

Contents

Preface	V
List of abbreviations	XVII
A. Introduction	1
1. Background	1
2. Terminology.....	2
2.1. Tax evasion	2
2.2. Tax avoidance and tax mitigation	2
3. Scope of the study.....	4
3.1. Point of departure.....	4
3.2. Bringing GAARs into play.....	5
4. The comparative approach and the research question	6
5. Structure of the study.....	9
B. Judicial anti-avoidance.....	10
1. Introduction	10
2. Judicial anti-avoidance in Germany	11
2.1. Introduction	11
2.2. The traditional view: Formal and literal interpretation	12
2.3. Major tax reform.....	13
2.3.1. Adoption of the “economic perspective” and introduction of a GAAR	13
2.3.2. Consequences of the reform.....	15
2.3.2.1. Counteracting abuse using the GAAR	15
2.3.2.2. Counteracting abuse by way of interpretation (and other means)	16
2.3.2.3. The tax reform was successful	19
2.4. Further development.....	19
2.4.1. National Socialist excesses under the guise of the statutory interpretation.....	19
2.4.2. Developments after 1945: (re-)adoption of the “economic perspective”	21
2.4.3. The “economic perspective” as a means of teleological interpretation.....	22
2.4.4. The status quo: Sec 42 Fiscal Code	24
	VII

2.4.4.1.	Introduction in 1977	24
2.4.4.2.	Amendment in 2001	25
2.4.4.3.	Amendment in 2008 and present state	25
2.5.	The legal relevance of Sec 42 Fiscal Code.....	27
2.5.1.	Two ways to deal with abuse	27
2.5.2.	The concept of Innentheorie.....	28
2.5.3.	The concept of Außentheorie.....	30
2.5.4.	Tax law and the mechanism of analogy.....	30
2.5.5.	More than just two theories.....	32
2.5.6.	Regarding the controversy and function of Sec 42 Fiscal Code.....	35
3.	Judicial anti-avoidance in the UK.....	39
3.1.	Introduction	39
3.2.	The traditional view: Literalism and formalism (The Duke of Westminster)	40
3.2.1.	The pillars of the Duke of Westminster.....	40
3.2.2.	The Duke of Westminster.....	41
3.2.3.	The Duke of Westminster put to the test	43
3.2.4.	Literal interpretation and form vs. substance: A myth is born.....	45
3.3.	The interim view: The uncertainty of Ramsay	47
3.3.1.	Initial remarks	47
3.3.2.	Artificial, circular and self-cancelling transactions: W.T. Ramsay Ltd. v IRC	48
3.3.2.1.	Facts of the case and the taxpayer's view	48
3.3.2.2.	Two ways to deal with the case	48
3.3.2.3.	The House of Lords' approach	49
3.3.2.4.	The House of Lords' alternative suggestion	50
3.3.3.	Ramsay confirmed: IRC v Burmah Oil	51
3.3.3.1.	Facts of the case and the taxpayer's view	51
3.3.3.2.	The House of Lords' approach	52
3.3.4.	Step transaction test: Furniss v Dawson	54
3.3.4.1.	Facts of the case and starting situation	54
3.3.4.2.	Ramsay as a transaction based anti-avoidance approach	54
3.3.4.3.	The impacts of Furniss v Dawson	56
3.3.5.	Ramsay at a dead end: Craven v White	57
3.3.5.1.	Facts of the cases	57
3.3.5.2.	Limiting the impacts of Ramsay	58
3.3.5.3.	Ramsay as an approach to statutory construction?	59
3.4.	The status quo: Ramsay as an approach to statutory interpretation	59

