The spread of GAAR(s)- an (in)successful legal transplant

Abstract

General anti-avoidance rules (GAAR) are often presented as a solution to the challenges that aggressive tax planning and tax avoidance schemes pose to tax systems worldwide. The legal drafting process is usually based on laws already enacted in another country or involves a process of legal transplantation or borrowing from another country. The Principal Purpose Test (PPT) or European Union (EU) GAAR was no different. To date, there has been little discussion of the coherence of the legal drafting of the PPT and the EU GAAR.

Core Hypothesis

To explore this issue, we analyse the motives that lead policymakers to replicate and borrow legal concepts traditionally used by common law countries. The Principal Purpose Test (PPT) or European Union (EU) GAAR was no different, based on the United Kingdom (UK) statutory GAAR. Considering the framing of the one-size-fits-all" or top-down approach" used to draft EU GAAR and PPT rule, we argue that those measure do not align with its functional goals. We argue that policymakers and governments did not discuss a misalignment in law-making. We conclude that policymakers’ actions comprise mimicking peers, which reduces the risk and uncertainty associated with adapting a specific policy.

Theoretical Framework

1- Evolution’s of GAAR Timeline (2009-2020)

1-The number of countries that promulgated a GAAR rose dramatically. What drove countries to adopt this measure?

2-Analyse the different legal designs of GAAR(s) worldwide.

3-Assess the Law-Making process: (i) The legal transplants, and (ii) top down, “one size fits all approach”, or bottom-up approach.

4- The 3 signals of misalignment in the Law-Making Process of the GAAR(s):

i) First Signal: The Link Between Legal Transplants and the Top-Down Approach

ii) Second signal: Comparative view of the GAAR legal design and the substance requirement to apply a GAAR

iii) The missing link between the GAAR and Aggressive Tax Planning

5-To do this it will be necessary to build bridges: within three different levels (legal environments): Domestic law, European law and international law.