from Finnish tax perspective and thus subject to withholding tax. The same applies also to outbound payments resulting from share buyback or capital return if the payment has been implemented in order to avoid taxes.

No tax treaty over-rule provisions.

General tax treaty position of the country
In Finland, the position is not clear whether or not domestic anti-abuse provisions can override treaty provisions. As Finnish tax treaties are based on the OECD model tax treaty, the tax treaty commentary should be a relevant source of interpretation in this respect.

Different type of anti-abuse provisions included in treaties

MPT clause
Finnish tax treaties do not include MPT clauses.

LOB clause
Finnish tax treaty between USA includes an LOB test.

Other anti-abuse provisions
- Exchange of information clause
- Associated enterprises clause
- Artiste/star company clause
- “Beneficial ownership” -concept in the dividend, interest and royalty income clauses
- “Limitation of relief” -clause (Barbados, Ireland and UK tax treaties)

Finland

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Transactions carried out should have other business reasons than avoiding taxation. "Letter-box" companies should be avoided.	When making outbound payments to related parties, a sufficient transfer pricing documentation should be maintained and it should be made sure that transactions and reorganisations have business reasons (other than mere tax saving).

12 France

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 30 % or 75 % (non-cooperative States) Interest: 0 % Royalties: 33,1/3 % or 75 % (non-cooperative States)	Dividends: 5% participation held for an uninterrupted period of 24 months Interest & Royalties: 5% participation held for an uninterrupted period of 24 months

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR and SAAR

France

Description

GAAR description

On basis of the abuse of law (*abus de droit*) doctrine, the French Tax Authorities may challenge any arrangements which are either fictitious or genuine but designed solely to avoid or evade the tax liability that would normally have been borne. If an abuse is identified, penalties may be imposed up to 80% of the taxes thus avoided.

The GAAR is limited to schemes based on statutory law: constitution, tax treaty provisions, law or decrees. The authorities may test whether an arrangement is (i) artificial and/or (ii) seeks to benefit from a literal application of legal provisions or decisions in contradiction with the objective set forth by the author of such provisions and, thus, motivated by the sole purpose of avoiding or alleviating the tax burden of the taxpayer.

PSD GAAR

The transposition of the PSD has been adopted by the French parliament as part of the Amending Financial Bill for 2015.
The definition of the PSD GAAR is strictly identical as the one used by the Directive.

SAAR description

The French Tax Code contains several SAARs. The most noteworthy are the following:

- Anti-abuse mechanism for withholding tax purposes: The passive income withholding tax exemption is denied when the beneficiary is controlled by non-EU resident companies, unless the beneficiary justifies that the main purpose, or one of the main purposes, of the ownership chain is not to benefit from the withholding tax exemption.
- Provision targeting hybrid debt instruments: Interest payments made by a French borrower to an affiliated entity are deductible only if such borrower is able to demonstrate that the lender is subject to an income tax on the corresponding interest income which is at least equal to 25% of the French corporate income tax that would have been due had it been computed in accordance with standard French rules.
- Payments made to non-cooperative jurisdictions: Certain types of payments made to entities established (or on bank accounts held) in a jurisdiction listed as a non-cooperative state or territory may (i) be subject to an increased 75% withholding tax, and (ii) become non-tax deductible (unless the taxpayer proves that the transaction's main purpose has both a purpose and effect other than to shift income outside France).

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

France aims to include PPT clauses in all new DTTs (e.g. China, Panama and Andorra).

LOB clause

DTTs signed with States where individuals are taxed on a lump sum basis (Switzerland) or only on their domestic incomes (UK) and also in the treaty signed with the US.

Expected impact

The current French abuse of law doctrine aims at tackling arrangements which only purpose is to obtain a tax advantage that defeats the purpose of a law. To this regard the wording of the PSD is more restrictive as it targets arrangements of which (one of) the main purpose(s) is to obtain a tax advantage. Therefore, while transposing the amended PSD, the legislator could decide to simply introduce the PSD GAAR within the parent subsidiary regime or take the opportunity to reform the abuse of law doctrine by introducing a “main purpose test”.
As expected, the legislator did not reform the whole abuse of law doctrine.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR

In practice, the GAAR is not applied on a regular basis regarding withholding taxes. However, it is recommended to maintain business substance and substantiate the economic rationale of structures and transactions.

Although French law does not contain a list of substance requirements, from case law it follows that the following substance requirements are of importance:

- Real office space and equipment
- Local bookkeeping
- Local resident employees on the payroll
- Staff on the payroll
- Local board meetings
- Board members: local expertise and management autonomy

13 Germany

Domestic withholding tax rates

Dividends: 25%

Interest: 25% [12]

Royalties: 15%

* In addition to the withholding tax, a supplementary solidarity surcharge of 5.5% of the amount of the withholding tax is due.

Requirements for withholding tax exemption

Dividends: According to the German “Basis for negotiation for DTTs” the withholding tax rate shall not exceed 5 % of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;

Interest & Royalties: N/A

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: SAAR and other

12 Note that interest payment made to non-residents are only subject to tax in Germany if the underlying debt claim is either directly or indirectly secured by German real property (or rights related to such real property) or by ships registered in a German ship register, or if it consists of certain jouissance rights with limited entitlements

Description

GAAR description

Introduced in 1977 (on the basis of a previous rule from 1934), and amended in 2002 and 2008. Pursuant to the applicable legislation, the choice of an inappropriate legal arrangement which, in comparison to an appropriate legal arrangement, leads to a tax advantage for the taxpayer (or a third person) that is not provided for by the law, is considered abusive unless the taxpayer can demonstrate significant non-tax reasons for the chosen transaction. In case of abuse, German tax is due according to the rules that apply to a legal arrangement which is appropriate with respect to the economic occurrences.

This applies also in the case of tax treaties

PSD GAAR

Currently it seems that Germany may not amend its domestic legislation in view of the PSD GAAR.

Expected impact

N/A.

SAAR description

Anti-dividend stripping

A foreign company is only entitled to relief from dividend (or interest and royalty) withholding tax under a tax treaty or EU directive, to the extent:

(i) it is owned by shareholders that would be entitled to a corresponding benefit if they earned the income directly, or

(ii) that it does not meet certain substance requirements, such as the generation of gross revenue through business activities of its own in the relevant tax year and the lack of economic or otherwise significant reasons for its interposition or a lack of participation in general commerce through a business establishment that is adequately equipped for its business purpose.

Unilateral subject-to-tax clause (treaty override)

Exemption for income from an employment activity is only granted if the other state has waived its taxing right or the tax due there has effectively been paid.

Unilateral subject-to-tax clause (treaty override)

Exemption granted in tax treaties is denied if the other state applies the tax treaty in a way which results in income not being taxed there at all or only at a reduced rate.

General tax treaty position of the country

Treaty override is possible if a domestic law becomes effective after the tax treaty.[13]

Different type of anti-abuse provisions included in treaties

PPT clause

N/A

LOB clause

Some DTTs (in particular, with Canada, Kuwait, Liberia, Liechtenstein, Malta, Republic of Korea, Singapore, Spain, Trinidad and Tobago, United Arab Emirates, and United States) include different variations of LOB clauses.

Other anti-abuse provisions

Remittance basis clause

Used in some DTTs (in particular, with Ghana, Ireland, Israel, Jamaica, Malaysia, Mauritius, Singapore, Trinidad and Tobago, and United Kingdom).

Subject-to-tax clause

There are three types of subject-to-tax clauses:

- related to a specific type of income;
- general subject-to-tax clauses; and
- deemed source clauses

13 Currently there are cases pending before the Constitutional Court on this issue after the Federal Tax Court has declared that the doctrine should change.

Germany

	Exemption is also denied if income is not taxable in the other state under its domestic law because the taxpayer is not liable to unlimited taxation there due to his place of residence, usual abode, effective management, seat or any other similar criterion (applicable to dividends only if they have been deducted from the profits of the distributing company). Unilateral switch-over clause (treaty override) If foreign PE income of a resident taxpayer would be subject to German CFC rules (hypothetical test if PE were a foreign company = catalogue of passive income, low taxation of less than 25%, and within the EU/EEA no proof that a real economic activity is exercised in the foreign state), the exemption method is replaced by the credit method.	**Switch-over clause** Germany frequently "switches" from the exemption to the credit method if an item of income is placed under different provisions of a DTT or is attributed to different persons and this results in low taxation or even double non-taxation (many DTTs contain the additional requirement that such qualification or attribution conflict cannot be resolved in a mutual agreement procedure).

