ec TAX REVIEW 2021–4

Editorial

State Aid Prohibition: The New GAAR in Town

Joachim Englisch*

Combatting tax avoidance has been on top of the EU tax policy agenda since many years now. We have seen the Anti-Tax Avoidance Directive (ATAD I[1] and II[2]) adopted in the wake of the 2015 Final Reports on BEPS (Base Erosion and Profit Shifting), which in addition to several special anti-avoidance rules also required Member States to implement a General Anti-Avoidance Rule (GAAR) covering the entire domestic corporate tax system. Shortly afterwards, those measures were reinforced by the adoption of the Directive on Administrative Cooperation 6 (DAC 6),[3] which prescribes mandatory disclosure rules for potentially 'aggressive' cross-border tax-planning arrangements. The European Court of Justice (CJEU), in its turn, put in place the final building blocks for a judge-made, uniformly and directly applicable anti-abuse doctrine, i.e., the general principle of prohibition of abuse of Union law.[4] Within the ambit of Union law, this general principle has been held to inform national GAARs; and where the latter do not exist or are insufficient, it directly requires to disregard abusive arrangements for taxation purposes. Moreover, upon initiative of the European Parliament, the EU Commission has launched the EU Tax Observatory in order to monitor and quantify trends in the level and scope of tax abuse within the EU.[5] Finally, the Commission in its Communication on Business Taxation for the twenty-first Century finds that at national level, Member States 'have increasingly engaged in adopting a patchwork of anti-tax avoidance […] measures'.[6]

But there is still another development that has so far received little attention, and yet has the potential to go beyond all prior Union law efforts in addressing tax avoidance structures and 'aggressive' tax planning through non-specific anti-abuse rules. In 2018, the EU Commission adopted its negative decision on fiscal State aid granted by Luxembourg to *Engie* (formerly *GdF Suez*).[7] At first sight, the decision was just another episode in the State aid & tax rulings saga initiated by the Commission in 2013.[8] Upon a closer look, however, the Commission in its decision has relied on the State aid prohibition in order to both enhance and surpass traditional anti-abuse measures.

Criticizing this novel approach, both *Engie* and *Luxembourg* brought an action against the decision before the General Court (henceforth: 'the Court'). The Court has recently delivered its judgement,[9] and it has fully confirmed the approach taken by the Commission. Remarkably, the Court was even less apologetic than the latter as to the establishment of a pervasive *substance over form* doctrine based on Article 107 (1) Treaty on the Functioning of the European Union (TFEU). And while it would not come as a surprise if *Engie* or Luxembourg appealed the judgement, it is far from certain that the Court of Justice of

* Professor for Public Law and Tax Law, director of the Institute for Tax Law at Münster University, Germany.
Email: joachim.englisch@uni-muenster.de

1 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19 July 2016, at 1.

2 Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144/1.

3 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139.

4 *See* CJEU, 22 Nov. 2017, Case C-251/16, Cussens, ECLI:EU:C:2017:881, paras 27 et seq.; and CJEU, 26 Feb. 2019, Cases C-115/16 et al., 'Danish cases', ECLI:EU:C:2019:134, paras 96 et seq.; *see also* comments by *Englisch*, Common Mkt. L. Rev. 503 (2020).

5 *See* EU Commission, Call for proposals TAXUD/2020/CFP-01, 'EU Tax Observatory', 26 June 2020.

6 *See* EU Commission, Communication from the Commission to the European Parliament and the Council, Business Taxation for the twenty-first Century, COM(2020) 67, at 1.

7 Commission decision of 20 June 2018 on State aid SA.44888 (2016/C) implemented by Luxembourg in favour of ENGIE, C (2018) 3839 final.

8 For an overview, *see* https://ec.europa.eu/competition-policy/state-aid/tax-rulings_en.

9 GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251. At the time of writing, only the original French version of the judgement was available; therefore, all subsequent translations are my own.

the EU (CJEU) would annul it, because the General Court's rationale is indeed well-founded in the expansionist tendencies of fiscal State aid jurisprudence of the CJEU.

