Current discussion about the adoption of GAAR in Kazakhstan*

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1. Introduction to GAAR and the current debate

For the past 30-40 years business models have changed rapidly due to technological progress and the development of the digital economy, the ease of doing business simultaneously in several jurisdictions and the subsequent emergence of the global market. However, tax legislation and the underlying principles have not kept pace with the changing business environment[3]. This has resulted in gaps in domestic tax systems and the emergence of loopholes in legislation due to the overlapping of domestic tax systems[4]. The inability of legislators to foresee all the forms of planning and structuring by taxpayers in a rapidly changing world has resulted in an increase in abusive tax arrangements[5].

These arrangements, which should be distinguished from legitimate tax planning arrangements, can be divided into two separate groups: tax avoidance and tax evasion. The line between the two is thin, but it exists. Tax evasion is generally considered to be the unacceptable and illegal exploitation of loopholes in legislation, whereas tax avoidance may take place within the letter of law, but not in compliance with the spirit of the law. For the purposes of this article, the authors further will concentrate on tax avoidance and General Anti-Avoidance Rules (GAARs) as one of the tools to combat tax avoidance. Tax avoidance can be defined as follows:

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[3] OECD 2013, Addressing Base Erosion and Profit Shifting, p.5.

[4] Ibid.

[5] F. VANISTENDAEL, in Tax Law Design and Drafting (volume 1; International Monetary Fund: 1996; Victor Thuronyi, ed.) Chapter 2, Legal Framework for Taxation, p.30.

For tax purposes, avoidance is a term used to describe taxpayer behaviour aimed at reducing tax liability that falls short of tax evasion. While the expression may be used to refer to "acceptable" forms of behaviour, such as tax planning, or even abstention from consumption, it is more often used in a pejorative sense to refer to something considered "unacceptable", or "illegitimate" (but not in general "illegal"). In other words, tax avoidance is often within the letter of the law but against the spirit of the law. It generally contains elements of artificiality, e.g. as to the legal form adopted, and may often be considered to be contrary to the spirit of the law[6].

The changing business environment and the increase in abusive tax arrangements has forced many countries to modernise their tax systems and implement special anti-abuse rules, in order to prevent or punish the avoidance behaviour of multinationals. The rules are divided into two groups: special and general anti-avoidance rules. Special anti-avoidance rules (SAARs) aim to combat particular tax abuses by denying certain benefits under certain conditions. They are of a legislative nature and may be implemented in different forms: transfer pricing rules, Controlled Foreign Corporation (CFC) rules, beneficial ownership requirements in tax treaties and domestic rules, thin capitalization rules and many others. On the other hand, GAARs are rules designed to fight the abusive tax avoidance behaviour of taxpayers without being specifically tailored to specific transactions. GAARs have evolved in some countries from judicial doctrines, but they have become widespread through statutory provisions enacted both in continental and common law systems. A typical GAAR may be defined as:

An anti-avoidance measure, generally statute based, providing criteria of general application, i.e. not aimed at specific taxpayers or transactions, to combat situations of perceived tax avoidance[7].

[6] The definition of tax avoidance is retrieved from the IBFD tax glossary, available at: www.ibfd.org Examples of tax avoidance include locating assets in offshore jurisdictions, conversion of income to non- or lower-taxed gains, spreading of income to other taxpayers with a lower marginal tax rate, splitting of business activities to avoid VAT registration, and lease and lease-back arrangements to take advantage of early input tax deduction.

[7] Definition of GAAR is retrieved from the IBFD glossary, available at: www.ibfd.org.

GAARs allow the tax authorities and courts to set aside the legal form of a transaction if it lacks or does not correspond to the economic substance of the transaction, and to determine the liability of taxpayer as if a certain transaction or arrangement had not taken place. As rightly noted by Masui, judges inevitably play an important role in interpreting and formulating the law, and this is especially the case in the application of anti-abuse laws, which may be general in nature and require purposive rather than formal interpretation. "*Although judges make decisions in the context of each case, their decisions inevitably shape broader tax policy. Yet they do so without openly engaging in a political battle in the law-making arena*"[8]. The role of judges and the discretionary power granted to state officials in the application of GAARs is therefore said to make the legal system uncertain, which is not well accepted by the public and discourages many countries from adopting GAARs.

As a result, the acceptance of GAARs and their effects are debatable. As noted by Silvani,[9] GAAR proponents consider GAAR to be the "broad spectrum antibiotic"[10] that should be able to fight tax avoidance. On the other hand, others, including Silvani, raise the question as to whether "*this antibiotic [should] be prescribed to every country and [whether it would] trigger the same consequences and side-effects in any of them?*".

In the following, the authors will consider the debate on issues associated with the introduction of GAARs, as well as arguments and good practice principles that Kazakhstan, as an example of a young and developing state, could take into account prior to adopting GAARs. In the first part of the article the authors will consider more closely the notion of uncertainty associated with GAARs and the effect this may have on a developing state. The second part of the article will consider the current situation in Kazakhstan to assess whether there is a need for a GAAR provision in the

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For more on the definition of GAAR see J. PREBBLE and Z. PREBBLE, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law,* Bulletin for International Taxation, 2008, pp.151-170, 2008.

[8] MASUI, YOSHIHIRO, *The Responsibility of Judges in Interpreting Tax Legislation: Japan's Experience*, Osgoode Hall Law Journal 52.2 (2015) : 491-512, p.493.

[9] As summarised by C. SILVANI, *IFA Research Paper: GAARs in Developing Countries,* 2013, p.5.

[10] Silvani refers in his work to *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6 at 49.

domestic system. The third part will review the proposed draft GAAR provision, evaluating it by applying the principles formulated for effective and successful GAARs in UK, India and the EU, and will put forward a recommendation on the possible improvements of GAAR provisions proposed in Kazakhstan. Finally, the fourth part will draw conclusions on the possible future development of GAARs in Kazakhstan.

1.1 GAARs and the issue of uncertainty

The first GAARs appeared at the beginning of the twentieth century: the first country to adopt a codified GAAR was Australia in 1915, followed by the Netherlands in 1924[11]. In the same period, judicial doctrines aiming to combat tax avoidance, similar to the aims of GAARs, were first formulated in the USA in connection with *Gregory* in 1935[12]. On the other hand, in the UK, the GAAR was enacted much later: the judicial doctrine was consolidated in 1982 with the formulation of the Ramsay principle[13] and a legislative GAAR was adopted after long debates and comprehensive studies only in 2013[14]. Until 1982, the interpretation of law and judicial decisions in the UK, and also in Australia and Canada,[15] was governed by the doctrine adopted in the *Duke of Westminster* case requiring "literal and strict interpretation" of the law,[16] with an impact on anti-abuse doctrines[17].

Scholars have different opinions about the role of GAARs: while some believe them to be a fundamental necessity to secure the legal system of a country, others believe them to lead to the dissolution of the rule of law[18].

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[11] K. NAKAYAMA, *GAAR in Asian countries. P*resentation for 4th IMF-Japan High Level Tax Conference for Asian Countries, 2013, p.5.

[12] G.V. HELVERING, 293 U.S. 465 (1935).

[13] See W.T. RAMSAY v. IRC*, Eilbeck (Inspector of Taxes) v. Rawling*, [1982] A.C. 300 and *IRC v. Burmah Oil Co. Ltd,* [1982] S.T.C. 30, H.L. (Sc.). The principle basically required the consideration of transaction and the result of the transaction in the context of series of actions, rather than a single act.