Recommendations

- Sound commercial reasons for the transactions undertaken. - Legal form should correspond to the economic substance of the structure	Certain elements will be analysed in order to determine whether the foreign company fulfils the necessary substance requirements, e.g.: - Local address/real office space - Local bookkeeping - Local bank accounts and local telephone lines - Local board meetings - Place of management - Business activities - Own employees	- A company receiving income should not be considered as not being resident in the other state as a result of the application of a tax treaty with a third country. - A company should not be subject to a territorial or preferential tax regime.

14 Greece

Domestic withholding tax rates

Dividends: 10%

Interest: 15%

Royalties: 20%

Requirements for withholding tax exemption

Dividends: 10% participation held uninterruptedly for at least 24 months

Interest & Royalties: 25% direct participation held uninterruptedly for at least 24 months.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Greece

Description

GAAR description
According to the GAAR recently introduced, the Greek tax administration may disregard any artificial agreement or series or arrangements that are aimed at tax evasion and lead to a tax advantage. Such arrangements are treated according to their commercial substance. An agreement/series of arrangements are considered artificial if lacking commercial substance. The goal of an agreement/series of arrangements is perceived to be tax avoidance if, regardless of taxpayer's subjective intention, it is contrary to the object, spirit and purpose of the tax provisions that would otherwise apply.

To be noted that the withholding relief available for dividends under tax treaties overrules the GAAR. Thus the impact of the GAAR on tax treaty relief is expected to be low.

PSD GAAR
It remains unclear whether the PSD GAAR will be implemented. No draft law has been circulated yet regarding PSD GAAR implementation.

Expected impact
The PSD GAAR will most probably not have an impact on the participation exemption for corporate income tax purposes, as the relevant anti abuse provision is already included in the GAAR. To what extent there will be an impact for dividend withholding tax purposes depends on the specific PSD GAAR implementation that will be adopted.

SAAR description

<u>Tax deductibility of payments to non-cooperative or preferential tax regimes</u>
Payments to individuals or entities resident in non-cooperative jurisdictions (i.e. blacklisted countries) or preferential tax regimes (i.e. countries effectively taxed with a corporate income tax rate of 14.5% or lower) are not deductible, except if the taxpayer evidences that the relevant expenses concern real and usual transactions and do not result in shifting of profits or capital outside Greece with the aim of tax avoidance or tax evasion. Payments to EU/EEC jurisdictions are deductible if exchange of information between Greece and the relevant country is in place.

General tax treaty position of the country
N/A

Different type of anti-abuse provisions included in treaties

PPT
Provides that the Interest and Royalties Articles shall not apply if the debt-claim in respect of which the interest paid respectively the right or property giving rise to the royalties was created or assigned mainly for the purpose of taking advantage of these Articles and not for bona fide commercial reasons.
Used in the interest Article of tax treaties with Canada, Ireland, Malta and Mexico and the royalties Article of tax treaties with the aforementioned states and with Tunisia.

LOB clause
DTT with Luxembourg, excluding from the scope of the treaty Luxembourg holding companies as well as income derived from such companies and shares or other rights in such companies owned by Greek tax residents.

Other anti-abuse rules

Remittance basis clause
Used in tax treaty with the UK

Subject-to-tax clause
General subject-to-tax clauses, e.g. DTT with India or income type related subject-to-tax clauses, e.g. interest/ royalties Articles of DTT with UK.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
In practice, to the best of our knowledge the GAAR has not yet been applied regarding withholding taxes. However, it is recommended to maintain business substance and substantiate the economic rationale of structures and transactions.	Although the current legal framework does not contain specific substance requirements to prevent application of domestic anti-abuse rules, tax auditors may in cases of cross border transactions take into account the following substance elements, set out in Circulars regarding the former regime for deductibility of payments to non-cooperative or preferential tax regimes: - existence of contract setting out the terms of the transaction - actual payment of consideration - documentation on actual receipt of goods or services (freight documentation respectively acceptance certificate) - evidence that the foreign company has a physical presence in its country of establishment (seat, employees etc.) and is subject to tax in such country - productiveness of expense for the Greek company - actual economic benefit from the transaction for the Greek company, e.g. lower product acquisition price compared to purchases from cooperative jurisdictions; price equal to stock exchange price; product/service is commonly purchased from non-cooperative jurisdictions (e.g. sea carriage services from Panama).

15 Hungary

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0% (unless the recipient is a private individual)	Dividends: N/A
Interest: 0%	Interest & Royalties: N/A
Royalties: 0%	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR and SAAR

Description

GAAR description

GAARs of the Act on Tax procedure

a) There is a GAAR which allows the tax authorities to ignore the legal form of an arrangement between entities and to look at the actual substance or genuine purpose of a contract or transaction (“substance over form).
b) An agreement (or transaction or arrangement) with the purpose (does not restrict this to the main or sole purpose) to avoid the obligations set out by tax law will be considered to be against the rule of law.
c) If with respect to an international transaction the application of the relevant treaties and domestic rules result in double non-taxation of the related proceeds, Hungary will deny tax exemption.

In cases described under b) and c) above the tax obligations will be assessed by the tax authority with regard to all relevant facts and circumstances, as if the transaction was carried out according to the rule of law. The supreme court issued an extensive interpretation of the GAARs by ruling that a transaction can be considered abusive if the taxpayer cannot demonstrate that the dominant purpose of the transaction was not tax avoidance.

SAAR description

Results of abusive transactions are not tax deductible

1. Any cost, expense or other reduction (including depreciation, amortization, impairment, etc) which is not related to the income generating, business activity is not tax deductible for corporate income tax purposes. This restriction includes (among others) payments made to CFC’s (unless the taxpayer proves that the payments were in line with the rational conduct of business.
2. The transactions and deductions related to transactions and agreements caught by the GAARs (see point 2 of the GAAR description).

General tax treaty position of the country

DTTs prevail over domestic tax legislation. However to the extent the anti-avoidance rules are not addressed in tax treaties domestic anti-avoidance rules are not affected by them. Therefore, as a general rule, there will be no conflict between the domestic anti-avoidance rules and the provisions of tax treaties.

Different type of anti-abuse provisions included in treaties

PPT clause

Some DTTs such as the one concluded with the UK

LOB clause

The new DTT concluded with the US (pending ratification of the US Senate) includes a LOB clause.

Other anti-abuse rules

N/A

Hungary

GAARs of the Act on Corporate income tax (which should be interpreted in line with the GAARs of the rules on tax procedure above) - Rights and transactions must be exercised and carried out properly and lawfully, in line with their specific purpose and in line with the Constitutional obligation of contributing to the public spending - The rules effecting one's tax obligations may only be applicable to the extent that the underlying transaction, agreement, arrangement fulfills the purpose of the given tax law or tax benefit. The applicability of any rule and tax benefit should be substantiated by the benefiting party. - If it is established based on the substance of the transaction or agreement that its sole purpose was to secure a tax advantage for either party, the costs and expenses (including any depreciation or losses) will not be deductible as business costs or expenses for tax purposes and any tax benefit will be denied.		

PSD GAAR

Hungary's withholding tax regime is not based on the PSD. Hungary does not levy withholding tax on dividends, interest or royalties paid to foreign entities irrespective of the location of the recipient or the degree of ownership. Similarly, the participation exemption for dividends received by Hungarian entities is not based on the PSD either, as Hungary exempts all dividends received except for dividends from CFCs. No tax bill will be introduced to address a Hungarian implementation of PSD GAARs. As Hungarian domestic legislation already contains GAARs, it is yet to be seen whether the domestic legislation will be effected and if yes to what extent by the PSD GAARs.