This editorial will therefore explore the key findings of the Court, and analyse how CJEU case law has paved the way for a 'State aid GAAR', where the Court could or should have decided differently, and the overall implications of the *Engie* judgement.

1 The catalyst: The engie tax rulings

The Commission's decision concerned rulings on two parallel 'tax optimization' arrangements each involving various Luxembourg-based companies of the *Engie* Group. The arrangements were based on a series of similarly structured transactions carried out within Luxembourg. Quintessentially, in each case an *Engie* holding company planned to transfer certain business operations to a subsidiary. The acquisition cost was to be financed by an intra-group convertible loan, a hybrid instrument called 'Zero-intérêts Obligation Remboursable en Actions (ZORA)', granted by another subsidiary acting as an intermediary. The loan was interest-free, but at conversion, the subsidiary that received it would have to issue shares to the lender representing the nominal of the loan plus a 'bonus' consisting of all the profits earned during the bond term. The lender, i.e., the intermediary sister company was to receive the capital needed to grant the loan from the holding company under a forward contract. As a consideration, the holding would be entitled to the shares that the intermediary would receive from the conversion of the ZORA. Overall, this legal structure was presumably set up to exploit the lack of a linking rule/anti-hybrid rule in the Luxembourg participation exemption regime. As confirmed by the disputed tax rulings, the subsidiary receiving the convertible loan could neutralize virtually all the profits of the thus financed business unit by provisions for the accumulating 'bonus' to be paid upon conversion, whereas the holding company ultimately receiving the bonus in the form of shares would benefit from the participation exemption. The intermediary entity would not be taxed, because it could offset gains and losses realized under the ZORA, on the one hand, and the forward contract, on the other. In issuing the ruling, the Luxembourg tax authorities had assessed each transaction in isolation, and moreover apparently without an anti-abuse test based on the domestic GAAR.

2 Enforcing national GAARs through State aid control

The first remarkable aspect of the *Engie* decision is how it arrived at the conclusion that the failure of the Luxembourg authorities to apply the domestic GAAR qualifies as fiscal State aid.

It is settled case law that in order to classify a national tax treatment as 'selective advantage', the Commission must demonstrate that it constitutes a derogation from the 'normal' domestic tax system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation.[10] Against this background, the Commission and the Court argued that the domestic GAAR forms part of the overall domestic system of corporation tax. A lack of proper application in an individual case therefore constituted a deviation from the 'normal' or benchmark tax treatment to the benefit of the taxpayer.[11] Moreover, it accorded preferential treatment to *Engie* over other taxpayers who are in a comparable situation regarding the objective to combat tax avoidance, i.e., who have made abusive arrangements that are disregarded by virtue of the domestic GAAR.[12] Obviously, if correctly assessed, such prima facie selectivity could then not be justified 'by the nature and overall structure of the tax system', as allowed by the CJEU under the third leg of the selectivity test.[13] There is no valid reason not to apply a GAAR where its conditions are met; consequently, the Court didn't discuss any.

In principle, this reasoning is firmly grounded in the case law of the CJEU. The unlawful misapplication of a GAAR can therefore *potentially* qualify as individual fiscal State aid, just like the non- or misapplication of any other provision of national tax law to the benefit of individual taxpayers. However, it is astonishing that the Court – as before the Commission – engaged in a strict scrutiny of all the four criteria that must be fulfilled under the national GAAR to establish an abusive arrangement. In particular, the Court explained in meticulous detail why *Engie* used a financing structure that the national legislator would 'reasonably' regard as inappropriately complex, and why *Engie* could not invoke any valid commercial reasons for so doing.[14] The Court did not limit itself to reviewing whether the assessment of the Luxembourg authorities that the GAAR was not applicable was seriously flawed and suffered from manifest errors. In so doing, the Court effectively supplanted the interpretation of the GAAR by the

[10] *See* e.g., CJEU 26 Apr. 2018, Cases C-236/16 et al., ANGED, ECLI:EU:C:2018:291, paras 26–28, with further references.