3.4.1.	The rediscovery of statutory construction: McGuckian v IRC	59
3.4.1.1.	Facts of the case and the taxpayer's view	59
3.4.1.2.	The House of Lords' approach	60
3.4.2.	Ramsay as a principle of statutory construction: MacNiven v Westmoreland	63
3.4.2.1.	Facts of the case and the taxpayer's view	63
3.4.2.2.	The House of Lords' approach	63
3.4.3.	Ramsay as a principle of statutory construction confirmed: BMBF	65
3.4.3.1.	Facts of the case and the taxpayer's view	65
3.4.3.2.	The House of Lords' approach	66
3.4.4.	Statutory construction can be difficult	68
3.4.4.1.	Making use of various methods of interpretation	68
3.4.4.2.	Mayes v HMRC ("SHIPS 2") as a reason for the introduction of the GAAR	71
3.4.4.3.	HMRC v DCC Holdings: What if?	75
4.	Judicial anti-avoidance in the EU.....	77
4.1.	Introduction	77
4.2.	Development of an abuse test	79
4.2.1.	Emsland Stärke	79
4.2.2.	Was it necessary to set up an abuse test?	80
4.2.2.1.	The pillars of Emsland Stärke	80
4.2.2.2.	Different approaches?	84
4.2.2.3.	There was no need to set up an abuse test in Emsland Stärke	86
4.2.3.	Implications of the abuse test	87
4.2.3.1.	No influence in the short run	87
4.2.3.2.	No influence in the short run also in the field of VAT	90
4.2.3.3.	Very influential in the long run	92
4.3.	Abuse in the field of VAT	94
4.3.1.	Halifax	94
4.3.1.1.	Facts of the case and questions referred to the Court ...	94
4.3.1.2.	Adopting the abuse test in the field of VAT	95
4.3.1.3.	There was no need to adopt the abuse test	95
4.3.1.4.	Implications of the objective test	97
4.3.1.5.	Implications of the subjective test	98
4.3.2.	Cases adopting the Halifax abuse test	99
4.3.2.1.	Part Service and Weald Leasing	99
4.3.2.2.	Objective test and tax advantage	101
4.3.2.3.	Subjective test	102

4.3.2.4.	Legal consequences	104
4.3.3.	New focus: Wholly artificial arrangements in the field of VAT	104
4.3.3.1.	Change of focus	104
4.3.3.2.	Wholly artificial arrangements in respect of the relevant statute	105
4.4.	Abuse in the field of direct taxation	109
4.4.1.	Cadbury Schweppes.....	109
4.4.1.1.	Facts of the case and questions referred to the Court ..	109
4.4.1.2.	Question of justification or question of scope?	110
4.4.1.3.	Preventing the creation of “wholly artificial arrangements”	113
4.4.1.4.	Proportionality of the restriction and no subjective test	114
4.4.2.	Shifting the emphasis towards proportionality	118
4.4.3.	Bringing Halifax and Cadbury Schweppes together ...	119
4.4.4.	Further development of the case law	120
4.4.5.	New focus: Wholly artificial arrangements in primary law	122
4.4.5.1.	Requirements for a restriction to be proportional	122
4.4.5.2.	The Court’s approach in Cadbury Schweppes and Thin Cap	123
4.4.5.3.	The Court’s approach in further cases	124
4.5.	A uniform concept of abuse?	128
C.	Comparison of the GAARs.....	131
1.	Introduction	131
2.	The way to the GAARs and identifying common elements	132
2.1.	The way to the GAAR in Germany	132
2.1.1.	The GAAR has a long lasting history	132
2.1.2.	Statutory requirements and the courts’ approach.....	132
2.2.	The way to the GAAR in the UK.....	134
2.2.1.	The failed attempt to introduce a GAAR in the late 1990s	134
2.2.2.	Aaronson Report	135
2.2.2.1.	Background of the Aaronson Report	135
2.2.2.2.	Main findings of the Aaronson Report	136
2.2.2.3.	General Anti-Avoidance Rule or General Anti-Abuse rule?	138
2.2.2.4.	Aaronson’s GAAR	139
2.2.3.	The UK GAAR	139
2.2.3.1.	Introduction of a general anti-abuse rule	139
2.2.3.2.	Statutory requirements	140

2.2.3.3.	The importance of the GAAR Guidance	141
2.3.	The way to the GAAR in the EU	142
2.3.1.	The pillars of the EU GAAR	142
2.3.1.1.	CCCTB Proposal: The first EU GAAR initiative	142
2.3.1.2.	Article 80 CCCTB and the influence of the ECJ	144
2.3.2.	The EU GAAR	145
2.3.2.1.	Recommendation of an EU GAAR	145
2.3.2.2.	Requirements of the EU GAAR	145
2.3.2.3.	Practical importance: The EU GAAR and domestic GAARs	146
2.3.2.4.	Practical importance: The EU GAAR and the PSD GAAR and the BEPS GAAR	147
2.4.	Identifying common requirements	149
2.4.1.	Overview of the common requirements	149
2.4.2.	The idea behind the various requirements	150
3.	Arrangements covered.....	152
4.	Taxes covered.....	153
5.	Objective test.....	155
5.1.	Common elements	155
5.2.	The objective test in the German GAAR.....	156
5.2.1.	Starting point.....	156
5.2.2.	Leaving the application of Sec 42 Fiscal Code open....	157
5.2.3.	Using Sec 42 Fiscal Code as a starting aid	159
5.3.	The objective test in the UK GAAR.....	162
5.3.1.	Starting point	162
5.3.2.	Indicators of abuse	163
5.3.2.1.	Indicators of abusive arrangements (Sec 207 (4) FA 2013)	163
5.3.2.2.	Indicator of a non-abusive arrangement (Sec 207 (5) FA 2013)	165
5.3.3.	Drawing the line between use and abuse: Examples of the GAAR Guidance	167
5.3.4.	Examples where the GAAR does not apply	167
5.3.4.1.	The arrangement is in line with the statutory requirements	167
5.3.4.2.	The “contrived or abnormal” arrangement is in line with the statutory requirements	169
5.3.5.	Examples where the GAAR applies on grounds of Sec 207 (2) (a) FA 2013	171
5.3.6.	Examples where the GAAR applies on grounds of Sec 207 (2) (c) FA 2013	174
5.3.6.1.	Further development of the law	174