Expected impact

N/A

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
When applying tax benefits (or any deduction for tax purposes,) the taxpayer should be ready to demonstrate the sound business reasons for the given transaction and weigh the business reasons against the tax benefits to defend its case.	N/A

16 Ireland

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 20% Interest: 20% on annual interest (short interest, i.e. where the obligation is less than 1 year is generally not subject to withholding tax Royalties: 0% (patents are potentially subject to 20% withholding tax)	Dividends: Wide domestic exemptions available e.g. payments to: 1. another Irish tax resident company 2. an EU company (other than Ireland) holding at least 5% of the Irish company (Irish domestic enactment of the Parent/Subsidiary Directive), (iii) a company which is not resident in Ireland but which is resident in an EU member state or a country with which Ireland has a double tax treaty provided that company is not controlled by any person or person resident in Ireland. Reduced rates also apply depending on the tax treaty concerned. Interest & Royalties: wide domestic exemptions available, e.g. interest paid 1. by a company in the ordinary course of its business to a company resident in a treaty country or an EU Member State which country generally taxes foreign source interest recovered by companies provided it is not paid in connection with a trade or business carried on in Ireland by the payee; 2. interest paid on quoted Eurobonds; (iii) interest paid on wholesale debt instruments, etc. Royalties other than potentially patent royalties are not subject to withholding tax. Exemption is available from parent withholding when patent royalties are paid by a company in the ordinary course of its trade to a non-Irish tax resident company resident in another EU Member State or treaty country which generally taxes foreign source royalty income provided it is not paid in connection with a trade or business carried on in Ireland by the payee and the payment is for bonna fide commercial purposes and not for tax avoidance purposes. A published Revenue concession may also apply in respect of potential royalties paid to other non-Irish companies subject to certain conditions being satisfied.

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and others

Description

GAAR description

A GAAR may be applicable in cases of tax avoidance. The specific GAAR provision applying depends on whether the transaction concerned was entered into after 23 October 2014,on or before that date. Broadly, whether a transaction constitutes tax avoidance may be judged by:

- The results of the transaction;
- Whether the transaction is used to obtain these results, and
- Whether the transaction, if not for the GAAR, gives rise to a tax advantage which is the primary object of the transaction.

In addition, regard is also had to the form and substance of the transaction, the substances of any related transaction, etc.

Application of the GAAR may lead to a 20% surcharge (or 30% in the case of a tax avoidance transaction entered into on or after 23 October 2014) and interest on the amount of attempted tax avoidance.

SAAR description

While Ireland has a significant number of SAARs the following are relevant to outbound payments.

Beneficial ownership

A withholding tax exemption exists in respect of dividend payments to foreign investors resident in an EU, or treaty partner, country in certain instances. It is a requirement that the recipient is 'beneficially entitled' to the distribution.

While the withholding tax exemption on interest payments to foreign investors does not explicitly require the recipient to be a beneficial owner of the payment, it is generally implicit in the language.

Subject-to-tax

Broadly, interest or other distributions by a certain special purpose vehicles may be re-characterized as non-deductible distributions potentially subject to dividend withholding tax where paid to a recipient in a country which does not generally tax such foreign source income.

General tax treaty position of the country

DTTs prevail over domestic law.[14]

Different type of anti-abuse provisions included in treaties

PPT clause

Numerous treaties include a PPT rule in the articles dealing with dividends, interest and royalties (e.g. DTTs with Finland, Spain, Norway and Greece)

LOB clause

DTT with the US.

Other anti-abuse provisions

Remittance basis clause

Many of Ireland's DTTs contain a 'limitations on relief' clause.

14 Ireland has signed 72 treaties of which 68 are currently in effect.

Ireland

PSD GAAR Implemented by the Finance Act 2015 on 21 December 2015. **Expected impact** No direct impact is expected in Ireland given under Irish domestic law provisions dealing with the PSD no exemption is granted for profit distributions received from subsidiaries in other Member States (there is no participation exemption for CIT purposes). In terms of outbound payments a withholding tax exemption is generally based on domestic law tests which are not themselves based on the PSD.	<u>Parent-Subsidiary Directive</u> Domestic legislation implementing the Directive contains an anti-avoidance section potentially denying the exemption from divided withholding tax if the parent is controlled directly or indirectly by non-EU or non-Treaty country residents	

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Firstly, there is a business activity exemption i.e. where a transaction is carried out with a view to realizing a profit in the course of business activities and is not primarily undertaken to give rise to a tax advantage. Secondly, the GAAR provisions do not apply where a transaction is undertaken or arranged to obtain a benefit of a relief or allowance and does not result directly or indirectly in the misuse or abuse of a provision, having regard to the purpose for which it was provided. With respect to a transaction occurring before 23 October 2014 the Irish tax authorities are required to form and issue an opinion that a transaction constitutes a tax avoidance transaction. For transactions occurring on or after that date the Irish tax authorities need only reasonably consider the transaction to be a tax avoidance transaction. It is possible to lodge a protective notification regarding a transaction with the Irish tax authorities to protect against / mitigate any potential surcharge and interest in the event that a transaction is considered to be a tax avoidance transaction.	To avoid withholding tax on interest or dividend payments to a recipient in an EU or treaty partner country it should be determined that the recipient is the beneficial owner of the payment. To avoid a re-characterization of a payment as a non-deductible distribution confirmation is required broadly that the interest/distribution is taxed in the recipient country without any reduction computed by reference to the payment.

17 Italy

Domestic withholding tax rates

Dividends: 26% or the reduced 1.375% in the case of dividends paid to companies resident in the EU (or in EEA area allowing an adequate exchange of information with Italy) and subject to corporate income tax in the State of residence. As from tax periods starting on or after 1 January 2017 the latter will be reduced from 1.375% to 1.2% This reduction follows the reduction of Italian corporate income tax from from 27% to 24% that will be effective from the same date. An 11% rate applies to dividends paid to EU pension funds (or set up in EEA States allowing an adequate exchange of information with Italy).
Interest: 26% or the reduced rate of: (i) 12,5% for interest deriving from public bonds issued by the Italian State or by States allowing an adequate exchange of information with the Italian tax authorities (ii) 5% for interest payments satisfying all the requirements for the application of the regime set forth in the Interest and Royalty Directive, with the sole exception of the beneficial ownership requirement, provided that (a) the above interest payments are used by the (recipient) non-Italian resident company to finance interest payments on bonds traded on a regulated market issued by the same recipient and (b) the issuance of the bonds is guaranteed by the Italian payer, by the controlling group entity or by an entity controlled by the latter. A special exemption regime applies to the payment of certain interest.

Royalties: 30%

Requirements for withholding tax exemption

Italian domestic law provides various specific exemptions from interest withholding tax in relation to:

1. loans advanced by certain regulated entities such as EU banks and insurance companies;
2. payments made in connection with certain bonds.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Description

GAAR

The GAAR entered into force on 1 October 2015 and it also applies to transactions entered into before such date provided that the notice of assessment has not already been served.

According to the GAAR, one or more business operations are deemed abusive

- when they lack economic substance;
- when they are aimed at achieving an undue tax advantage.

Business operations are not abusive if they are justified by sound non marginal extra-fiscal reasons (such as organizational reasons).

The taxpayer is always free to choose between different optional tax regimes provided by the law or between different business transactions leading to a different tax burden.

PSD GAAR

So far the PSD GAAR has not been expressly implemented into Italian law. In practice there are no consequences from the lack of implementation as the domestic GAAR (see above) is in line with the PSD GAAR and it could also apply in situations covered by the PSD Directive.

Expected impact

N/A

SAAR description

Domestic legislation implementing the EU Parent Subsidiary Directive provides for an anti-avoidance rule which denies the withholding tax exemption if the EU parent is controlled by non-EU residents unless the EU parent provides evidence that it was not interposed for the purpose of taking the advantage of the exemption regime.

General tax treaty position of the country

In general, Italian tax treaties prevail over domestic law.[15]

Different type of anti-abuse provisions included in treaties

PPT clause

Some Italian treaties include a PPT provision (e.g. DTT with Estonia). In some treaties, the PPT is limited to specific items of income (e.g. DTTS concluded with France, UK and US)).

LOB clause

Some Italian DTTs, either in the text or in the protocol, provide LOB clauses (e.g. DTTs concluded with Switzerland or the US).

Subject to tax clause

Included in some DTTs (e.g. DTT with Germany, Switzerland or UK).

Other anti-abuse provisions

Several treaties include specific anti-abuse clauses aimed at disallowing any tax exemption or limitation on specific items of income if the sole or main purpose of the person receiving the income is to take advantage of such treaty benefits (e.g. art. 10(8) Italy/France DTC).