[14] For brief historic overview of UK statutory GAARs see J. FREEDMAN, *Designing a General Anti-Abuse Rule: Striking a Balance*, University of Oxford Legal Research Paper Series, Paper No xx/2014, Asia Pacific Tax Bulletin, 2014.

[15] For more about the development of anti-abuse legislation in Canada see: W.I. INNES, P.J. BOYLE, J.A. NITIKMAN, *The Essential GAAR Manual: Policies, Principles and Procedures.* CCH Canadian Limited, 2006.

[16] F. VANISTENDAEL, see supra note 5 at p.25.

[17] This issue will be further discussed in part 3.3 of this article.

[18] For more on this idea see R.M. UNGER, *Law in Modern Society*, see also A.V. DICEY, *Introduction to the Study of the Law of the Constitution.*

Thus, in Unger's view, as they are rules with open-ended standards, incorporating the intention of the legislator, GAARs tend to be broad in their nature and in terms of application require purposive legal reasoning and interpretation[19]. As a result, the application of GAARs, especially the related judicial doctrines, gives rise to the need to apply the principles underlying the rule to different facts and situations, whereas the interpretation of the rule may vary depending on the facts taken into consideration (where some facts may be deliberately omitted) and the experience and understanding of the rule by a particular tax official or judge (which may vary from case to case). The combined effect of these factors may lead to a lack of consistency and certainty in law[20]. This general notion was examined by Unger in "Law in Modern Society", where the author critically assessed the use of open-ended standards in legislation, purposive legal reasoning and substantive justice, which in the opinion of Unger can lead to the dissolution of the rule of law:

Purposive legal reasoning and non-formal justice also cause trouble for the ideal of generality. The policy-oriented lawyer insists that part of interpreting a rule is to choose the most efficient means to the attainment of the ends one assigns to it. But as the circumstances to which decisions are addressed change and as the decision maker's understanding of the means available to him varies, so must the way he interprets rules. This instability of result will also increase with the fluctuations of accepted policy and with the variability of the particular problems to be resolved. Hence, the very notion of stable areas of individual entitlement and obligation, a notion inseparable from the rule of law ideal, will be eroded[21].

Whereas Unger does not explicitly project his theories onto tax law, the authors of this article believe the theory of Unger is appropriate to tax law and the use of GAAR clauses. The view expressed by Unger was put forward earlier by Dicey,[22] who stated that the rule of law requires "the absolute supremacy or predominance of regular law as opposed to the influence of

[19] For more on the theory of open-ended clauses in legislation and purposive interpretation, see R.M. UNGER, Law in Modern Society, pp.194-195.
[20] Ibid. p. 196.
[21] Ibid. p. 196.
[22] See A.V. DICEY, *Introduction to the study of the law of the constitution*, 1st ed. Published in 1885, and reprinted later, reprint of 8th ed.

arbitrary power",[23] and later on supported by scholars particularly in the context of tax law. Thus, Ruz[24] concluded that "*In the present context, the most important [...] is that the law should be capable of guiding people. In order to guide people, laws must be relatively clear and their application relatively certain; otherwise, no one will know what is permitted and what is forbidden*"[25].

As further noted by Prebble, certainty in law is the basic expectation of the legislator on the part of the public. Whereas in general legislators manage to ensure certainty in law, with the formulation of GAARs it becomes less feasible[26] because according to Prebble, to be effective GAARs need to be uncertain, and this constitutes the main argument against the use of GAARs.

If such a rule tried to define tax avoidance with absolute certainty, tax avoiders would soon find new strategies that fell outside the definition. Concrete rules are the most open to avoidance; thus, a general anti-avoidance rule must indeed be general if it is to catch tax avoidance arrangements and have deterrent value[27].

1.2 GAARs and developing countries

Although the level of certainty and discretionary power granted to the tax authorities is important in all countries,[28] this is especially relevant in practice in developing countries, where the judicial system and education in conjunction with the experience of judges in tax matters may be significantly lower than in developed countries, with a consequent negative

[23] A.V. DICEY in R. PREBBLE and J. PREBBLE, *Does the use of General Anti-Avoidance Rules to combat tax avoidance breach principles of the rule of law?*, Victoria University of Wellington Legal Research Papers, Paper No 8/2012, Vol. 2, Issue No 2, 2012, p. 22.
[24] See J. RAZ, *The rule of law and its virtue, in the authority of law: essays on law and morality*, (2d ed. 2009).
[25] The statement of Raz was summarised by J. Prebble and R. Prebble and retrieved for the purposes of this paper from R. PREBBLE and J. PREBBLE, *Does the use of General Anti-Avoidance Rules to combat tax avoidance breach principles of the rule of law?*, Victoria University of Wellington Legal Research Papers, Paper No 8/2012, Vol. 2, Issue No 2, 2012, p. 22.
[26] Ibid, p.22.
[27] See J. PREBBLE and Z. PREBBLE, *Comparing the General Anti-Avoidance Rule of income tax law with the civil law doctrine of abuse of law*, Bulletin for International Taxation, 2008, p.156.
[28] J. FREEDMAN, supra note 14, p.167.

impact on how GAARs work[29]. There is a view that in cases in which the GAAR works inadequately, it can undermine the stability of the legal system in the view of investors and consequently have a negative impact on inward investment flows[30]. There may also be instances in some developing countries, especially those that do not function as fully developed democracies, where the powers of the tax authorities may be abused and used as an instrument of coercion against political opponents or entrepreneurs who do not wish to cooperate with the business interests of the influential individuals who have the power over the tax authorities and state bodies[31].

Silvani has thoroughly analysed whether the differences existing between developed and developing countries influence the functioning of GAARs, concluding that it does, and thus should be taken into account when deciding whether to implement GAARs in developing countries and how to apply them if they are already in place[32]. The main concern Silvani expresses is "whether the tax authorities are actually capable of handling the anti-abuse provision" in developing countries and "whether the country's legal system offers sufficient safeguards against the misuse of anti-avoidance rules by the tax authorities"[33].

In his work he notes that the use of SAARs, but not GAARs, may be a more "balanced solution" for developing countries, since GAARs may act as a "formidable weapon"[34] in the hands of tax authorities and judges and their introduction "must be handled with care"[35]. He also notes that GAARs may be successful in developing countries assuming that responsible tax authorities will be administering them.

Thus, one of the arguments against the use of GAARs in developing countries is the uncertainty they may bring, due to the limited capacity of the tax authorities to invoke these rules only in appropriate cases, and in

[29] Silvani, supra note 9, p.6.
[30] See for instance presentation by BSR and Company, General Anti-Avoidance Rules, 2012.
[31] The problem of corruption and GAARs was also addressed by Silvani, where he summarised different views on the issue in several developing countries. See supra note 9, p.68-69, 83.
[32] Silvani, supra note 9, p.6.
[33] Ibid. p.59.
[34] Ibid, p.61.
[35] Ibid, Abstract.

many cases the inability of the legislator to ensure that GAARs provide safeguards to limit the discretionary power of the tax authorities.

Another argument against introducing GAARs in developing countries concerns the potential link between uncertainty and the impact it may have on the overall economic growth of the developing country. However, Silvani notes that there is no empirical data to confirm the influence of GAARs on inward investment, in particular to establish whether there is a negative impact, but there is still a concern that GAARs may have a negative impact on investment decisions[36].