5.3.6.2.	The GAAR and Mayes (SHIPS 2)	176
5.3.6.3.	Counteracting arrangements using the instruments of teleological reduction and analogy	177
5.3.7.	Lessons learnt from the examples	179
5.3.7.1.	The importance of the various GAAR elements	179
5.3.7.2.	The objective test as an approach to statutory interpretation	180
5.3.7.3.	The objective test as a reminder of having to properly interpret the law	181
5.4.	The objective test in the EU GAAR.....	182
5.4.1.	The objective test is not flawless	182
5.4.2.	The objective test will be applied differently.....	183
5.5.	Conclusion: An objective test can be valuable.....	185
6.	Subjective tests	185
6.1.	Common elements	185
6.1.1.	Subjectivity in the German GAAR.....	185
6.1.2.	Subjectivity in the UK GAAR	186
6.1.3.	Subjectivity in the EU GAAR.....	187
6.1.3.1.	Starting point	187
6.1.3.2.	The EU GAAR reveals weaknesses	187
6.1.4.	Subjectivity is present on various layers	190
6.2.	Arrangement test	190
6.2.1.	What it is about and the difference from the objective test	190
6.2.2.	(In)appropriateness: The arrangement test instead of the objective test	191
6.2.2.1.	Starting point	191
6.2.2.2.	Inappropriate and appropriate arrangements	191
6.2.2.2.1.	Non-tax reasons to rebut the inappropriateness	191
6.2.2.2.2.	Arrangements that have the effect of offsetting or cancelling each other	194
6.2.2.2.3.	Overall plan	196
6.2.2.2.4.	Interposition of persons	197
6.2.2.2.5.	Arrangements and the expectation of a reasonable business conduct	201
6.2.2.3.	The arrangement test must be rejected	203
6.2.3.	Artificiality: The arrangement test in addition to the objective test	204
6.2.3.1.	Starting point	204
6.2.3.2.	“Artificial”	205
6.2.3.3.	The arrangement test must be rejected	206

6.3.	Purpose test	207
6.3.1.	Main or essential purpose.....	207
6.3.2.	... of the arrangement or the person?	209
6.3.3.	The purpose test must be rejected.....	211
6.4.	Tax advantage.....	213
6.4.1.	The idea behind the tax advantage	213
6.4.2.	The presence of the tax advantage.....	213
6.4.3.	The subjectivity of the tax advantage	216
6.4.4.	Requiring a tax advantage must be rejected.....	217
6.5.	Double-reasonableness test.....	218
6.5.1.	What is it about.....	218
6.5.2.	The double-reasonableness test must be rejected	220
6.6.	Conclusion: Subjective tests must be rejected	220
6.6.1.	Summary of the critique	220
6.6.2.	Solution	222
7.	Legal consequences	224
7.1.	Basing taxation on a fictional arrangement	224
7.2.	Reconstruction poses serious problems	227
7.3.	Consequential adjustments	228
D.	Valuation of the GAARs	231
1.	Introduction	231
2.	Judicial anti-avoidance	231
2.1.	Points of departure in the UK and in Germany.....	231
2.1.1.	Resembling starting positions: The legal form is decisive.....	231
2.1.2.	Contrasting developments: Various methods of interpretation vs. literal interpretation	232
2.1.2.1.	Tax reform in Germany	233
2.1.2.2.	No action taken in the UK	234
2.1.2.3.	Developments around the Second World War	235
2.1.2.4.	Developments in the post-war years	236
2.1.3.	Reasons for these divergent developments	238
2.1.3.1.	The relationship of tax law with other fields of law	238
2.1.3.2.	Liberalism and social reasons	239
2.1.3.3.	Victorian values and background of the judges	240
2.1.3.4.	Common law and influence of academics	242
2.1.3.5.	Parliamentary sovereignty, legal certainty and the rule of law	243
2.1.4.	Consequence: Different drafting of tax legislation	245
2.2.	EU Law: Adding another layer of complexity	247
2.2.1.	Abuse was a latecomer in EU law	247
2.2.2.	Judicial anti-avoidance in European law	248