[11] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251, paras 394 et seq.

[12] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251, paras 466 et seq.

[13] *See* landmark decision CJEU, 6 Sept. 2006, Case C-88/03, Portugal/Commission, ECLI:EU:C:2006:511, para. 81; settled case law.

[14] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251, paras 437 et seq. and paras 450 et seq.

national tax authorities by its own understanding of the provision.[15] Moreover, if consistent, it would have to pursue the same approach vis-à-vis national court rulings concerning the application of the GAAR. The Court thereby acts like a (supreme) administrative court that polices the application of the domestic GAAR.

It is respectfully submitted here that the Commission and the Court have overstepped their authority and encroached upon the competences of the Member States.[16] Arguably, a certain degree of deference to the legal assessment of the competent national institutions is required when testing the alleged misapplication of national tax law. Article 107 (1) TFEU has not been conceived to vest European institutions with ultimate interpretative authority over non-harmonized national (tax) law. This would also clearly exceed their capacities, and would therefore necessarily result in a haphazard exercise of their powers. Consequently, the Commission and the Court should restrain themselves to asking whether the failure to apply a domestic GAAR is manifestly erroneous or arbitrary.

3 A step further: An anti-abuse rule without abuse test

However, it might ultimately not matter much which standard of review is adopted regarding the application of a national GAAR, because the Commission and the Court have furthermore transformed the very State aid control itself in a kind of Union law super-GAAR. In fact, the Commission had relied on the alleged misapplication of the national GAAR only as a subsidiary line of reasoning.

The Commission did not need to be creative in order to justify its primary approach that relied directly on the State aid prohibition; its underlying rationale is indeed a logical consequence of the recent case law of the CJEU: If the objective underlying the benchmark of 'normal taxation' is either not consistently developed or if it is imperfectly implemented in the relevant normative framework, so that the tax regime at issue contains a 'loophole', any taxable person exploiting the latter benefits from a tax advantage. This advantage is moreover *a priori* selective. It constitutes a derogation from the 'ordinary' system, and thereby puts the taxpayer concerned in a better position than other economic operators who are comparable in the light of the objective pursued by the benchmark system, because they do not make use of the loophole and therefore fall under the scope *ratione materiae* of the circumvented tax law provision.

In the case at hand, the Commission and the Court argued that the rationale underlying both, the system of corporate taxation in general and the national participation exemption was the 'single but full' taxation principle of business profits.[17] The tax-free receipt of the equivalent of the subsidiary's profits by the *Engie* holding, even though those profits had not been subject to taxation at the level of the subsidiary, derogated from the objective of either benchmark regime. The *Engie* holding thereby obtained preferential treatment over other holdings in a comparable situation of receiving returns for having funded their subsidiaries.[18]

In the light of now consistent CJEU jurisprudence,[19] it has no bearing on the above assessment whether the tax avoidance opportunity is available to every business willing to exploit it, or exclusively accessible by a particular category of undertakings with specific properties and characteristics.[20] It was therefore also of no importance that apparently, not only *Engie* but also other Luxembourg taxpayers using ZORA hybrid financing benefited from similar rulings and tax treatment.[21] Moreover, it is irrelevant whether the avoidance opportunity arises due to an unintended technical defect of the law, or whether it was to a certain degree anticipated but tolerated by the legislator, or even purposefully created as a covert form of tax expenditure.[22] Pursuant to settled case law, Article 107 (1) TFEU 'does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects'.[23] Finally, while in fiscal State aid cases it is often crucial and disputed

[15] This had actually been one of the complaints of *Engie* and Luxembourg, to which the Court replied that the Commission merely applied the standard approach taken by Luxembourg tax authorities as manifested in several administrative circulars (*see* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, para. 145); however, this was correct only with respect to the interpretation of the circumvented provisions on non-deductibility of profit distributions, but not regarding the GAAR.