At the same time, Silvani notes that legislative GAARs may be less harmful and unpredictable than judicial anti-avoidance doctrines, since legislative rules usually provide more detailed and stricter administrative procedures for the tax authorities to adopt when applying GAARs[37].

Additionally, Silvani notes that despite the accepted notion that GAARs give rise to uncertainty, there should be no exact and generally applicable answer to the question of whether GAARs will lead to uncertainty in any particular jurisdiction and therefore should not be adopted. In the view of Silvani, the degree of uncertainty may vary from country to country, primarily depending on the scope for which the GAAR is drafted, whether it is narrowly or broadly drafted, and how it is implemented.

The position of Silvani is shared by Freedman, who believes that statutory GAARs may in fact bring more certainty to the legal system than the purposive interpretation of tax law provisions with broad latitude by the courts, since statutory GAARs lay down limits of interpretation as regards what kind of arrangements are covered by anti-abuse legislation and whether or not the rules should apply.

Once we move away from literal interpretation, the discretion rested in the courts means that a measure of uncertainty is present anyway. In the absence of a GAAR, the courts might be tempted to stretch the interpretation of the wording before them, whereas if there is a carefully formulated GAAR in place they will be more inclined to interpret the legislation more narrowly but then look to the GAAR for guidance as to

[36] Ibid, p.62-63.
[37] Ibid, p.63.

whether it should be subjected to that anti-avoidance rule. In this way, a GAAR could actually increase certainty[38].

While the debate on the certainty and uncertainty of GAARs goes on, developing countries continue to struggle with the loss of potential tax revenues due to avoidance practices, and start to care less about the attractiveness of their systems and investor-friendly image, while strengthening their arsenal of anti-avoidance rules with GAARs[39]. In general, developing countries may be more susceptible to tax avoidance in comparison to developed countries, given the difference in legal and administrative capacity, as well as the expertise and resources available to capture avoidance practices[40]. Additionally, the loss of tax revenue due to avoidance practices may be more palpable in developing economies[41].

In this connection, according to Schon, when introducing GAARs some developing countries should not pay too much attention to the attractiveness of their systems, since investors will invest there anyway, regardless of whether there is a GAAR or not. As summarised by Silvani, some scholars argue that market and economic conditions, together with natural and labour resources, are the factors that motivate investments to certain countries, rather than fiscal regime alone[42]. As a result, such countries should not be concerned whether GAARs will influence the level of investments but they should introduce GAARs if there is a need to do so.

Freedman makes a useful comment concerning the introduction of GAARs in developing countries. She believes that GAARs should be designed to fit the legal background of each particular jurisdiction[43]. In other words, GAARs should account for the way the underlying tax legislation is constructed, the methods used for statutory drafting, and current interpretations by the courts. In addition, she argues that the resources available to the tax authorities should also be considered when designing appropriate safeguards for taxpayers.

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[38] J. FREEDMAN, supra note 14.
[39] See recent practice of Brazil, China and India as summarised by Silvani.
[40] As summarised by Silvani, supra note 9, p.5.
[41] Ibid. p.5 the view expressed by the OECD in connection with the BEPS (Base Erosion and Profit Shifting) initiative.
[42] Ibid, p. 65, as referred to Li and Holmes.
[43] J. FREEDMAN, supra note 14, p.167.

In the view of the present authors, it is important to note that the certainty vs. uncertainty debate turns on one focal point, and that is the extent to which tax avoidance should be sanctioned or tolerated by the tax system. GAARs should allow the tax authorities to interpret the legislation with reference to the economic nature of the transactions undertaken by the parties. It is clear that when taxpayers undertake transactions with a view to obtaining tax benefits, constructing complex legal transactions to achieve their goals, they are concerned that the tax benefits contemplated will be achieved and the legal system will allow them to achieve those benefits. GAAR provisions act as a potentially unpredictable element in the tax and legal system, which can make the taxpayer nervous about the possibility that the legal model that they carefully constructed may be set aside by tax inspectors who will disregard their creative approach and instead assess their tax liabilities with reference to the economic substance.

The present authors therefore lean towards the view expressed by Schon et al., who acknowledge arguments that investors should pay attention to the existence of GAAR provisions but if investors come without the objective of minimising their tax liability by means of tax avoidance practices, they will indeed come anyway due to other factors in the developing economy that are perceived to be more important.

To sum up, when considering the adoption of a GAAR in a developing country, the government should bear in mind that GAARs can give rise to concerns on the part of investors, especially if implemented and applied incorrectly. The uncertainty which the GAAR can give rise to may be mitigated by the safeguards built into the GAAR provision.

The flow of investment in many cases depends more on the existence of economic factors in the country other than tax policy, and especially the existence of a reliable and sophisticated tax administration, and a functioning and independent judicial system able to prevent the misuse of GAARs. At the same time, GAARs may be the tool required to support the tax system. In cases in which tax avoidance is widespread, countries should not be hesitant to take the necessary measures and adopt GAARs, but they should take care in designing such rules, considering the legal background

of their systems and the ability of the tax authorities and the courts to implement GAARs properly.

2. Does Kazakhstan need a GAAR?

Kazakhstan is an example of developing country that does not yet have a GAAR, although there have been several attempts to introduce one[44].

Kazakhstan adopts the principles of the civil law system and it is believed that a GAAR can only be enacted by the legislator. It was reported in an interview by one of the authors with Victor Thuronyi[45] that a clause on general anti-avoidance was included in the early versions of the draft legislation in the 1990s, but gradually eliminated. Subsequent attempts occurred in 2008 in the drafting of the current version of the Tax Code,[46] though as a result of political decisions at the executive level, this rule was once again not included in the tax legislation, despite pressure from the tax authorities.

In this section the current situation in Kazakhstan will be analysed with respect to tax avoidance to assess whether Kazakhstan needs a GAAR. First of all the analysis will consider what kind of SAARs exist in Kazakhstan and how they operate, then list the kinds of abusive transactions taking place in Kazakhstan that are out of the reach of currently employed anti-avoidance measures, and finally reference will be made to the situation in the region with regard to GAARs in neighbouring states. Based on the study undertaken, an opinion will be put forward about whether a GAAR is urgently needed in Kazakhstan.

2.1 SAARs in Kazakhstan

Although the Kazakh tax authorities have not yet managed to introduce a GAAR, they tend to succeed in introducing SAARs targeting various avoidance schemes. The advantage of SAARs is that they clearly establish the limits to acceptable and unacceptable tax optimisation behaviour on the

[44] The latest attempt took place in 2013, Retrieved from the information provided on the official website of the Association of Taxpayers in Kazakhstan.
[45] IMF Expert in charge of drafting the early versions of Kazakh Tax Legislation.
[46] One of the authors was involved in this process in his capacity as the International Expert appointed by the European Union to the Ministry of Finance of RK.

part of taxpayers. However, a GAAR has not been adopted in Kazakhstan probably due to the fact that taxpayers face uncertainty about whether the transactions concluded with the objective of reducing their tax liability will be challenged by the tax authorities.

Examples of Special Anti-Avoidance Rules in Kazakhstan are listed below.