15 See decisions of the Italian Constitutional Court n. 348 and n. 349 of 24 October 2007

Italy

		Subject to tax clause Some treaties provide that treaty benefits are granted: - if the person to which the treaty applies is taxed at least in one of the Contracting States (see art. 4(5) Italy Switzerland DTC); - If a specific item of income is subject to tax in the other Contracting State (see § 16 of the Protocol to the Italy Germany DTC; see art. 13(5) Italy UK DTC;)

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
There is no specific safe harbor in term of substance. However it is possible to obtain a ruling from the Italian tax authorities.	It is recommended to have a solid substance and sufficient business rationale to prove it was not the main purpose to obtain a tax advantage. The taxpayer may always ask for a preliminary ruling in order to know whether the envisaged business transactions could be considered as an abuse of law or not.

18 Latvia

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0%	Dividends: N/A
Interest: 0%	Interest & Royalties: N/A
Royalties: 0%	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and others

Latvia

Description

GAAR description

Tax authorities assess a taxpayer's transactions not only based on their legal form, but also economic substance.

PSD GAAR

It is not expected that the Latvian government will introduce any amendments to implement the PSD GAAR as Latvia does not levy dividend withholding tax.

Expected impact

N/A

SAAR description

Any payments made to specified black-listed offshore jurisdictions are subject to 15% withholding tax. The mentioned rule does not apply if the payment is made as consideration for supply of goods or purchase of EU/EEA publicly traded securities if such goods / securities are purchased at arm's length prices.

Interest paid by a financial institution to specified black-listed offshore jurisdictions are subject to 5% withholding tax.
Interim dividends paid to specified black-listed offshore jurisdictions are subject to withholding tax.

Dividends received from specified black-listed offshore jurisdictions are taxable at 15% CIT.

Tax authorities may issue a special permission not to withhold tax from the mentioned payments if taxpayer proves that their aim was not avoidance or reduction of taxes payable in Latvia.

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

PPT clauses are included in several tax treaties, e.g. with Belgium, Canada, Estonia, India, Italy, Kazakhstan, Lithuania, Malta, Qatar, Russia, United Kingdom

LOB clause

LOB clauses have been included in few tax treaties, e.g. DTTs with the United States of America, United Arab Emirates.

Other anti-abuse rules

Beneficial ownership clause – dividends, interest and royalties
Anti-abuse rules regarding income taxed on remittance basis (United Kingdom).

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Ensure that tax reasons are not the only motives of the arrangement / that the taxpayer has sound business reasons in addition to tax reasons for implementing a structure.	In case of transactions with offshore jurisdictions, ensure that there is a sufficient proof that tax reasons are not the only motives of the arrangement and apply for the special permit by the tax authorities.

19 Lithuania

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 15% Interest: 10% / 0% (to EEA and DTT countries) Royalties: 10% / 0% (to EU)	Dividends: 10% participation held for an uninterrupted period of 12 months Interest & Royalties: 25% participation held for an uninterrupted period of 24 months

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and others

Description

GAAR description

Substance over form principle is considered as a GAAR in Lithuania. The GAAR is set forth in the national Law on Tax Administration and is in force as of 2004. The GAAR says that in taxation priority is given to content rather than form of the transactions of the taxpayers. More precisely, this rule means that where the main purpose of the transaction is to obtain tax benefits (such as avoidance or reduction of due taxes, deferral of taxation, increase of tax credits or shortening of the refund periods), tax administrator should disregard the form of the transaction, re-characterise it and tax according to the real factual circumstances and intentions of the taxpayer.

PSD GAAR

The initial draft law has been released, stating that: "The provisions of this chapter (i.e. *chapter of the Law on Corporate Income Tax regulating taxation of inbound and outbound dividends and exemptions in both domestic and cross-border situations*) shall not apply when the only or one of the main objectives is obtaining tax benefit. This provision shall apply to the extent the situation relates to seeking tax benefits without having reasonable commercial reasons representing the economic reality". The draft law has been prepared by the Ministry of Finance and should, after public consultations, be submitted to the Parliament.

SAAR description

Lithuania sourced qualifying dividends are not subject to a withholding tax on a condition that the recipient is not established in a blacklisted offshore jurisdiction.

Lithuania sourced royalties paid to qualifying EU recipient are not subject to a withholding tax in Lithuania if the recipient is a beneficial owner of these royalties.

General tax treaty position of the country

In general tax treaties have supremacy over the national laws. Nevertheless, as tax treaties only determine the jurisdiction to tax, but taxation is determined by the national laws, national GAAR and SAAR would apply in situations involving application of the tax treaties as well.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in almost all DTTs

LOB clause

Included in the DTT with the US.

Other anti-abuse provisions

Other anti-abuse rules in the DTTs concluded by Lithuania include cancellation of treaty benefits where the result would constitute an abuse of the general principles of the treaty (e.g. Portugal); exclusion of exempt entities (e.g. United Kingdom, Malta); Remittance provision (e.g. Singapore, Malta, United Kingdom).

Lithuania

Considering the fact that the above indicated GAAR applies to the whole chapter regulating taxation of dividends in both domestic and cross-border situations, it is likely that the intention of the Ministry of Finance is to introduce a wide GAAR to be applied in all situations relating to taxation of dividends, meaning that it will likely affect application of the dividend withholding tax exemption and the participation exemption for CIT purposes. The draft law is still under discussion.

Expected impact

The current draft PSD GAAR would apply to all domestic and cross-border situations relating to taxation of dividends.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayers are recommended to have proof of real underlying business reasons of the transaction and illustrating that tax benefits were only ancillary and sequential. Exact proof depends on the circumstances of a particular situation.	Collect respective evidences, where applicable.

20 Luxembourg

Domestic withholding tax rates

Dividends: 15%

Interest: no (except for profit participating bonds)

Royalties: no

Requirements for withholding tax exemption

Dividends: 10% participation or acquisition price of at least EUR 1.2 million in a Luxembourg company. The shareholder must notably be (i) an EU entity normally subject to tax or (ii) an entity resident in a country with which Luxembourg has concluded a double tax treaty and subject to a profit tax of at least 10.5%

Interest & Royalties: N/A

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES (to the extent they are included in the relevant DTT)
Types: GAAR, SAAR and others

Luxembourg

Description

GAAR description

There are several conditions to fall within the scope of the Luxembourg domestic GAAR:

- The use of forms or institutions of private law – this covers, e.g., the constitution of a company or a loan agreement – in an inadequate manner (→ misuse of these forms / institutions)
- An avoidance of the tax liability using for that purpose an inadequate way; and
- The absence of non-tax motives to support the choice of the form or institution of private law. According to the case law, non-tax motives must be real, i.e., it is not enough to claim that the economic benefit of the arrangement go beyond tax benefits

Note that the courts have recognized that the taxpayer, when faced with multiple choices, may choose the least taxed structure.
The sanction for the abuse is that the tax charge is computed and levied as if the arrangement / structuring were in line with the economic process / facts / relationships.

SAAR description

A capital reduction, to be free from Luxembourg withholding tax, needs to be justified by genuine economic reasons. Otherwise, it may qualify as a distribution of profit (revenus de capitaux mobiliers), from the perspective of the recipient, possibly subject to a 15% withholding tax.

In addition, several articles of the Luxembourg legislation grant tax exemptions to certain corporate recipients of Luxembourg income, provided they are subject to a similar tax.

General tax treaty position of the country

DTTs prevail over domestic law.
Domestic GAARS are applicable only to the extent: (i) they are explicitly mentioned in the treaty (DTTs with: Austria, Belgium, Canada, Israel,; or (ii)
they have been discussed with the relevant contracting state with reference to a specific case and after recourse to the mutual agreement procedure .

Different type of anti-abuse provisions included in treaties

PPT clause

Included in the DTT with Georgia

LOB clause

Included in the DTT with the United States, Poland and Trinidad & Tobago.

Other anti-abuse rules

Almost all treaties exclude exempt entities from treaty benefits
Subject to tax clause can be found in the DTT with Mauritius
Remittance provisions are included in the DTTs with Singapore and Malaysia.

