Commission recommendation on aggressive tax planning (12/2012) “encourages” member states to adopt the following rule:

“An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored.” ➔ taxation “by reference to [...] economic substance”


“For the purpose of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine (…) an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality”.
acceptable tax planning ↔ aggressive tax planning

tax mitigation ↔ tax avoidance

“Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury.”

(Judge Learned Hand in Helvering v. Gregory, 69 F.2d 809 [2. Cir. 1935])

“The freedom to arrange one’s affairs to minimize taxes does not include the right to engage in financial fantasies with the expectation that the IRS and the courts will play along.”

(Forseth v. Commissioner, 85 T.C. 127 [1985])
Does a tax system need a GAAR at all?

Not every jurisdiction has a GAAR, but every jurisdiction faces the problem of how to address new tax shelters.

Judicial “activism” (see UK, US) or extension of other concepts (sham – see France, US; requalification)

Decades of experience in various countries have shown that fighting tax avoidance is not just a mere exercise of purposive interpretation.

A GAAR is not necessary but helpful to avoid a “functional misuse” of other instruments and to address concerns with respect to the separation of powers principle.
 Would a harmonisation of statutory GAARs lead to greater uniformity in drawing the line between acceptable and unacceptable tax planning?

 Is it likely that a harmonisation of statutory GAARs would have any negative effects?

 Is there any need for harmonisation given the similarity of the criteria used in different jurisdictions to “define” tax avoidance?
Unproblematic criteria
- Legal arrangement
- Tax advantage (broad understanding)

Problematic criteria
1. Attributes of transactions
   artificial/inadequate/unusual/unreasonable...
2. Tax advantage contrary to the purpose of statutory law
3. No (substantial) non-tax reasons/no (substantial) non-tax effects
4. Taxpayer’s intent
5. Discrepancy form/substance (legal/economic?)
### Criteria (?) for tax avoidance (1): artificiality

<table>
<thead>
<tr>
<th>GAAR DE</th>
<th>artificiality</th>
<th>may indicate</th>
<th>inadequateness</th>
</tr>
</thead>
<tbody>
<tr>
<td>GAAR UK</td>
<td>contrived/abnormal steps</td>
<td>i.a. relevant for</td>
<td>abusiveness as defined by double reasonableness test</td>
</tr>
<tr>
<td>GAAR F</td>
<td>artificiality</td>
<td>may indicate</td>
<td>??? (defeat of legislative purpose? sole purpose test?)</td>
</tr>
<tr>
<td>US</td>
<td>artificiality</td>
<td>may indicate</td>
<td>divergence substance/form</td>
</tr>
<tr>
<td>GAAR EU (2012)</td>
<td>artificiality</td>
<td>defines</td>
<td>lack of commercial substance</td>
</tr>
<tr>
<td>GAAR EU (2016)</td>
<td>Ø</td>
<td></td>
<td></td>
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</tbody>
</table>

**Criteria:**
- **Statutory:** primary, secondary
- **Case Law:** statutory, case law
### Criteria (?) for tax avoidance (2): form and (economic) substance (ES)

<table>
<thead>
<tr>
<th>GAAR D</th>
<th>legal form $\neq$ economic purpose</th>
<th>defines</th>
<th>inadequateness</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>abhorrence of ES arguments</td>
<td>indicates</td>
<td>abusiveness as defined by double reasonableness test</td>
</tr>
<tr>
<td>GAAR F</td>
<td>substance $\neq$ form</td>
<td>may indicate</td>
<td>??? (defeat of legislative purpose? sole purpose test?)</td>
</tr>
<tr>
<td>US</td>
<td>lack of economic substance (economic) substance $\neq$ form</td>
<td>may indicate</td>
<td>various criteria</td>
</tr>
<tr>
<td>GAAR EU (2012)</td>
<td>lack of commercial substance (ES relevant for tax adjustments)</td>
<td>defines</td>
<td>artificiality</td>
</tr>
<tr>
<td>GAAR EU (2016)</td>
<td>valid commercial reasons reflecting economic reality</td>
<td>define</td>
<td>genuineness of arrangement</td>
</tr>
</tbody>
</table>
Criteria (?) for tax avoidance (3): defeat of legislative purpose

GAAR D: defeat of legislative purpose

GAAR UK: substantive results of arrangements consistent with principles/policy objectives of provisions? relevant for double reasonableness test („...reasonable course of action in relation to the relevant tax provisions”?)

GAAR F: defeat of legislative purpose may indicate? artificiality substance ≠ form

US: the argument concerns „relevance“ of economic substance doctrine

GAAR EU (2012): defeat of legislative purpose defines Purpose of arrangement = avoiding taxation
Criteria (?) for tax avoidance (4): non-tax reasons/effects

**GAAR D**
- **substantial non-tax reasons** (debate: objektive/subjective?)
  - preclude → abuse

**UK**
- Ramsay: steps without commercial purpose
  - lead to → tax treatment as „composite transaction“
- GAAR: substantial non-tax reasons
  - might preclude → main purpose: tax advantage

**GAAR F**
- Non-negligible non-tax reasons
  - preclude → Subjective element of abuse: sole purpose = tax avoidance

**US**
- substantial non-tax purpose/meaningful economic effect

**GAAR EU (2012)**
- non-negligible non-tax reasons
  - preclude → essential purpose: avoiding taxation

**GAAR EU (2016)**
- valid commercial reasons reflecting economic reality
  - define → genuineness of arrangement
Similar criteria

Unclear function and relevance
(circumstantial/substantial?
essential criteria/mere indicators?)

Interchangeability?

Certainly yes – but to what extent?

A case for harmonisation?
But...

- Unclear relevance ➔ how to harmonise?
- Watch out:
  It is not possible to deduce the effectiveness of a GAAR from its wording.
- Watch out:
  It is not possible to deduce differences in how particular cases are decided from terminological differences.

➔ Is there any need for harmonisation?
GAARs necessarily contain *vague concepts*; in every jurisdiction, these concepts are interpreted in line with its *particular legal and constitutional tradition*.

- What a British tax lawyer might call „realistic view of the facts“ might be, for an US tax lawyer, an economic substance analysis (which the British tax lawyer will fervently deny)

- What the CJEU calls „main purpose test“ is equivalent to the „sole purpose test“ in French law

⇒ Will harmonisation of GAARs really foster uniformity in their application or might it result in the opposite?
Harmonisation of GAAR terminology will not help to ensure uniform GAAR application but will bring about new uncertainties.

Harmonisation of GAAR terminology might even increase differences in how GAARs are applied in practice.

Is there a way to avoid pure judicial discretion amounting to a „smell test“?
We need to focus on the function of GAARs

Their aim is **not to provide the best description of the real-world phenomenon of tax avoidance.**

Their aim is **to define a threshold for overriding legal rules** in cases where their justification (“purpose”) is not applicable.
To perform this function various types of criteria are conceivable, e.g.

- criteria addressing the **degree of tension** between literal application of provision and legislative purpose (**degree of “wrongness”**)  
- criteria addressing (lack of) **legitimate expectations** of taxpayers  
- criteria addressing whether the legislator could have foreseen a certain tax planning opportunity when drafting the provision (**drafters’ responsibility**)  

(…)

A way ahead...?
Thank you for your attention!