2.1.1 Thin-Capitalization Rules

These rules limit the deductibility of interest, in cases in which the company is excessively reliant on debt rather than equity provided by shareholders or parties related to shareholders, with the objective of gaining the benefit of a "tax-shield" resulting from the tax saving on deductible interest. Kazakhstan adopts the debt-to-equity concept, where it limits deductibility of interest with reference to the debt-to-equity ratio, which is currently 1:4, and for financial institutions 1:7[47]. The rule also covers back-to-back loans and any loans made by offshore companies.

2.1.2 Anti-Offshore Rules

These rules are aimed at mitigating tax planning and tax structuring of transactions through offshore jurisdictions. Kazakhstan has three types of anti-offshore rules:

1. *Withholding tax on payments made to offshore jurisdictions*,[48] which obliges a tax agent (payer of income to an offshore company) to withhold 20% of the payment as a tax on payment for any services supplied in the offshore jurisdiction, irrespective of the place where the services were provided. There is a special black-list of jurisdictions issued by the Government[49].
2. *Place of effective management rule*,[50] which permits treating an offshore company as tax resident in Kazakhstan and thus subject to tax on its worldwide income, if it is effectively managed from Kazakhstan, where the definition of place of effective management is as follows:

[47] Art. 103, Tax Code of RK.
[48] Art. 192(1), p. 4 in combination with Art. 194 of the Tax Code of RK.
[49] Decree of the Minister of Finance of the RK No. 595 dated 29 December 2014 on "Approval of the list of states with preferential tax regime".
[50] Art. 189(5), Tax Code of RK.

"*Place where meetings of the actual authority (board of directors or similar authority) are held, where the principal management and (or) supervision is carried out, and also where strategic commercial decisions which are required for the performance of business activities of the legal person are take, shall be recognized as effective place of management (place of location of the actual managerial authority)*."

3. *CFC Rules*[51]*.* These rules makes it possible to allocate the income of the offshore company to its Kazakhstani shareholders based on their ownership, if 10% or more of the shares or voting rights are held by Kazakhstani tax residents (both physical and legal persons). In Kazakhstan, the concept of *transparency* is used, rather than the concept of dividend distribution. Income is allocated and taxed in the hands of the resident taxpayer[52].

2.1.3 Limitation on carrying forward losses

Currently, Kazakhstan has only limited rules to prevent abusive transactions with losses. Unlike other countries that limit the transfer of carry forward losses in the case of substantial change of ownership or substantial change of activities,[53] Kazakhstan does not have such rules. Such rules could combat abusive mergers, where the sole purpose is to merge an empty loss-making company with a profit-making company with the objective of utilising the losses of a completely unrelated company.

However, Kazakhstan has several measures adopted previously when tax avoidance was detected by tax authorities, for example, using the artificially engineered losses from financial derivatives to offset against the regular operating (trading) income. Currently, the Tax Code lays down a requirement to allocate losses to different baskets based on the nature of the losses and allows these losses to be offset only against income of the

[51] Art. 224, Tax Code of RK.

[52] See T. Balco and X. Yeroshenko for analysis of CFC legislation in Kazakhstan, *A Critical Analysis of CFC Legislation in Kazakhstan: Practical Challenges and Legislative Issues.* European Tax Studies Review, August 2014.

[53] For example the following countries (the list is not exhaustive) Australia, Austria, Canada, Denmark, France, Germany, Ireland, Italy, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

same nature.[54] Similar additional rules are adopted to combat certain abusive transactions, for example transactions involving the transfer of shares in extractive companies[55].

2.1.4 Transfer Pricing Rules

Transfer pricing is often used to shift profits between related parties, usually in the direction of the party subject to a lower effective tax rate. In many cases, however, the transfer price does not necessarily mean abusive or artificial prices. In fact, in many instances, the transfer price has to be set by the related parties, since there may be no comparable market price for the given service or transaction.

Transfer Pricing Rules permit the tax authorities to make adjustments to the prices that the related parties charge on transactions taking place between them if these prices do not reflect the market price of the transactions and thus appear to be manipulated due to the special relationship between the parties.

Kazakhstan has a special law containing all the relevant rules and principles for transfer pricing for different types of tax – not only income tax[56]. For the purpose of determining market prices, the transfer pricing law provides several methods for the arm's length price to be determined. The law specifically provides for all five OECD methods. It extensively elaborates on the Comparable Uncontrolled Price (CUP) method and for the remaining methods merely mentions their hierarchy, providing short definitions, but no guidance on how to apply them. This also reflects the reality, where in practice the tax authorities are unwilling to accept methods other than the CUP method.

In addition, the tax treaties contain provisions aimed at eliminating double taxation arising as a result of transfer pricing adjustments[57] in the form of a corresponding adjustment. While Kazakhstan frequently exercises primary adjustments, it has not been reported that a secondary adjustment was

[54] Art. 136 in combination with Art. 137 Tax Code of RK.
[55] Art. 137, Tax Code of RK.
[56] The Law of the RL No.67-IV dated 5 July 2008 on "Transfer Pricing".
[57] Art. 9 paragraph, p.2 of most tax treaties as well as the OECD Model Tax Convention and the UN Model Tax Convention.

ever made. This is also possible because there have been no reported cases of primary adjustment made abroad in relation to Kazakhstan.

2.2 Examples of tax avoidance schemes in Kazakhstan

At the same time, there are various avoidance schemes operating in Kazakhstan, that do not fall within the scope of existing special anti-avoidance rules, and may thus require the implementation of a legislative GAAR. Examples of tax avoidance schemes include:

- Sale of company shares by listing the shares on the stock market. This scheme is used for the purpose of avoiding capital gains tax on mining and on oil and gas (O&G) companies. The company shares are listed on the Kazakh Stock Exchange shortly before the transaction takes place, the company sale is negotiated long in advance, due diligence and share purchase agreements are concluded, but the final act of sale is formalised through a transaction on the stock exchange, which takes place in a moment with the company shares sold in one transaction.
- Purchase of companies with VAT receivable, merging them into companies with VAT payable.
- Purchase of companies with carry forward losses, merging them into companies with significant profits.

During the Ninth Tax Conference of the Association of Taxpayers of Kazakhstan, the GAAR principles were discussed in the Kazakh context.[58] During the conference mention was made of additional tax avoidance schemes popular in Kazakhstan:

- Acquisition of goods and services from shell companies (known in Kazakhstani law as "false enterprises") that result in an increase of output VAT (value added tax) and a reduction of VAT payable. The VAT charged by the shell companies may never actually be transferred to the tax authorities.
- Transactions with related parties, in which one of the parties may be a sole trader and the other a large enterprise. The large enterprises may acquire goods from the sole trader, manipulating the prices and taking

[58] Ninth Tax Conference in Kazakhstan.

advantage of corporate deductions for the purposes of Corporate Income Tax (CIT) and the 3% rate of personal income tax for sole traders.

In the view of the present authors both of these additional schemes are already addressed by the existing rules. In the first case, the transactions are addressed by means of the concept of False Entrepreneurship (referring to shell companies) and corresponding rules (addressed in section 2.4. below) and the second may be addressed by Transfer Pricing Rules. The problem with the second scheme is that the current transfer pricing rules have only limited scope with respect to domestic transactions and they may thus require fine-tuning.

The tax authorities have repeatedly tried to challenge some of the transactions outside the scope of the SAARs by applying the general principles of Civil Law, but failed, and the SAARs existing in Kazakhstan are not applicable in such cases, unless they are modified. The advantage of GAARs would clearly be that the SAARS do not always have to be adjusted when the taxpayers find another way around them.