PSD GAAR

The PSD GAAR was implemented in domestic law effective as per 1 January 2016. The legislator has followed the wording of the PSD amendment and opted for a restrictive scope of implementation: the benefit of the participation exemption and of the withholding tax exemption will be denied only to income from participations, respectively to distributions, which fall within the scope of the PSD GAAR and which were so far exempted only based on the PSD. If the income or distribution qualifies for an exemption under another Luxembourg domestic criterion (e.g., because the subsidiary satisfies a “comparable tax” test), the PSD GAAR will not apply, even though the income from the participation, respectively the distribution, could also have previously qualified under the PSD. Only the benefit of the PSD is withdrawn; the PSD GAAR will not restrict the benefit of other exemptions.

Luxembourg

Expected impact

It is unclear how the tax authorities will apply the new PSD GAAR. The GAAR provided in Luxembourg domestic law prior to the introduction of the new PSD GAAR already entitled the tax authorities to challenge a structure on the basis that it has no economic reality.
Advance tax ruling requests can be filed with the tax authorities to seek confirmation on the Luxembourg tax treatment applicable to a specific contemplated structure.

Additional guidelines are also expected at EU level.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR

Ensure that tax reasons are not the only motives of the arrangement / that the taxpayer has sound business reasons which reflect economic reality in addition to tax reasons for implementing a structure.

Recommendations / substance requirements to prevent application of the SAAR

A repayment of capital should always be justified by valid business reasons.

21 Malta

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0%	Dividends: N/A
Interest: 0%	Interest & Royalties: N/A
Royalties: 0%	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: Both GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR

Malta

Description

GAAR description

A GAAR is included in Malta income tax legislation namely where a scheme is put in place that reduces the amount of tax payable by any person and such scheme is artificial or fictitious, then the relevant Malta tax authority has the power to disregard such artificial or fictitious scheme and assess the person accordingly.

PSD GAAR

It is not expected that Malta government will introduce any amendments to implement the PSD GAAR as Malta does not levy dividend withholding tax. Also no amendments to the CITA are expected (apart from an anti-hybrid rule).

Expected impact

N/A

SAAR description

SAARs are available under Malta tax laws namely:-

- The investment income provisions cater for a final withholding tax to be payable at source. Within the context of the investment income provisions, where the Malta tax authority considers that a series of transactions is effected with the sole or main purpose of reducing the amount of tax payable by a person by virtue of the investment income provisions (which provide for taxation at a flat rate), such person is assessed as though the investment income provisions did not apply.
- Where a company advances any amounts or distributes any assets to its shareholders, or otherwise makes payments on behalf of or for an individual shareholder, the Malta tax authority may re-characterize such amounts, distribution or payments as a distribution of a dividend paid from the profits of the company.
- Within the context of the participation exemption regime, anti-abuse provisions are also applicable, which anti abuse provisions mostly stipulate conditions that must be fulfilled by the company in which the investment is held.

General tax treaty position of the country

DTTs prevail over domestic law.[16]

Different type of anti-abuse provisions included in treaties

PPT clause

A PPT as defined under BEPS Action 6 is very uncommon (or rather never) to find under the tax treaties signed with Malta. Usually an LOB would cater for abusive tax practices

LOB clause

Some treaties (such as the DTT with the US) contain LOB clauses.

16 Malta had signed treaties with 68 countries as at 1st January 2015. Most treaties are based on the OECD Model Convention

22 Netherlands

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 15% Interest: no, unless requalified as dividends Royalties: no	Dividends: In principle an exemption is available to receiving companies resident in a Member State, holding an interest of 5% or more in a Dutch company. The receiving company should be the beneficial owner of the dividend. The Netherlands does not implement the PSD GAAR for the withholding tax exemption (apart from a specific rule for cooperatives), but in the non-resident CIT as described under 'PSD GAAR'. Interest & Royalties: N/A

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR and SAAR, others

Netherlands

Description

GAAR I description

In 1926 the Dutch Supreme Court introduced a GAAR, in the form of fraus legis, which can be invoked by the Dutch tax authorities in cases where the taxpayer enters into a transaction that is (i) contrary to the purpose of Dutch tax legislation and (ii) with the predominant aim of avoiding taxation and (iii) without real practical meaning. These are cumulative requirements.

GAAR II description

Foreign corporate shareholders holding an interest of 5% or more in a Dutch tax resident company (Substantial Interest) may be liable to Dutch non-resident CIT, unless the Substantial Interest is attributable to an enterprise and/or the interest is not held with (one of) the principal purpose(s) to avoid the levy of personal income tax and/or dividend withholding tax of another person. The principal purpose is in principle tested by verifying whether Dutch tax benefits are obtained from having the foreign corporate shareholder in the structure.

PSD GAAR

As per 1 January 2016, the Netherlands implemented the PSD GAAR for outbound dividends via the existing non-resident CIT rules (i.e. GAAR II). The Dutch non-resident CIT rules are reworded to bring them in line with the PSD GAAR by providing that there should not be an artificial arrangement or a series of artificial arrangements. The existing principal purpose(s) test remains. An artificial arrangement is considered not to be present if there are business reasons reflecting economic reality.

SAAR description

Dividend stripping rules

The Dutch tax authorities may deny application of a beneficial dividend withholding tax rate under domestic law, tax treaties or the PSD if, in a series of transactions, a company entitled to such beneficial rate has been interposed between a Dutch entity and an entity that would not be entitled to such beneficial rate, while the latter entity has maintained an (indirect) interest in the Dutch entity that is comparable to its interest in that Dutch entity prior to the series of transactions. This provision disallows a recipient “beneficial ownership” status generally required to gain access to favourable dividend withholding tax rates.

General tax treaty position of the country

In general, double tax treaties prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

Dutch DTTs with a PPT clause include: the UK, China, Switzerland and Malta

LOB clause

Dutch DTTs with an LOB clause include: the US, Japan, Panama and Hong Kong.

The allocation of a Substantial Interest to an enterprise or top holding company of the foreign corporate shareholder is considered to have business reasons, i.e. not artificial. Intermediary holding companies, which perform a linking function within a corporate group and that have sufficient minimum substance, are also not subject to non-resident CIT for their Substantial Interest. **Expected impact** The proposed legislation covers both EU and non-EU situations and does not implement the PSD GAAR into the participation exemption regime for inbound dividends. In addition, the Dutch government takes the position that bilateral tax treaties concluded by the Netherlands are in principle not affected by the implementation of the PSD GAAR.		

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
It is recommendable that: - There are sound commercial reasons for the transactions undertaken; - Legal form corresponds to the economic substance of the structure. Regarding intermediate holding companies with a linking function, it is recommended to verify whether the company needs to satisfy the Dutch minimum substance requirements.	N/A

23 Poland

Domestic withholding tax rates

Dividends: 19%

Interest: 20%

Royalties: 20%

Requirements for withholding tax exemption

Dividends: 10% shareholding held for an uninterrupted period of 24 months.

Interest & Royalties: 25% shareholding held for an uninterrupted period of 24 months.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Description

GAAR description

The GAAR was introduced into the Polish tax laws for the first time in 2003, but was ruled unconstitutional by the Polish Constitutional Court as it did not meet the constitutional requirement of appropriate legislation. Therefore, the GAAR was repealed in 2004.

The Polish Government is once again attempting to implement the GAAR. In draft legislation dated 23 December 2014 (temporarily withdrawn from legislative works with regard to the GAAR), the tax authorities will be entitled to fix or determine the amount of tax liability by disregarding artificial legal structures and taking into account actual commercial activities and so-called typical legal structures. The tax authorities must prove that the main purpose of the artificial structure is tax avoidance resulting in the taxpayer receiving a substantial tax benefit. The tax authority will be obliged to justify that the so-called typical legal structure is applicable in a given situation and that the taxpayer will not be able to invoke other important objectives or significant economic benefits behind the artificial legal structure.

PSD GAAR

The legislation regarding PSD GAAR (based on the EU Parent- Subsidiary Directive) in Poland was published in Journal of Laws on 23 November 2015 and shall generally apply to dividends paid after 31 December 2015.

SAAR description

N/A

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

Several DTTs concluded by Poland include MPT clauses (e.g. DTT with Singapore, Malta and Canada).

