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The ATAD general anti-abuse rule in Ireland



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Ireland has had a domestic GAAR for many years and, as a result, did not introduce any new measures or amend its existing GAAR as a consequence of ATAD. Ireland's GAAR

could be said to be broader than the minimum standard required by ATAD. In addition, Ireland's GAAR has been considered by the Irish Supreme Court in a recent case.

Introduction

1. The following table reflects how ATAD has been transposed into Irish law.

ATAD provision	Provision in Taxes Consolidation Act 1997	Transposed
Interest limitation (Article 4)	Not yet transposed	Expected date 1 January 2021
Exit taxation (Article 5)	Sections 627 – 629C	1 January 2019, with effect from 10 October 2018
GAAR (Article 6)	Section 811C	Pre-existing
CFC rules (Articles 7 and 8)	Sections 835I to 835Y	1 January 2019
Anti-hybrid rules (Article 9 and ATAD 2)	Sections 835Z to 835AX	1 January 2020

How ATAD Directive's anti-abuse clause has been transposed into Irish domestic law

2. Ireland has had a general anti-avoidance rule ("GAAR") for many years. Ireland did not introduce any new measures or amend its existing GAAR as a consequence of ATAD. This is because Ireland's GAAR was considered to be comprehensive and was likely broader than the minimum standard required by ATAD.

Ireland's GAAR

3. Ireland's GAAR appears in section 811C of the Taxes Consolidation Act 1997. It operates to deny a taxpayer the benefit of a "tax advantage" created through a "tax avoidance transaction". The GAAR is intended to defeat the effect of transactions which have little or no commercial reality and have been arranged primarily to reduce or avoid a tax charge or to artificially create a tax deduction or tax refund.

The concept of a tax avoidance transaction is quite broad and includes transactions where it would be "reasonable to consider" that:

- the transaction must give rise to a tax advantage; and
- the transaction must not have been undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

The reasonable to consider test is an objective test that "involves asking oneself a hypothetical question of what a reasonable person would reasonably consider, given the facts of the case".

4. A "tax advantage" includes:

- a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or
- a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person, including any potential or prospective amount so refundable or payable, arising out of or by reason of a transaction, including a transaction where another transaction would not have been

1 Irish Revenue, *Guidance Notes on GAAR: the General Anti-Avoidance Rule & Protective Notifications*, September 2019.

undertaken or arranged to achieve the results, or any part of the results, achieved or intended to be achieved by the transaction.

This concept of “tax advantage” is broad and can capture outcomes that result in tax reductions or the creation of tax losses. In guidance notes, the Irish Revenue Commissioners have stated that a tax advantage is “*essentially, the effect which the would-be tax avoider is trying to achieve through a tax avoidance scheme*”².

Impact of Ireland's GAAR

5. Ireland's GAAR empowers the Irish Revenue Commissioners to withdraw or deny any tax advantage arising from a tax avoidance transaction by making or amending tax assessments. There is no time limit on the power of the Irish Revenue Commissioners, unless a taxpayer notifies the Irish Revenue Commissioners that they have entered into a tax avoidance transaction (a so-called “protective notification”).

If invoked, Ireland's GAAR may have the following consequences for a taxpayer:

- tax liability as a consequence of any tax advantage that is withdrawn;
- interest on the additional tax due (approximately 8% per year); and
- a surcharge of 30% on the additional tax owed.

The 30% surcharge may not apply where a taxpayer has made a protective notification to the Irish Revenue Commissioners, which include copies of all supporting documentation regarding the relevant transaction and details as to why the taxpayer considers that Ireland's GAAR should not apply.

Safe harbours from Ireland's GAAR

6. Ireland's GAAR contains certain “safe harbour” provisions, which exempt certain transactions from the application of GAAR. It provides that a transaction should not be a tax avoidance transaction where that transaction was:

- undertaken or arranged with a view, directly or indirectly, to the realisation of profits in the course of the person's business and was not undertaken primarily to give rise to a tax advantage (the “**Business Profits Exception**”); or
- undertaken or arranged for the purpose of obtaining the benefit of a relief, allowance or other abatement provided under Irish tax legislation and did not result directly or indirectly in “*a misuse of the provision or abuse of the provision*” having regard to the purposes for which the provision was provided (the “**No Misuse or Abuse Exception**”).

Consultation on ATAD

7. Ireland launched a public consultation following publication of ATAD and invited comments on the extent to which Ireland needed to amend its GAAR to comply with the minimum standard required by ATAD. The general consensus was

that Ireland's GAAR was stronger and more comprehensive than the minimum standard required by ATAD.

Many responses suggested that Ireland should amend its GAAR to align it to the common EU standard contemplated by ATAD, noting that Article 6 of ATAD required a standard which was less onerous and restrictive than Ireland's existing GAAR.