2.3.	All roads lead to Rome	250
2.3.1.	Counteracting abuse on grounds of a judicially developed GAAR?	250
2.3.1.1.	The initial uncertainty of Ramsay and the concept of Außentheorie	250
2.3.1.2.	Ramsay did not develop into a judge-made GAAR	253
2.3.2.	Counteracting abuse as a matter of interpretation?	254
2.3.2.1.	Common elements: Transaction based anti-avoidance	254
2.3.2.2.	Germany: Counteracting abuse should only be a matter of interpretation	256
2.3.2.3.	UK: Counteracting abuse is a matter of interpretation	258
2.3.2.4.	EU: Counteracting abuse should return to a matter of interpretation	259
2.3.3.	Development of similar ways to counteract abuse by interpretation	260
2.3.3.1.	Summary	260
2.3.3.2.	Influence of other countries on the UK	262
2.3.3.3.	Influence of the ECJ on UK courts	263
2.3.4.	Substance-over-form and the economic perspective (wirtschaftliche Betrachtungsweise)	265
2.3.4.1.	Substance-over-form approach from a German court's perspective	265
2.3.4.2.	Economic perspective (wirtschaftliche Betrachtungsweise) from a UK court's perspective	266
3.	Statutory anti-avoidance (GAARs)	269
3.1.	Common elements inherent in the GAARs	269
3.2.	Drawing the line between "abusive" and "non-abusive" arrangements	270
3.3.	The GAARs only codify what courts already did	271
4.	Reasons for introducing and suggesting the GAARs	272
4.1.	To raise revenue and for political reasons	272
4.2.	To compensate legislative cowardice	275
4.2.1.	Overly complex tax systems as a source of tax avoidance	275
4.2.2.	Tax systems do not have to be 'perfect'	277
4.2.3.	GAARs as a result of legislative cowardice	278
4.3.	To compensate judicial and administrative shortcomings in statutory interpretation	279
4.3.1.	Methods of interpretation and the complexity of the tax system	279

4.3.2.	Applying various methods of interpretation can be difficult	281
4.3.3.	GAARs as a tool to compensate shortcomings in interpretation	283
5.	What remains at the end?	284
5.1.	What is claimed to be achieved.....	284
5.2.	What is achieved	285
5.2.1.	GAARs leading to a simpler tax system?	285
5.2.1.1.	A GAAR alone does not make the tax system simpler	285
5.2.1.2.	Legislators may contribute to the simplification of a tax system	286
5.2.2.	GAARs reducing the uncertainty surrounding the case law?	290
5.2.2.1.	Uncertainty is a result of overly complex tax systems	290
5.2.2.2.	GAARs can contribute to legal uncertainty and inequality	291
5.2.3.	GAARs can be detrimental to the legal culture	293
5.2.3.1.	The finding of an abusive arrangement is a matter of interpretation	293
5.2.3.2.	GAARs may have an adverse effect on the legal culture	294
5.3.	Is there even a remaining scope for GAARs?	296
5.3.1.	GAARs as reminders of having to interpret the law	296
5.3.2.	Making interpretation possible	298
E.	Summary	300
1.	Starting position	300
2.	The courts' approach	300
3.	The GAARs' approach	308
4.	Valuation of the GAARs.....	313
F.	Annex	318
1.	Overview of the common requirements of the German, UK and EU GAAR	318
2.	German GAAR (author's translation)	319
2.1.	Sec 4 and 5 Reich Fiscal Code	319
2.2.	Sec 6 Fiscal Adjustment Act	319
2.3.	Sec 42 Fiscal Code in the version of 1977and 2001	320
2.4.	Sec 42 Fiscal Code in the version of 2008.....	320

3. UK GAAR.....	320
4. EU GAAR	327
4.1. EU GAAR: Commission Recommendation on Aggressive Tax Planning	327
4.2. PSD GAAR	328
4.3. BEPS GAAR	328
G. Bibliography.....	330