LOB clause

Several DTTs concluded by Poland include LOB clauses (e.g. DTT with Israel).

Other anti-abuse rules

Additionally, some DTTs concluded by Poland provide for artificial arrangement clauses, which exclude the application of the DTT to income received or earned in connection with an artificial structure (e.g. DTT with Luxembourg, India and Slovakia).

Poland

Under the anti-abuse rule, the tax exemption for inbound dividends and the exemption from withholding tax on outbound dividends would not apply if dividends were connected with an agreement, a transaction, or a legal action or series of related legal actions, where the main or one of the main purposes was benefiting from these tax exemptions and such transactions or legal actions do not reflect the economic reality and are used with the sole intention of obtaining a tax benefit detrimental to the substance and main purpose of the PSD.

For the purpose of the above rule, it is considered that a transaction or a legal action does not reflect the economic reality if it is not performed for justified economic reasons, but results, in particular, in transferring the ownership of shares of a dividend-paying entity or in earning revenue by that entity which is then paid as a dividend.

Expected impact

The introduction of PSD GAAR may significantly increase the interest of the Polish tax authorities in the examination of applicability of the PSD tax exemption to outbound dividends. Given the vague wording of the Polish provisions implementing PSD GAAR, it is expected that they may raise controversies and the specific prerequisites of applying the PSD GAAR will be shaped mainly by jurisprudence of Polish administrative courts.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should ensure that there are commercial reasons (substance) for the transaction.	N/A

24 Portugal

Domestic withholding tax rates

Dividends: 25%

Interest: 25%

Royalties: 25%

The withholding tax rates are increased to 35%, if the income is paid or made available to the accounts of one or more taxpayers held on behalf of unidentified third parties or to an entity resident in a blacklisted jurisdiction.

Requirements for withholding tax exemption

Dividends: 5% participation held for an uninterrupted period of at least 24 months

Interest & Royalties: 25% participation held for an uninterrupted period of at least 24 months

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Description

GAAR description

In 1999 Portugal included a GAAR in domestic legislation. The GAAR may be applicable to juridical acts or agreements, when it is evidenced that they were performed by artificial or fraudulent means and abuse of legal forms, with the sole or principal objective of reduction, elimination or deferral of taxes that would have otherwise been due. When applicable, tax will be levied as if those means and forms were not used and no advantage would also apply.

PSD GAAR

A law proposal transposing the PSD GAAR into Portuguese legislation is pending discussion in the Parliament, since December 21st 2015.

According to the draft-legislation there will be a specific PSD GAAR closely following wording of the Directive and therefore focusing on the existence of valid economic reasons and economic substance. If approved, this amendment will give rise to a mismatch as the Portuguese domestic GAAR focusses on the resort to fraudulent means and on the abuse of legal forms.

Expected impact

N/A

SAAR description

Payments to individual or corporate entities in a low tax jurisdiction

Payments made or owed, directly or indirectly, to non-resident entities or individuals, which are subject to a clearly more favourable tax regime, are not eligible as costs for Corporate Income Tax purposes, unless the taxpayer proves that they relate to operations effectively undertaken and are not of abnormal nature nor do they have an exaggerated amount.

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

Several treaties provide for PPT clauses, e.g.: DTTs with Greece, Panama, Senegal, Switzerland, Barbados, and Colombia.

LOB clause

Several treaties provide for LOB clauses, e.g.: DTTs with the US and Sweden.

Other anti-abuse rules

Other anti-abuse rules in DTTs include, for instance, the express provision for clauses stating that the application of domestic anti-abuse rules are not limited by the treaty (e.g.: DTTs with East-Timor and UAE) or the cancellation of treaty benefits which would otherwise amount to an abuse of the general principles of the treaty (e.g. DTTs with Latvia and Lithuania).

Portugal

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
Taxpayers should analyse the existence of business reasons underlying the arrangements to implement in connection with their activity and be in the position to demonstrate that such arrangements were not primarily or predominantly put in place to secure tax advantages nor are they the result of artificial or fraudulent means or of the abuse of legal forms.	N/A

25 Romania

Domestic withholding tax rates

Dividends: 5%

Interest: 16%

Royalties: 16%

Requirements for withholding tax exemption

Dividends: 10% of share capital held for a minimum uninterrupted period of 12 months as of the income payment date

Interest & Royalties: 25% of share capital held for a minimum uninterrupted period of 24 months as of the income payment date

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Romania

Description

GAAR description
The Romanian Fiscal Code contains a GAAR whereby Romanian tax inspectors may disregard a transaction with no economic substance or reclassify a transaction in order to reflect its true economic purpose.

PSD GAAR
The Romanian Fiscal Code adopted in September 2015, enforced on 1 January 2016, contains provisions which implemented the PSD GAAR word by word.

Expected impact
The tax authorities' focus on scrutinising the applicability of tax exemptions under PSD could increase.

SAAR description
A 50% withholding tax rate applies to certain types of incomes (such as dividends, interest, royalties, commissions) paid to a resident of a state with which Romania has not concluded a legal instrument under which the exchange of information can be performed (e.g. a treaty), if such transaction qualifies as artificial. A transaction qualifies as artificial if it does not have economic substance and cannot be used within the frame of usual economic activities, being performed with the main purpose to avoid taxes or to obtain tax advantages

General tax treaty position of the country
DTTs prevail over domestic law. The provisions of treaties are not applicable in case of transactions qualified as artificial.

Different type of anti-abuse provisions included in treaties

PPT clause
Included in DTTs concluded with Israel and Saudi Arabia

LOB clause
Included in the DTT concluded with India.

Other anti-abuse rules
Remittance provisions can be found in the DTTs concluded with Canada, Cyprus and Singapore).

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should be able to justify the sound business reasons of a transaction.	The taxpayer should be able to justify the sound business reasons of a transaction.

26 Slovakia

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0%	Dividends: N/A
Interest: 19% / 35% (in case of payments to “non-whitelist recipients”)[17]	Interest & Royalties: 25% participation held uninterruptedly for a period of 24 months
Royalties: 19% / 35% (in case of payments to “non-whitelist recipients”)	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and others

17 “Non-whitelist recipients” refers to individuals not having permanent residence or a legal entity not having registered seat in a "Whitelist" state (The Whitelist is a list of states which have concluded with the Slovak Republic an international convention on the avoidance of double taxation, an international agreement on exchange of information on tax matters, and states which are parties to the multilateral convention containing provisions on exchange of information on tax matters. The list is maintained by the Ministry of Finance of the Slovak Republic.)

Description

GAAR description

A new GAAR was introduced on 1 January 2014. According to new general anti-abuse provision, the actions or other circumstances that are without economic substance and their aim is to avoid tax obligations or to gain unjust tax advantage are not taken into consideration by the tax authorities.

PSD GAAR

Dividends paid to both Slovak residents and non- residents by an eligible Slovak entity (e.g. joint stock company, limited liability company, cooperative) or a similar foreign company out of profits generated on or after 1 January 2004 are in general not subject to taxation in Slovakia. Currently no PSD GAAR for CIT purposes is proposed. Introduction of withholding tax to dividends is currently not anticipated.

Expected impact

Relatively negligible.

SAAR description

N/A

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in the DTTs concluded with Israel and Poland .

LOB clause

Included in the DTTs concluded with Canada and the US .

Other anti-abuse rules

A (quasi) subject to tax clause is included in the DTT with Cyprus;
An exclusion of exempt entities is included in the DTT with Luxembourg.

Slovakia

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
N/A	N/A

27 Slovenia

Domestic withholding tax rates

Dividends 15%

Interest: 15%

Royalties: 15%

Requirements for withholding tax exemption

Dividends: 10 % participation held uninterruptedly for a minimum period of 24 months (in accordance with the PSD). Under domestic law, an exemption applies to EU/EEA States (except Liechtenstein) with no minimum participation required if: (i) withholding tax cannot be credited In the residence country and (ii) the purpose of the transactions is not tax avoidance.

Interest & Royalties: 25% participation held uninterruptedly for a minimum period of 24 months.

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Slovenia

Description

GAAR description

According to Slovene legislation, the GAAR allows the tax authorities to ignore the legal form of any transaction and to assess tax on the basis of the actual substance of the transaction (its economic result).