2.3 Civil law doctrines on abuse of law

The Civil Code contains several provisions and principles that can be contemplated as anti-avoidance and anti-abuse measures,[59] though the question remains to what extent they can be employed to challenge abusive tax avoidance and tax shelters given the limits of the Civil Code in terms of application.

The limits may be considered to exist due to the fact that the Civil Code,[60] when establishing its scope of application in Article 1 paragraph 4, specifically provides that: "*4. Civil legislation shall not apply to property relations which are based on the administrative or any other power subordination of one party by the other, including tax and other budget relations, except for the cases provided for by legislative acts*".

[59] The authors wish to express their gratitude for the contribution of Bakhytzhan Kadyrov who outlines some of these provisions in the draft chapter on Tax Planning from Tax Lawyer's point of view in the book: Introduction to Tax Law in Kazakhstan, edited by Tomas Balco and CATRC team.

[60] The Civil Code of the RK, adopted by the Supreme Council of the RK on 27 December 1994.

It thus becomes questionable whether these otherwise highly effective anti-abuse doctrines could be extrapolated into the application of tax law by the tax authorities.

The following provisions and principles can be found in the RK Civil Code:

- *Good Faith Principle*[61]

When implementing their rights, citizens and legal entities must act reasonably and in good faith, and comply with the legislative requirements, moral principles and business ethics. This provision contains a fundamental principle. It captures the essence of how the business should operate. Specifically, the good faith requirement is important. Normally, tax avoidance involves a breach of this requirement.

- *Abuse of law is prohibited* [62]

This is a more specific principle. It essentially provides that taxpayers should not apply the law in an abusive manner, even if the application is correct from a formal perspective.

- *Invalidation of transactions in the case of attempts to avoid liability*[63]

According to this provision a transaction can be invalidated if it was concluded with the intention of avoiding liability *vis-à-vis* a third party or the state and the party to the transaction knew or should have known about this intention. This may be considered the main anti-avoidance provision contained in the law. Specifically, the expression "avoid liability *vis-à-vis* a third party or the state" is important because one of the responsibilities towards the state is payment of taxes. This anti-avoidance provision has been invoked by the tax authorities.

While this principle may seem clear, its practical application is complex. For instance, the "intention" to avoid liability is not easy to prove. In addition, the knowledge element is not always crystal-clear. Finally, the invalidation of the transaction may be difficult to enforce in practice.

- *Sham transactions doctrine*[64]

This rule provides that a transaction can be invalidated if it is sham, i.e., it is not intended to create legal consequences or it is aimed at concealing

[61] Art. 8(4), Civil Code of RK.
[62] Art. 8(5), Civil Code of RK.
[63] Art. 158(3), Civil Code of RK.
[64] Art. 160, Civil Code of RK.

another transaction. The sham transaction doctrine can be used in conjunction with transactions being declared invalid in the case of a taxpayer attempting to avoid tax liability. In particular, tax avoidance may involve entering into arrangements that are sham in substance, although they may appear to be genuine from a formal perspective.

2.4 Concept of false entrepreneurship as the only example of a GAAR-inspired rule in criminal, tax and administrative law

It is important also to mention the concept of false entrepreneurship, which is based on criminal and administrative law, and applied in the case of fraudulent transactions, leading to the invalidation of such transactions.

The approach currently used by the enforcement bodies is that upon identification of the behaviour that qualifies as false entrepreneurship, the financial law enforcement authorities will carry out investigation leading to criminal proceedings against the parties involved. Based on the decision of the criminal courts, the parties may be held liable for committing the criminal offence of:

- constituting (establishing or buying) entities, which qualify as false enterprises,[65] or
- carrying out transactions not aimed on carrying out commercial activity.[66]

In cases in which the damage caused does not reach the threshold envisaged by the Criminal Code, the law-enforcement agencies may carry out administrative proceedings to the same effect, addressing the same administrative offences:

- constituting (establishing or buying) entities, which qualify as false enterprises,[67] or
- carrying out transactions not aimed at carrying out commercial activity.[68]

[65] Art. 215, Criminal Code of RK.
[66] Art. 216, Criminal Code of RK.
[67] Art. 154, Administrative Code of RK.
[68] Art. 154-1, Administrative Code or RK.

Subsequently, the law enforcement agencies may seek civil law proceedings with the objective of declaring the legal entity (false entrepreneurship) to be non-existent.

This approach can be used when it can be proven that the legal entity was established in conflict with the obligatory norms of civil law related to the establishment of the legal entities. For example, this would be possible in cases in which:

- the legal entity was established by persons lacking legal capacity (deceased persons or persons with severe disabilities);
- the legal entity was established in the absence of knowledge of the person registered as the founder (in cases of stolen ID, passport or other document of identity, without the knowledge of the owner);
- the legal entity was established in breach of other obligatory norms for setting up legal entities.

Alternatively, the law enforcement agencies may seek to invalidate the transactions concluded without the aim of entrepreneurial activity.

This approach may be used in cases where it is impossible to invalidate the legal entity, yet it was proven in the criminal or administrative proceedings that the transactions entered into were not aimed at carrying on entrepreneurial activity but they were transactions aimed at defrauding the other party (false loans) or causing damage to the state (tax fraud).

The invalidation of the legal entity results in the invalidation of all the legal acts entered into by the legal entity from the moment of its establishment. The invalidation of the legal acts and legal transactions results in their invalidity from the moment of conclusion of these transactions.

Subsequently, the tax authorities may address the taxpayers (the parties to the agreement) entering into transactions with false enterprises or those entering into transactions not aimed at carrying out commercial activity. As a result of the invalidation of these transactions under the civil law, they may also make a claim for the invalidity of the tax consequences under the tax law.

Thus the payments made in respect of the invalidated transactions will

become non-deductible expenses[69] and also any VAT claims made on the basis of the invalidated transactions will be considered as invalid. As a result the claims for the refund of VAT or claims for VAT credit will become invalid[70].

These are the current approaches adopted in Kazakhstan to combat fraudulent entrepreneurs and the frauds resulting therefrom. They have the legal consequence of invalidating acts concluded, with the subsequent invalidation of these transactions for the purpose of tax law leading to non-deductibility of expenses and loss of entitlement to VAT refund.

2.5 Potential GAARs and competitiveness of Kazakhstan in the region

The repeatedly postponed introduction of GAARs in Kazakhstan should also be seen in the broader regional view. Not long ago, Kazakhstan became a member of the Eurasian Economic Union (EEU) with four other countries in the region[71]. While the countries are expected to cooperate as part of the economic union, they also compete for investments. Kazakhstan will clearly need to compete for investment and development with a gigantic competitor: Russia. As a result Kazakhstan aims to preserve its business and fiscal climate attractiveness for investors to compete with other EEU members and other neighbouring countries in the Central Asian region, including Mongolia. Thus, we briefly investigate whether the introduction of GAARs may be seen as a potential threat to the attractiveness of the tax regime in Kazakhstan in comparison to other member states, though this has not been publicly debated as a political concern.

Based on the study conducted by the authors of this article, currently there are no legislative GAARs envisaged in the tax systems of other member states and neighbouring countries.

[69] Art. 115, Tax Code of RK.
[70] Art. 257, Tax Code of RK.
[71] The Eurasian Economic Union between Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia entered into force on 1 January 2015.