[16] Likewise, regarding the role of the Commission and the application of national law in general, *Lyal,* Fordham Int'l L. J. 1017 (1042) (2015).

[17] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, paras 292 et seq.

[18] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, paras 370–372.

[19] *See* e.g., CJEU, 21 Dec. 2016, Cases C-20/15 P and C-21/15 P, Commission/World Duty Free, ECLI:EU:C:2016:981, paras 70–71; CJEU, 25 July 2018, Case C-128/16 P, Commission/Spain et al., ECLI:EU:C:2018:591, paras 69–70; now settled case law, in deviation from earlier decisions such as, e.g., CJEU, 19 Sept. 2000, Case C-156/98, Germany/Commission, ECLI:EU:C:2000:467, para. 22.

[20] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, paras 365, 367, 369, and 378–379.

[21] *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, paras 374 et seq.

[22] *See* Commission decision of 20 June 2018 on State aid SA.44888 (2016/C) implemented by Luxembourg in favour of ENGIE, C (2018) 3839 final, paras 184 et 220; *see also* CJEU, 9 Oct. 2014, Case C 522/13, Navantia, EU:C:2014:2262, para. 28.

[23] *See* e.g., CJEU 9 June 2011, Case C-71/09 P et al. – Comitato 'Venezia vuole vivere', ECLI:EU:C:2011:368, para. 94, with further references.

whether the reference framework for 'normal' taxation is to be determined by virtue of the fundamental objectives of the tax system – as now usually preferred by the CJEU[24] – or by the purpose (*ratio legis*) of the specific tax regime or statutory provision at issue, this aspect does not normally matter with respect to tax avoidance structures. They usually defeat the objective of either benchmark, as demonstrated in the *Engie* case.

The differences to a traditional GAAR or anti-abuse doctrine are striking, and their consequences are drastic. Under a conventional approach, the assertion of abuse can usually be refuted by the taxable person if she can advance 'valid' or 'legitimate' commercial reasons for the disputed structure, which show that the accrual of a tax advantage did not constitute the sole aim – or at least not the essential aim or principal purpose – of the chosen arrangement. But this is immaterial for the classification of the tax advantage as prohibited State aid,[25] precisely because Article 107 (1) TFEU has not been conceived as an anti-*abuse* rule. Under a State aid approach, there is furthermore no need to demonstrate that the tax minimization arrangement is artificial, contrived, overly complex, unusual, or lacks transparency. This standard criterion for abuse under a classical GAAR arguably has a dual purpose: It serves as an indicator for the dominance of tax avoidance motives and a lack of 'substance' on the part of the taxable person, and it preserves the rule of law and separation of powers by hindering the executive or judicial branch to correct the letter of the law where the legislator has made a conscious decision not to do so (because the legislator could foresee the avoidance opportunity but did not address it). However, neither concern matters for the State aid selectivity test.[26]

By contrast, as for the remaining criteria, i.e., the existence of a tax advantage that runs counter to the spirit of the law, the approach now endorsed by the Court is closely aligned with the traditional 'substance over form' doctrine.[27] It is necessary to ascertain whether the economic reality of the arrangement, understood as the economic effect achieved through some or all of its constituent elements, would be chargeable if the objective underlying the allegedly circumvented provision were consistently implemented.[28] Moreover, a sort of step transaction doctrine may be relied on to establish the ultimate economic effect of a series of transactions, or to unveil a self-cancelling ('U-turn') scheme. Where individual transactions were carried out as part of an overall plan, and where intermediaries were controlled to this effect, they need not be assessed in isolation.[29]