Moreover, Slovene law provides additional clarifications in relation to anti-avoidance rules. In particular:

- If some action or behavior violates an act prohibiting or imposing some action or behavior, and economic consequences arise, this shall not affect taxation;
- If a legal transaction is invalid or becomes invalid, this shall not affect taxation, if in spite of its invalidity economic consequences of this legal transaction arise and exist, unless otherwise provided in the legislation;
- Fictitious legal transactions shall not affect taxation. If a fictitious legal transaction conceals some other legal transaction, the concealed legal transaction shall serve as the criterion for taxation;
- Avoiding the application of taxation regulations shall not be possible through the avoidance or abuse of other regulations. If such avoidance or abuse is established, it shall be deemed that tax liability arose commensurate with liability arising where account is taken of the circumstances arising on the basis of economic events.

SAAR description

No SAAR in relation to dividends, however there are certain other “SAAR”:

- Beneficial ownership requirement in relation to the taxation of interest and royalties within EU;
- Thin capitalization rules; interest on loan surplus non-deductible. These rules may affect the withholding tax rate due to the re-characterization as hidden dividend distributions.
- In this event, the exemption under the PSD does not apply. Potentially, the domestic withholding tax exemption for EU/EEA States (except for Liechtenstein) may apply under certain conditions (e.g. the purpose of the transactions is not tax avoidance) or a reduction of the tax pursuant to a tax treaty.

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

DTTs concluded with UK and France.

LOB clause

DTT concluded with the US.

Other anti-abuse rules

DTTs concluded with UK or France contain anti-treaty-shopping provisions
.

Other GAAR

- Business purpose requirement (in general, companies may deduct all substantiated expenses directly connected to, or being the result of, the business activity).

PSD GAAR

PSD GAAR was implemented as per 1 January 2016. Tax benefits shall not be granted for outbound dividends, if the circumstances pursuant to Art 74 TPA (above) exist, or in the case of an arrangement or series of arrangements, having been put into place for the main or one of the main purposes of obtaining a tax advantage, whereby non-recognition of benefits may affect only one step or part of the arrangement.

In addition, the PSD GAAR will have an impact on the participation exemption for corporate income tax purposes. Dividend exemption shall not be granted, if circumstances pursuant to Art 74 TPA exist, or in the case of an arrangement or series of arrangements, having been put into place for the main or one of the main purposes of obtaining a tax advantage, whereby non-recognition of benefits may affect only one step or part of the arrangement.

Expected impact

More scrutiny of certain transactions or arrangements regarding profit distribution.

Slovenia

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should ensure that there are economic reasons for the transaction.	N/A

28 Spain

Domestic withholding tax rates

Dividends: 20% for 2015 and 19% for 2016 onwards.

Interest: 20% for 2015 and 19% for 2016 onwards.

Royalties: Generally 24% but for EU and EEA residents, the applicable rate is 20% for 2015 and 19% for 2016 onwards.

Requirements for withholding tax exemption

Dividends: 5% participation (or the value of the participation must exceeds 20 million euros) held uninterruptedly for at least 12 months.

Interest: Exempt if derived by companies resident in other EU Member States or EU-situs permanent establishments of EU resident

Royalties: 25% participation (held uninterruptedly for at least 12 months

Domestic anti-abuse measures

Domestic anti-abuse rules: YES
Types: GAAR and SAAR

Tax treaty anti-abuse measures

Tax treaty anti-abuse measures: YES
Types: GAAR, SAAR and others

Spain

Description

GAAR description

The current GAAR has been enacted in 2003. The GAAR applies in two cases:

- If there is a conflict in the application of tax regulations. This is the case if a transaction is (i) highly artificial or untypical in the relevant case and (ii) results in benefits that would not have arisen in a non-artificial transaction. If the GAAR is applied, the results that would normally be derived are taxed;
- If there is a sham transaction (simulation), which conceals the true purpose of a transaction. The existence of such a simulation could lead to a deemed transaction (in line with the true purpose) to be taxed, together with interest and a penalty

PSD GAAR

Spanish internal provisions have included general anti-abuse rules, which have been modified as of January 1, 2015.
No further changes are expected.

GAAR II description

As of 2015, exemption of withholding on dividend and royalty payments is denied if the beneficiary is controlled by non-EU resident companies, (where the majority of the voting rights in the EU parent company are directly or indirectly held by individuals or companies not resident in any EU Member State), unless the beneficiary justifies that the incorporation and operation of the parent company are based on valid economic reasons and substantial business motives.

Different type of anti-abuse provisions included in treaties

PPT clause

Some treaties include a PPT rule in the articles dealing with dividends, interest and royalties (e.g. DTTs with Ireland).

LOB clause

LOB clauses have been included in several DDTs, e.g. DTTs with Germany, US, Malta, Dominican Republic, or Uruguay.

Other anti-abuse rules

Remittance provisions are included in DTT with United Kingdom.

The DTT with Estonia includes a look-though provision.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should be able to proof the existence of valid economic and substantial business reasons.	The taxpayer should be able to proof the existence of valid economic and substantial business reasons.

29 Sweden

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 30% Interest: 0% Royalties: 0% [18]	Dividends: 10% participation. In addition, dividends paid to a foreign company on so-called business-related shares may be exempt from withholding tax provided that certain conditions are met Interest & Royalties: N/A

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

18 Royalties are not subject to withholding tax in Sweden. However, under domestic law, royalties are considered as income from a permanent establishment in Sweden if the compensation comes from a business with a permanent establishment here. Royalties that are paid to a person not tax resident in Sweden may thus be subject to Swedish income tax.

Description

GAAR description

There is a general anti-avoidance legislation in Sweden which applies to Swedish income tax. The Swedish Tax Avoidance Act defines tax avoidance as a method where the taxpayer makes a transaction that forms part of a scheme resulting in a significant tax benefit for the taxpayer and conflicting with the purpose of the tax legislation. The tax benefit must be the principal reason for the scheme and the taxpayer must, directly or indirectly, actively have taken part in the scheme. The Swedish Tax Avoidance Act is not applicable to withholding tax.

PSD GAAR

It has been the general interpretation in Sweden that it already has sufficient anti abuse measures in its domestic legislation and that hence, no implementation of the PSD GAAR is needed.

The specific anti-avoidance provision in the Swedish Withholding Tax Act (the "WTA") already applied to dividends covered by the PSD before 1 January 2016. However, due to the structure of the WTA it was considered prudent to include a new section to make this specific anti-avoidance provision expressly applicable to dividends that are covered by the PSD as of 1 January 2016. Hence it was only clarified in the legislation that it also applies to dividends covered by the PSD.

SAAR description

The WTA contains a specific anti-avoidance provision under which withholding tax may be imposed on a person that holds Swedish shares under such circumstances that another party is thereby afforded an undue relief from withholding tax. If the provision applies, withholding tax at a rate of 30% can thus be imposed on a person that normally should not be subject to withholding tax or on a person that normally is subject to a reduced rate.

General tax treaty position of the country

Swedish DTTs normally do not include any general or specific anti-avoidance rules. However, there are certain DTTs that contains anti-abuse rules.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in the new DTT that has been signed with the UK, for example.

LOB clause

Included in the DTT concluded with the U.S., for example.

Other anti-abuse provisions

Subject-to-tax clause

Included in the DTT with Mauritius and Georgia, for example.

Remittance clauses

Included in the DTT concluded with Malta, for example.

Sweden

Expected impact Since the specific anti-avoidance provision in the WTA already has been considered applicable to dividends that are covered by the PSD, the impact is expected to be negligible.		

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
A scheme is considered tax avoidance only if the tax benefit outweighs other reasons for the relevant arrangements, for example business, organizational or similar reasons. An arrangement should thus not fall foul of the provision if it can be demonstrated that the transaction can be justified on commercial grounds.	According to a report from the Swedish Government the anti-avoidance provision of the WTA will only apply to transactions where the purpose of the transaction is to save withholding tax and cannot be justified on other economic, commercial or other significant ground. A transaction should thus not fall foul of the provision if there is any commercial factor of any significance that demonstrates that the transaction has a purpose other than avoiding/reducing Swedish withholding tax.