Nevertheless, over the past 15 years Russia has developed several judicial doctrines to combat tax avoidance schemes[72] including doctrines on:[73] the good faith of the taxpayer,[74] unjustified tax benefit/enrichment,[75] substance (reality) of economic activity,[76] abuse of law[77] and transactions undertaken in violation of the legal order,[78] with the latter two based on civil code provisions.

Table 1 (below) shows the development of foreign direct investment (FDI) in Russia with reference to the introduction of anti-avoidance doctrines.

[72] See D. VINNITSKIY, *Tax Planning and Abusive Practices in Domestic and International Tax Law: the main trends in the development of legislative and judicial doctrines.*

[73] See Ibid. and Y. IGOSHINA, *GAAR as an instrument to regulate international taxation*. "Economics and Law", No. 07-08 2015.

[74] See Determination of the Constitutional Court No. 138-O dated 25 July 2001 at the request of the Russian Ministry for Taxes and Levies for clarification of the Decree of the Constitutional Court of the RF dated 12 October 1998 in the case on the constitutionality of paragraph 3 of Article 11 of the Law of the RF "Concerning the basis of the tax system in the RF" and Decree of the Constitutional Court of the RF No.3 dated February 20, 2001 in the case concerning the constitutionality of the second and third paragraphs of Article 7 paragraph 2 of the Federal Law On Value Added Tax in connection with the complaint of the Closed Joint Stock Company VOSTOKNEFTERESURS.

[75] Resolution of the Plenum of the Supreme Arbitration Court of the RF No. 53 dated October 12 2006 "On the assessment by the arbitration courts of the entitlement of the taxpayer for tax benefits".

[76] Resolution of the Presidium of the Russian Federation No.9299/08 dated 11 November 2008 in the court case of Closed Joint Stock Company "Kestroy 1".

[77] Art.10 Civil Code of the RF.

[78] Art.169 Civil Code of the RF.

Table 1: Volume of foreign direct investment in Russia 1998-2013[79]

	Per year (mln USD)	GAAR doctrines
1995	2,065	
1996	2,579	
1997	4,865	
1998	2,761	
1999	3,309	
2000	2,714	
2001	2,748	Good faith doctrine
2002	3,461	
2003	7,958	
2004	15,444	
2005	15,508	
2006	37,595	Unjustified enrichment
2007	55,874	
2008	**74,783**	Abuse of law doctrine
2009	36,583	
2010	43,168	
2011	55,084	
2012	50,587	
2013	**69,219**	
2014	22,857	

The growth of the flow of investments to Russia was not characterised by any significant decrease in the early 2000s that could be assumed to be connected with GAARs. In 2009 there was a significant decrease and it might be argued that this was because of the introduction of the abuse of law doctrine, introduced in Russia in 2008. However the authors do not share this view but rather suggest that FDI calculated with reference to assets with foreign investment reflects the value of underlying assets. One can note a sharp increase of FDI in 2008 and subsequent decline in 2009,

[79] Data retrieved from World Bank website.

corresponding with variations in the price of oil, with the price heading for USD 200 per barrel shortly before the crisis then dropping below USD 50 after the global financial crisis.

Furthermore, while some tax avoiding investors clearly take note of provisions like GAARs, for many other investors the introduction of some of the doctrines means reasserting the power and independence of the courts, indicating a growing degree of maturity of the judicial and legal system and rule of law, thus favouring investors who come for long-term gain and not merely for short-term profit by taking advantage of the rights of other investors.

As a result, while some proponents of the argument that GAARs have a negative influence on FDI may clearly cite the Russian example as a case in point, the authors would argue otherwise, based on the reasons outlined above. However, any further debate would require data-driven economic analysis.

The authors are aware that it is difficult to measure the indirect influence of GAARs on investment, as correctly pointed out by Silvani. It may be possible to calculate the direct increase in tax revenue from a properly functioning GAAR, but not so easy to estimate the amount of investments and subsequent tax revenue that would be received, if any, if GAARs were not introduced. Additionally, Russia may be seen as an example of a country that in view of Schon would continue to receive investments in any case, irrespective of changes to legal provisions, as long as the rule of law is upheld.

In Belarus as well, practice shows that the tax authorities find ways to challenge some transactions despite the absence of GAARs. For example, they may challenge contracts concluded by a resident company with non-residents who do not submit tax returns in their states of residence. If it is further established that a non-resident is delinquent or has been liquidated, the tax authorities may treat payments transferred to such non-residents as income of the resident company and impose applicable taxes and penalties[80].

[80] Derived from KPMG Global Corporate Tax Handbook, 2014.

As a result, since other major economies in the region have already started to apply judicial doctrines to combat tax avoidance, the authors of the present article believe that Kazakhstan will not be an innovator once it introduces legislative GAARs into the Tax Code, and thus, assuming it works properly, it should not undermine the attractiveness of the tax system, but rather could inspire other EEU member states and other countries in the region to do the same.

In the view of the authors, tax abusive behaviour, that cannot be dealt with by SAARs, nor by civil law doctrines, should undoubtedly lead to the introduction of GAARs in Kazakhstan. At the same time, the authors agree that the introduction of GAARs should follow best practices and take into account that Kazakhstan is a developing country, where neither the administrative bodies nor the courts are experienced in purposive interpretation of the law and therefore, GAARs should provide safeguards and guarantee compliance with the rule of law on the part of the state.

In the next section the authors will review the wording of the GAAR proposed earlier in Kazakhstan, to identify its deficiencies and suggest potential improvements based on other countries' practices and studies conducted by international scholars and research groups.

3. Review of GAAR proposed in Kazakhstan

3.1 Assessment of draft Kazakh GAAR

The earliest wording of GAAR which is publicly available was proposed with the draft amendments to the Tax Code in September 2013. The draft provision of Article 556-1 was worded as follows:

"*Article 556-1, Prevalence of economic substance over form when implementing tax control.*

When discovering (in the course of a tax audit) instances of performance (commitment) by a taxpayer (tax agent) or group of taxpayers (tax agents) of actions, transactions or commercial operations which do not have economic sense and which resulted in a decrease of tax liability, the tax authorities shall determine the tax obligation of such taxpayers (tax agents) without taking into account such actions, transactions or commercial operations. A list of typical actions, transactions or commercial operations

which do not have economic sense and which result in a decrease of tax obligations shall be established by the Government of the Republic of Kazakhstan based on the recommendations of the Consulting Council on Tax Issues"[81].

During the summer of 2014, a new version of possible GAAR provisions was circulated in Kazakhstan. This version reads as follows:

"*Article 556-1. For purposes of tax audits, substance prevails over form.*

Tax authorities conducting taxation audits shall ignore any act or failure to act on the part of a taxpayer or group of taxpayers, including all business or other transactions, where such act or failure to act (a) lacks economic substance and (b) causes a decrease in tax liability; and the tax authorities shall ignore such act or failure to act in determining the liability of such taxpayers"[82].

It is clear from a cursory reading that the wording and structure of the provision changed slightly compared to the version circulated to the public in September 2013, in that the provision gives a right to the tax authorities to disregard both legal acts and any failure to act in cases in which they lack economic substance and lead to a reduction in tax liability.

The wording and position of the GAAR within the Tax Code makes it applicable to all areas of taxation – direct and indirect taxes, as well as special tax regimes and other obligatory payments regulated by tax code.