4 What are the limits?

Despite the radical break with convention, there is little to be said against the approach taken by the Commission and now endorsed by the Court, unless one questions the concept of fiscal State aid developed by the CJEU more fundamentally. As is well-known, scholarly opinion on the merits of the case law as it now stands is not merely divided, but indeed spread over a broad spectrum of alternative approaches defended by those who disagree with the CJEU. In the author's view, the selectivity criterion should generally be assessed based on the same standards for both, direct subsidies and tax expenditure. Tax advantages that are generally accessible (de jure and de facto) should therefore not be regarded as selective, regardless of whether they derogate from the benchmark tax system or not, and irrespective of whether they are obtained by exploiting unintended loopholes or deliberately granted as tax benefits. Where this is not the case, a sliding scale of review regarding the 'unsystematic' nature of the advantage obtained through the disputed arrangement should be applied, depending on the degree of specificity of the advantage.[30] Only blatant derogations from the objective underlying the allegedly circumvented tax regime should be objected to as selective aid, unless the avoidance opportunity is confined to specific sectors of the economy or to clearly distinguishable categories of businesses. However, it must be acknowledged that the Court has so far explicitly rejected such limitations of the notion and review of State aid, as mentioned above. On a side note, even based on the stricter approach advocated here, the outcome of the *Engie* case would arguably have been no different.

Otherwise, few limits (should) exist. The Commission has previously held that exploiting a lack of coordination between *two different* national tax systems does not necessarily imply a derogation from either of them, and thus need not classify as selective aid.[31] Besides, as stated

24 *See* e.g., CJEU, 8 Sept. 2011, Cases C-78/08 et al., Paint Graphos et. al., ECLI:EU:C:2011:550, para. 50; 28 June 2018 – C-203/16 P – Andres, ECLI:EU:C:2018:505, para. 103.

25 *See* Commission decision of 20 June 2018 on State aid SA.44888 (2016/C) implemented by Luxembourg in favour of ENGIE, C (2018) 3839 final, paras 258 et seq.

26 *See also* Commission decision of 20 June 2018 on State aid SA.44888 (2016/C) implemented by Luxembourg in favour of ENGIE, C(2018) 3839 final, paras 184 et 220.

27 This has even been explicitly stated, *see* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU: T:2021:251, para. 311.

28 *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/ Commission, ECLI:EU:T:2021:251, para. 300; the same would apply, *mutatis mutandis*, in a case where a tax benefit is allegedly obtained contrary to its *ratio legis*.

29 *See* e.g., GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251, paras 313, 322 and 343.

30 For a more extensive discussion, *see Englisch*, in Schaumburg/ Englisch, Europäisches Steuerrecht (2d ed. 2020), paras 9.28 and 9.30.

31 *See* Commission decision 19 Sept. 2018 on tax rulings granted by Luxembourg in favour of McDonald's Europe, C(2018) 6076 final, paras 109 et seq.

above, an exception to the application of the general tax system may be justified if the Member State concerned can show that the advantageous effect results directly from the basic principles of its tax system. However, no such justification exists where a tax planning scheme is used precisely to game the system to the taxpayer's advantage, contrary to its spirit and guiding principles. It might only exceptionally be different, where the taxpayer exploits the fringes of a legitimate simplification measure. Beyond selectivity, the criteria of a distortion of competition and a trade impact will usually be fulfilled, too, especially in view of their traditionally broad interpretation by the CJEU. It should merely be noted that the thresholds of the *de minimis* Regulation[32] apply also in an anti-abuse context. Finally, where the tax avoidance opportunity is inherent to harmonizing Union legislation that has been faithfully transposed into national law by the respective Member State, its exploitation cannot constitute *State* aid within the meaning of Article 107 (1) TFEU.[33] Here, only the general principle of prohibition of abuse of Union law will be directly applicable, with its conventional – stricter – criteria for assessing abuse.

Finally, regarding the recovery of the obtained advantage, it should be noted that loopholes which already existed in the legislation of the Member State concerned prior to its accession to the Union cannot be recovered based on Article 108 (3) TFEU. By contrast, the taxable person will usually not be in a position to successfully invoke the principle of protection of legitimate expectations as impeding recovery,[34] considering the strict criteria set up by the CJEU in this regard.[35] And even though not generally convincing, this restrictive approach can be approved of at least where the taxable person set up an elaborate and complex structure to obtain the tax advantage, since this is indicative of an awareness that the advantage is not 'normally' available and thus potentially constitutes State aid.