30 Switzerland

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 35%	Dividends: depending on tax treaty
Interest: 0% (35% in case of taxable bonds, notes, deposits)	Interest & Royalties: depending on tax treaty
Royalties: 0%	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES Types: GAAR, SAAR and other

Switzerland

Description

GAAR description

No specific GAAR legislation in Switzerland, but established practice of the Swiss Federal Supreme Court regarding tax avoidance.

A transaction is disregarded for Swiss tax purposes based on the practice of the Swiss Federal Supreme Court if:

1. the legal structure used by the taxpayer is abnormal or artificial and has no commercial basis;
2. tax considerations are deemed to be the only motive for the transaction; and
3. the transaction results in a significant tax benefit for the taxpayer.

PSD GAAR

Not applicable for Switzerland.

Expected impact

N/A

SAAR description

Swiss domestic anti-abuse rules apply in respect of applying a reduced withholding tax rate on dividends, interest and royalties (the latter two from foreign source).

Dividend distributions by a Swiss company

For the general 35% Swiss dividend withholding tax rate to be reduced under an applicable tax treaty or the Savings Agreement, the shareholder of the Swiss company must qualify as the true beneficial owner of the dividends and this qualification must be confirmed by the Swiss Federal Tax Administration.

Relief foreign withholding taxes by a Swiss company

For a Swiss resident company to claim relief for foreign withholding taxed on the basis of a treaty the Swiss company should qualify under one of the following tests:

1. Active trade or business test;
2. Direct stock exchange test;
3. Indirect stock exchange test; or
4. Pure holding company test.

If a Swiss company does not meet any of the abovementioned tests then the company should ensure that it meets the following requirements:

1. 50% base erosion requirement;
2. Expenditure requirement;
3. Dividend distribution requirement; and
4. Financing and interest requirement

General tax treaty position of the country

DTTs prevail over domestic law.

Different type of anti-abuse provisions included in treaties

PPT clause

Included in the DTTs concluded with Colombia, Malta or Portugal .

LOB clause

Included in the DTT with the US.

Other anti-abuse rules

In the DTTs with Australia, Belgium, Bulgaria, Chile, China, Colombia, Cyprus, Czech Republic, Estonia, France, Hong Kong, Hungary, Iceland, India, Italy, Japan, Malta, Morocco, Mexico, the Netherlands, Peru, Portugal, Qatar, Russia, Slovenia, Spain, Taiwan, UAE, UK, USA specific anti-abuse clauses have been included and in case of such specific anti-abuse clauses.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
The taxpayer should ensure that there are commercial reasons for the transaction .	Qualification as true beneficial owner for dividends: For this qualification of the shareholder as the true beneficial owner of the dividends the following requirements must be met: - The assets of the shareholder are continuously financed with at least 30% equity (on a stand-alone basis, based on book values); - The shareholder may not have any obligations towards third parties in respect of the shares in the Swiss company; - The shareholder may not issue an option on the shares of the Swiss company; - The shareholder meets general substance requirements in its country of residence. Recently in certain cases the Swiss Federal Tax Administration seems to have increased the substance requirements. In addition to the 30% equity financing and general substance requirements (e.g., local directors, board meetings in the state of residence) the Swiss Federal Tax Administration seems to take into consideration also additional elements such as: whether there is a certain connection with the state of residence of the shareholder, whether the shareholder has employees on payroll (not a requirement, but strong indication of local substance), whether the shareholder performs holding functions (real holding company with more than 1 participation), whether there are non-tax reasons for using an intermediate holding company.

31 United Kingdom

Domestic withholding tax rates	Requirements for withholding tax exemption
Dividends: 0%	Dividends: N/A
Interest: 20%	Interest & Royalties: there are several exemptions. Under the UK legislation, payments of royalties can be made without deduction of withholding tax if the payer has a reasonable belief that the recipient will be entitled to exemption under the Interest & Royalties Directive. In respect of interest payments, the legislation will require HMRC to issue an exemption notice to the payer before he may pay the interest without deduction.
Royalties: 20%	

Domestic anti-abuse measures	Tax treaty anti-abuse measures
Domestic anti-abuse rules: YES Types: GAAR and SAAR	Tax treaty anti-abuse measures: YES, to the extent they are included in the relevant DTT

Description

GAAR description

In 2013 a GAAR was enacted to target abusive tax arrangements and covers – among others - the following taxes: income tax, corporate tax and capital gains tax. The GAAR is aimed at transactions:

- Of which it is reasonable to conclude that their main purpose is to obtain a tax advantage; and
- Which cannot reasonably be regarded as a reasonable course of action (double reasonableness test).

Criteria to assess whether the double reasonableness test is met are:

- Whether the substantive result of the arrangement is consistent with policy and principles of the relevant tax provisions.;
- Whether the arrangement include contrived or abnormal steps; and
- Whether the arrangement is intended to exploit loopholes in the relevant tax provisions.

Application of the GAAR will lead to adjustments of the tax arrangements as are ‘just and reasonable’, and may impose or increase tax liability.

PSD GAAR

There is no indication that the UK will implement any changes into domestic law to account for the new PSD GAAR.

SAAR description

It is estimated that there are more than 300 SAARS (known in the UK as Targeted Anti-Avoidance Rules (TAARs)). Some of the key TAARs include rules around preventing:

- The artificial transfer of value out of a company resulting from either an intra-group asset transfer otherwise than at market value or the payment of a dividend out of artificial profits.
- Entities avoiding tax by trying to turn economic income into a return that is treated as capital
- Diverted Profit Tax rules were designed to counter companies entering into arrangements to divert profits from the UK and thereby reducing their UK corporation tax liability. It applies for accounting periods beginning on or after 1 April 2015 and the amount of Diverted Profit Tax payable is 25% of the amount of taxable diverted profits.

General tax treaty position of the country

N/A

Different type of anti-abuse provisions included in treaties

PPT clause

Numerous tax treaties include a PPT clause regarding dividends, interest, and royalties. See for example the DTTs concluded with Belgium, Germany, Norway, and Albania.

LOB clause

Included in the tax treaty concluded with the US.

Other anti-abuse rules

Certain tax treaties contain general or specific provisions that aim to prevent treaty shopping. Examples are the UK-Netherlands DTT that contains specific anti-avoidance provisions with respect to dividend, interest and royalty income.

United Kingdom

As outbound dividends are not subject to WHT in the UK, the PSD GAAR will not apply on the dividend payments between UK and other EU Member States and therefore the amended PSD will have no/low impact on the UK. Domestic TAARs will subject dividends paid to UK companies to corporation tax if the distribution does not fall within certain statutory exemptions. In this respect the UK does exempt incoming dividends from corporation tax except where a tax avoidance scheme/purpose is present.

The anti-avoidance provisions in the CITA apply in cases of a “tax advantage scheme” which means a “scheme the main purpose or one of the main purposes of which is to obtain a tax advantage.”

It follows that UK’s response to the amended PSD will be that no action is required as the UK does not grant the benefits of the directive to outgoing dividends. The practical effect of the post-2009 UK legislation is that the UK already has an anti-avoidance regime that is effectively the same as the new Article 1(2) of the PSD. In addition, the UK participation exemption (or Substantial Shareholding Exemption, as it is called in the UK) provides that a gain on a sale of shares by a company is tax exempt where, throughout a continuous 12-month period beginning not more than two years before the sale, the company selling the shares held a substantial shareholding (generally, at least a 10% interest) in the company whose shares are being sold.

Anti-avoidance rules have been implemented that aim at tax-driven arrangements that are intended to exploit any of the exemptions.

Expected impact

The PSD GAAR will not have an impact on outbound dividends since the UK does not have a dividend withholding tax, nor on the domestic participation exemption for corporate income tax purposes regarding profit distributions as the UK already is compliant.

Recommendations

Recommendations / substance requirements to prevent application of the GAAR	Recommendations / substance requirements to prevent application of the SAAR
For inbound dividends, taxpayers should ensure that the arrangements are not contrived or abnormal arrangements that produce a tax position that is inconsistent with the legal effect and economic substance of the underlying transaction.	Generally, the main purpose, or one of the main purposes, of the arrangement should not be obtaining a tax advantage; i.e the transaction should have valid commercial reasons. SAARs can also contain specifically tailored clauses dictating to what transactions they apply or do not apply.

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