The objective element of the proposed GAAR was to identify an act or failure to act that lacks economic substance, which as a result decreases tax liability. Assuming these conditions are met, the tax authorities may disregard these actions, transactions or operations. Additionally, a list of such transactions was supposed to be drawn up by the government based on the recommendations of the Consulting Council on Tax Issues in accordance with the wording initially proposed, but the clause was deleted in the second version. The intentions of the taxpayer or other subjective elements were not considered and are not part of the current proposal.

[81] Unofficial translation kindly provided by Mr. Bakhytzhan Kadyrov, Associate at Morgan Lewis's Business and Finance Practice in Almaty and also Deputy Chair of Tax Working Group of American Chamber of Commerce in Almaty, Kazakhstan.

[82] Translation by Mariya Dzhaembayeva, CATRC Researcher, edited by Prof. John Prebble.

The legal consequence of applying GAARs (if adopted with the latest wording) is that the tax authorities would be able to assess tax liabilities irrespective of the legal actions and transactions undertaken. It is thus assumed that the legal transactions will remain valid, but the tax assessment will be based on economic substance rather than legal form.

The rule does not currently specify what should be the basis for assessment – what kind of transactions, in particular, would be considered for the assessment.

To examine the rule more closely, the authors intend to compare it with the principles of good GAAR as summarised in the Aaronson report prepared for the UK government prior to the introduction of a legislative GAAR in the UK[83] and also with the recommendations made by the Shome Committee[84] to the Indian government prior to introduction of GAAR in that country[85].

In the UK report, the Aaronson advisory committee identified the principles that good GAARs should have in order to be effective and, at the same time, to ensure certainty for the public, allowing reasonable tax planning and preventing the abuse of power by the tax authorities. Such a rule, in the opinion of Aaronson, should be narrowly drafted and contain certain safeguards.

In particular, the following principles are the most critical in the view of Aaronson when formulating the GAAR:

1. The rule should contain (non-exclusive) definitions of terms contained therein.
2. The burden of proof should be on the tax authorities.
3. The rule should provide for clear procedures to invoke the GAAR.
4. The rule should provide for the establishment and functioning of special Advisory Panel to monitor application of the GAAR.

[83] See report by G. AARONSON, *A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system,* 2011. The report and UK GAAR were chosen due to the intention of the rapporteur and the legislator to would ensure certainty for the public, preserve the attractiveness of the UK tax system, and at the same time be an effective tool to combat tax avoidance. As in Kazakhstan, the introduction of a legislative rule was long debated in the UK and therefore, the study undertaken prior to the introduction of the rule, in the view of the authors, may be a good lesson for Kazakhstan to consider as well.

[84] Shome Committee Report on GAAR, 2012.

[85] Indian GAAR is effective from 1 April 2018 and contained in section XA of the Income Tax Act 1961.

Applying the principles provided by Aaronson, both Kazakh drafts would probably be considered as extensive (broad). The 2014 version is even broader than the 2013 one, due to inclusion of the "omitted acts" requirement and the elimination of the clause that the list of economic transactions subject to GAAR should be provided by the tax authorities in advance. Aaronson would consider these drafts to be extensive because they do not provide any safeguards and grant full discretion to the tax authorities to interpret the rule and the terms therein, while giving no guidance on the administrative procedure to implement the rule.

Thus, in contrast, as recommended by Aaronson, the UK GAAR applies only to abusive arrangements, the indication of which is provided within the rule itself,[86] so that the tax authorities and taxpayers are to a certain extent guided by the rule and aware of its requirements[87]. In the report, Aaronson proposes to explicitly exclude reasonable tax planning techniques from the scope of the GAAR and also the arrangements which are not intended to avoid taxation,[88] but these recommendations were not followed exactly by

[86] See section 5 "General Anti-Avoidance Rules", Finance Act 2013. Section 206, para.1: "*This Part has effect for the purpose of counteracting tax advantages arising from tax arrangements that are abusive*".

[87] Ibid, Section 207, para. 2, Extraction of indication on what may be considered as an abusive arrangement: *"(2) Tax arrangements are "abusive" if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including—*
(a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,
(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
(c) whether the arrangements are intended to exploit any shortcomings in those provisions".
Also see Section 207, paras. 4 and 5
"(4) Each of the following is an example of something which might indicate that tax arrangements are abusive—
(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,
(b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes, and
(c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid, but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.
(5) The fact that tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice, is an example of something which might indicate that the arrangements are not abusive".

[88] Aaronson, supra note 83, p.45.

the legislator. As a result the indication on abusive arrangements to a certain degree excludes reasonable courses of action.

Similar to the Aaronson recommendation, the Shome Committee recommended the Indian government to include the definitions of critical terms contained in the rule, such as "commercial substance" or "connected person"[89]. The Committee also recommended excluding permitted tax mitigation arrangements from the scope of GAAR by providing an indicative list of transactions that are not covered by the rule (negative list)[90].

To provide similar safeguards, the Kazakh rule would need to define or at least indicate what should constitute as an "act" or "failure to act" having no economic sense[91]. Thus, the initial inclusion of provisions concerning the responsibility of government to issue a list of transactions that would be subject to the GAAR would bring the current draft closer to the standards indicated by Aaronson and Shome. It is important that this list should not be exclusive in order to have more effect.

Another safeguard suggested by Aaronson[92] and implemented by legislation is the placing of the burden of proof on the tax authorities[93]. Thus, if the tax authorities consider a particular transaction to be abusive, they should notify the taxpayer accordingly and explain why they consider the advantage arising from a specific arrangement as abusive. The tax authorities should also set out a course of action that they consider should be taken and inform the taxpayer about the period to make representation, and may also set out the steps the taxpayer may take to avoid the proposed penalties[94]. A similar recommendation for placing the burden of proof on the tax authorities was made by the Shome Committee and accepted by the Indian government[95].

In contrast, the Kazakh draft did not comment on the procedures the tax authorities should take to implement GAAR, thus leaving it to the discretion

[89] Shome report, supra note 84, pp.5 and 26.
[90] Ibid, pp.7 and 35.
[91] For an example of a possible definition see Section 97, supra note 85.
[92] Aaronson, supra note 83, p.49.
[93] See Schedule 43 on "General Anti-Avoidance Rule: Procedural requirements" Finance Act 2013.
[94] Ibid. Schedule 46.
[95] See A. GIRI, *25 key takeaways from the final Shome Committee report on GAAR*. International Tax Review, 2013.

of the tax authorities. The draft does not specify whether the burden of proof should be placed on the tax authorities or the taxpayer.

The last safeguard recommended by Aaronson and accepted by the UK legislator concerned the establishment of a special Advisory Panel that would independently assess whether the GAAR should apply[96]. Under the procedural rules governing the application of the GAAR in the UK, the tax authorities cannot invoke the GAAR unless they have first consulted the Advisory Panel. Although the Advisory Panel has no legislative or judicial power, and does not issue a binding opinion, it should be consulted by the tax authorities in each particular case and it may be consulted also in judicial trials[97]. In Aaronson's view, the opinions issued by the Advisory Panel over a certain period could serve as non-binding but illustrative guidelines for all the parties concerned. Similarly, the Shome Committee recommends introducing a GAAR Approving Panel. This recommendation was accepted by the Indian government, but the Panel was granted more power than the one established in the UK. In India, decisions of the Approving Panel are binding for the taxpayer concerned and the tax authorities. The applicability of the same approach in Kazakhstan is to be discussed by the authors in section 3.4 below.