Ireland responded to feedback to its public consultation to confirm that no changes would be needed or made to Ireland's existing GAAR to ensure compliance with the minimum standard required by ATAD. The feedback paper explained that:

*“Ireland already has a robust GAAR, dating back to 1989, currently contained in section 811C of the Taxes Consolidation Act, 1997. Following review of these provisions, it is considered that no amendments will be required for compliance with the ATAD provision”*³.

How local tax authorities are going to apply the ATAD's anti-abuse rule (i.e., including issued tax authorities' guidelines or statements)

8. The Irish Revenue Commissioners have published guidance on the application of Ireland's GAAR, which was updated as recently as September 2019. The guidance sets out Irish Revenue's interpretation of the relevant legislation and its practices in respect of these matters. In addition, the guidance sets out the practical aspects of the protective notification process, including how to make such a notification and the interaction of this process with Ireland's mandatory disclosure rules.

9. In addition to legislation and guidance, Ireland's GAAR has been considered by Ireland's Supreme Court in the case of *Revenue Commissioners v O'Flynn Construction*⁴. In that case, the Supreme Court considered whether the taxpayer's reliance on particular Irish tax reliefs were an appropriate use or a misuse of the Irish tax provisions or an abuse of them (i.e., the No Misuse or Abuse Exception).

The Supreme Court concluded that the object of the No Misuse or Abuse Exception was to ensure that reliefs and benefits are only available to transactions which can be regarded as a proper and intended use of the relevant provision⁵. In considering whether a transaction is a tax avoidance transaction, only appropriate uses of tax provisions should get the benefit of relevant tax reliefs.

Speaking of Ireland's GAAR, the Supreme Court commented:

*“it is clear that the distinction sought to be made in the section between permissible tax advantage and impermissible tax avoidance, is a distinction between legitimate tax mitigation of a genuine commercial transaction on the one hand, and a transaction undertaken or arranged primarily for the purposes of giving rise to a tax advantage”*⁶.

2 Irish Revenue, *Taxes Consolidation Act 1997 Notes for Guidance – Finance Act 2019 Edition*: 811C.

3 Government of Ireland, *Ireland's Corporation Tax Roadmap*, September 2018, p. 22.

4 [2011] IESC 47.

5 [2011] IESC 47, § 75.

6 [2011] IESC 47, § 68.

The Supreme Court also recognised that some tax reliefs may be highly technical and prescriptive in nature and, in applying the No Misuse or Abuse Exception, it may not be possible to discern any broad intention or purpose from statutory provisions only that transactions which satisfy required conditions should benefit from prescribed tax reliefs.

Differences between ATAD and Ireland's GAAR

10. There is one key difference between Ireland's GAAR and the GAAR contemplated by ATAD.

ATAD identifies tax avoidance transactions using an objective factual test of arrangements that are "*not genuine having regard to all relevant facts and circumstances*".

Ireland's GAAR identifies tax avoidance transactions using when it is "*reasonable to consider*" that a transaction would not have been undertaken or arranged primarily for purposes other than to give rise to a tax advantage. This is arguably a much lower burden of proof than contemplated by ATAD.

11. In addition, the safe harbours are different. Ireland's GAAR provides a safe harbour for "*the realisation of profits in the course of the business activities of a business*". ATAD provides a safe harbour for transactions that are in place for "*valid commercial reasons*".

This means that Ireland's safe harbour may be narrower than those contemplated by ATAD and may not apply to taxpayers who undertake one-off or investment transactions outside their normal course of business (even where such transactions are completed for valid commercial reasons).

7 ATAD, Article 6.

Articulation of the anti-abuse clause with other anti-abuse provisions transposing EU secondary law (i.e. Parent subsidiary Directive, Interest and Royalty Directive, Merger Directive, etc.)

12. It is common for Irish provisions that are transposing EU secondary law to include an anti-abuse provision. This has been the case for each of the Parent-Subsidiary directive,⁸ the Interest and Royalties Directive⁹ and the Merger Directive¹⁰. Specific anti-abuse rules in provisions implementing tax reliefs are generally more directly relevant than Ireland's GAAR and are considered in priority to it. In the *O'Flynn* case, it has been suggested that Ireland's GAAR may have no application to provisions which have their own specific anti-avoidance measures. Having said this, Ireland's GAAR will generally always be relevant where a specific anti-abuse rule would fail to capture a single step in a larger tax avoidance transaction or an elaborate scheme that had not been contemplated by the legislature in drafting the specific anti-abuse rule in question.

Articulation of the anti-abuse clause with other anti-abuse domestic provisions (both general or special)

13. Ireland's GAAR and its interaction with more specific anti-avoidance rules is described in detail above.

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8 Section 831 of the Taxes Consolidation Act 1997.

9 Section 267K of the Taxes Consolidation Act 1997.

10 Section 635 of the Taxes Consolidation Act 1997.