PORTUGAL

Vieira de Almeida

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# Interpreting the new GAAR in Portugal

**Filipe de Vasconcelos Fernandes of Vieira de Almeida examines the evolution of the general anti-abuse rule in Portugal and considers how tax authorities are approaching the changes.**

Law No. 32/2019 of May 3 transposed most of the solutions from Council Directive (EU) 2016/1164 of 16 July (EU Anti-Tax Avoidance Directive I, ATAD I) into the Portuguese tax system. One of the innovative solutions of this directive was the creation of a European general anti-abuse rule (GAAR), which is provided for in Article 6 of the directive.

According to Recital 11 of ATAD I "general anti-abuse rules (GAARs) feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions. GAARs have therefore a function aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs. It is furthermore important to ensure that the GAARs apply in domestic situations, within the Union and vis-à-vis third countries in a uniform manner, so that their scope and results of application in domestic and cross-border situations do not differ".

On the other hand, according to the Preamble of Law No. 32/2019, of May 3, its main purpose, in line with ATAD I, is "to strengthen the fight against tax avoidance practices".

## The differences between the old and the new general anti-abuse clause

The amendment to the Portuguese GAAR from ATAD I has a strong practical impact on the Portuguese tax system and will certainly require changes in the approach of the Portuguese tax authorities.

The new wording of Portuguese GAAR presents a terminology inspired by several normative tests from the common law and currently present in most tax systems ("substance over form", "economic substance", "step transaction", etc.) especially from OECD members.

### Comparison between the two wordings of the Portuguese GAAR

| Old | New |
|---|---|
| 1 – (...)<br>2 – Any legal documentation or formalities, aimed by artificial or fraudulent means and by abuse of the legal forms, wholly or mainly at reducing, eliminating or postponing taxes that would be payable as a result of facts, legal documentation or formalities with the same economic purpose, or to obtain tax advantages that would not be achieved in whole or in part without the use of these means, shall be ineffective for tax purposes, and taxation shall proceed in accordance with the rules that would have applied in their absence and the tax advantages referred to shall not arise. | 1 – (...)<br>2 – Constructions or series of constructions which, having been carried out for the main purpose or one of the main purposes of obtaining a tax advantage that frustrates the object or purpose of the applicable tax law, are carried out with abuse of legal forms or are not considered genuine, taking into account all relevant facts and circumstances, they are disregarded for tax purposes, so taxation will be carried out in accordance with the rules applicable to business or acts that correspond to the substance or economic reality and the desired tax advantages will not be produced |

## The steps of the new GAAR and it impacts

Like the previous GAAR, the new set of rules is structured by a set of cumulative steps that must be followed by the tax authorities.

The new steps for the application of Portuguese GAAR can be presented in this sequential way:

i) First, the existence of a construction or series of constructions;

ii) Second, a main purpose (or one of the main purposes) of obtaining a tax advantage that frustrates the applicable given tax law;

iii) Third, the abuse of legal forms or the absence of genuine character;

iv) Fourth, considering all relevant facts and circumstances.

In relation to step (iv) – one of the main innovations of the new Portuguese GAAR is that Portugal preferred not to densify the concept of "all relevant facts and circumstances"..

This could indicate that it will be up to the Portuguese tax authorities to densify this concept, however, in line with the concept of "valid economic reasons" already used in the corporate income tax code, in the tax neutrality regime applicable to mergers vis-à-vis the Mergers Directive.

As such, taxpayers must be alert to the role of the Portuguese tax authorities in the proper application of the new GAAR and react (now also based on European law) if this does not happen.

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