In the light of the above, the primary constraint on the use of the State aid prohibition as an anti-abuse instrument will not be rooted in legal requirements (as established by the CJEU) but rather in considerations of political expediency. The capacities of the Commission's State aid infringement unit are limited, and the Commission is moreover careful not to overplay its cards in border areas and grey zones of fiscal State aid control unless the case smacks of harmful tax competition. Where a Member State makes reasonable efforts to neutralize a tax avoidance scheme as soon as it is uncovered, even if only by amending the law with *pro futuro* effect, it is therefore unlikely that the Commission would intervene. As a caveat, the same need not be true for national courts that might deny the tax advantage also with retroactive effect on grounds of its classification as prohibited State aid.

5 Relationship to genuine GAARs and anti-abuse rules

Genuine Union law GAARs and anti-abuse doctrines remain exclusively applicable to tax avoidance schemes in areas that do not fall within the ambit of Article 107 (1) TFEU. As mentioned before, this primarily concerns loopholes in tax regimes that are fully harmonized by Union law, and arrangements relating to non-business activities.

Moreover, national administrations and courts always need to apply genuine anti-abuse rules with priority before considering Article 107 (1) TFEU. If an abusive arrangement can already be disregarded by virtue of their application, the taxable person ultimately does not obtain a tax advantage that could give rise to prohibited State aid.

By contrast, no such constraints exist for the Commission. If a Member State fails to properly implement or apply anti-avoidance rules stipulated in Union tax legislation, such as Article 6 ATAD, the Commission can arguably commence infringement proceedings and State aid proceedings in parallel, or prioritize the latter, because the outcome of one procedure will not preempt the other, and their objectives and legal consequences differ. Arguably, the same applies to the relationship between Article 107 (1) TFEU and the general principle of prohibition of abuse of Union law, in the areas (of only partial harmonization) where they overlap.

6 Conclusion

Who would have imagined that the prohibition of State aid would one day become the capstone of the European anti-avoidance architecture? Yet this development is inherent in the tendency of the CJEU to transform the notion of selective aid into a broad non-discrimination standard that can be mounted against any kind of tax relief that does not conform to the overall system of taxation and its underlying rationale. Whereas the Commission and the General Court discovered the anti-avoidance potential of Article 107 (1) TFEU in the *Engie* case, they should therefore not be faulted for inventing it. The sweeping effects of this new dimension of State aid control will nevertheless come unexpectedly for tax administrations and tax advisors alike. Most significantly, it blurs the conventional line

32 Commission Regulation 1407/2013/EU of 18 Dec. 2013.

33 *See* by analogy, CJEU 23 Apr. 2009, Case C-460/07, Puffer, ECLI:EU:C:2009:254, paras 67 et seq.

34 Based on Art. 16 (1) of Council Regulation (EU) 2015/1589, of 13 July 2015, laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union.

35 *See* GC, 12 May 2021, Cases T-516/18 and T-525/18, Luxembourg/Commission, ECLI:EU:T:2021:251, paras 501–502, with further references.

between legitimate tax minimization structures and abusive arrangements. Moreover, some important correctives of State aid control, namely the possibility of 'intrinsic' justification, 'extrinsic' approval based on Article 107 (3) TFEU, or the protection of legitimate expectations, are typically of no avail in a tax avoidance context.

While some criticism may be appropriate, also in the light of the harsh consequences of a State aid finding, it should not primarily be directed against the *Engie* decision, but rather against the settled case law of the CJEU. Then again, the ruling of the General Court might also be reason to reflect upon eventual shortcomings of the conventional anti-abuse approach. In the author's view, it is not self-evident that a GAAR should always be conceived so as to accept valid commercial reasons for a given structure and thereby allow a taxable person to avoid a tax burden that the legislator clearly meant to be imposed in view of the ultimate economic outcome.