In general in the opinion of Aaronson,[98] and also Silvani,[99] the more narrowly drafted rule may be easier to apply and it may result in greater certainty and predictability for taxpayers, as it should enable taxpayers to engage in reasonable and responsible tax planning.

The Shome Committee made some recommendations in addition to those in the Aaronson report. For instance, the Committee recommended that India should introduce GAAR immediately but defer the effective date by three years, so that the time in between could be used to increase taxpayers' awareness of the new rule and prepare the employees of the tax administration to deal with their new responsibilities. In the view of the authors the same approach would be practical in the case of Kazakhstan

[96] See Schedule 46, supra note 93.
[97] See Advisory Panel Terms of References.
[98] AARONSON, supra note 83, p.3.
[99] SILVANI, supra note 9.

and it should be taken into account for the training of state officials applying the GAAR, if it is adopted.

Some more recommendations made by the Shome Committee not currently envisaged in the Kazakh GAAR, including the exclusion of inter-company transactions from the scope of the GAAR, the "grandfathering" of certain transactions, and the relationship between the GAAR and tax treaties, will be discussed below.

3.2 How reasonable is the public critique of the proposed GAAR in Kazakhstan?

Apparently, the business community in Kazakhstan is strongly against this draft Article 556-1 and it will be a matter of political process whether it is eventually enacted or not.

Based on the opinion of one of the leading local law firms,[100] the current version of the article should be revised to ensure that:

1) the rule is applicable only during the documentary tax audit to ensure there is documentary evidence to disregard the situation;
2) the rule is applicable only in transactions between related parties;
3) there is a provision preventing the tax authorities from abusing the rule.

In the opinion of business leaders represented by Deloitte Kazakhstan,[101] the GAAR rules should correspond to several criteria and be introduced gradually, so businesses are aware of the coming changes and are prepared. Businesses expect:

1) clear principles of GAAR, so that the new rules do not complicate the existing administrative burden of taxpayers;
2) clear guidance to clarify which provisions of the domestic law/tax treaties will prevail over domestic GAARs;
3) the setting up of a special group by the tax authorities that will be responsible for consulting taxpayers on GAARs.

[100] Opinion of one of the law firms in Kazakhstan, GRATA.
[101] A. MAHON., *Norms on prevention of tax-avoidance,* Kapital, 11 November 2014.

The most recent attempts to introduce GAARs in 2014 were challenged by the Association of Taxpayers of Kazakhstan as well as by the Association of Entrepreneurs, currently two major players representing private-sector interests. The possible introduction of GAAR is triggering various reactions of business sector, consulting firms and law firms.

In the view of the authors of this paper and based on the principles laid down in the Aaronson report, the expectations on the part of the public in Kazakhstan are reasonably justified and should be taken into account by the legislator. The political debate on GAAR mainly addresses issues like predictability of tax treatment by taxpayers, and certainty of legal transactions. Accordingly,[102] taxpayers take the view that GAARs should be clearly formulated, have detailed and broad instructions, place the burden of proof on the tax authorities, and ensure that the application of the GAAR should be supported by verifiable facts. In addition, the GAAR should contain a certain threshold and transactions below which taxpayers would not be subject to the GAAR. It should not be applicable along with the legitimate application of the tax incentives, and, thus, the GAAR should be applicable only where there is an intention to evade or lower taxes.

3.3 Comparison of the draft Kazakh GAAR with the draft Common Consolidated Corporate Tax Base provisions: is there anything to learn?

In addition to the principles laid down in the Aaronson report, the authors of this article are also interested in whether the current EU discussion and drafts of common GAAR for the EU member states could provide a good example for a developing country, as Kazakhstan, to follow. In this section the authors will consider the draft Common Consolidated Corporate Tax Base (CCCTB) provision on GAARs as outlined in the EU Recommendation on Aggressive Tax Planning (the ATP Recommendation).

[102] EY Kazakhstan also presented this position during the Ninth Tax Conference in Kazakhstan, the Partner that supports the general position of taxpayers and their representatives.

In 2011, as part of a draft Directive for Common Consolidated Corporate Tax Base (CCCTB)[103] an anti-abuse clause was proposed, worded as follows:[104] "*Artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base.*
The first paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts".

The term "sole purpose" in the first paragraph has been discussed extensively by scholars, who believe that this wording could easily be abused, since there may be more reasons for the taxpayer, in addition to obtaining tax benefits, to adopt arrangements in a certain way and therefore the provision will not apply in cases where the tax advantage was not the sole purpose of the transaction. As a result, it was proposed to replace "sole" with "one of the reasons" (or a synonym thereof), so that it becomes more difficult for the taxpayer to prove that the tax advantage was not one of the reasons to enter into the particular arrangement[105].

With regard to the second paragraph, it has not yet been challenged by scholars. The draft is unique, since it works as a saving clause and should prevent the GAAR from penalising situations in which taxpayers choose the more favourable of the available options for carrying out genuine commercial transactions. In other words, the GAAR should tolerate abusive transactions having economic sense and carried out within the limits of the law to achieve the best possible tax outcome. At this point the question arises as to whether it was indeed the outcome the EU Commission had in mind and whether it is necessary to keep this saving clause in the article.

The EU publications[106] issued prior the Directive on CCCTB do not comment on this matter. In this connection, the Business Europe Task Force on the CCCTB group in general commented that business is against inclusion of GAARs in the Directive due to the uncertainty they may bring. In case such

[103] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4, 2011/0058 (CNS).
[104] Ibid. Art. 80.
[105] For more see Freedman, supra note 14, p.170.
[106] For review of EU communications prior issuing the CCCTB proposal.

a rule is included, business will tend to opt for CCCTB only if the rule is sure to "strictly adhere to the concept of wholly artificial arrangements and in no way conflict with bona fide business activities",[107] which is actually how the rule is currently drafted. The same view was shared by the EBIT group, that endorsed the exception for genuine commercial activities.

In this respect Prof. Prebble expressed his concern,[108] that the saving clause had most likely been inspired by UK judicial practice, in particular by the doctrine arising from the *Duke of Westminster* case, which provided for "literal and strict interpretation" of the law[109] and was the leading doctrine in the UK, Canada and Australia[110] until 1982, favouring and justifying abusive practices for many years[111]. This doctrine basically allowed taxpayers to use their ingenuity to reduce tax liability by means of legitimate tools, as allowed by the current CCCTB wording.

Every man is entitled if he can to order his affairs so as the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax[112].

Although the doctrine was criticised by scholars, it was not linked to the current CCCTB provision. In the view of Prebble, it "would be a big mistake of the EU to incorporate that saving clause in the directive", since it may establish the same legal framework as in the *Duke of Westminster* case.

In this connection, unlike the draft Kazakh GAAR and also the old UK doctrine, the CCCTB draft provision establishes that the GAAR will apply only in the case of transactions where the sole purpose is tax avoidance.

As a result, in contrast with the old UK doctrine it should distinguish between artificial arrangements and arrangements having an economic

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[107] Workshop on the Common Consolidated Corporate Tax Base (CCCTB) Comments on document CCCTB/RD/004 Anti-Abuse rules in the CCCTB, October 2010, p.1.

[108] Prof. Prebble expressed his concern about the CCCTB draft wording of GAAR provision during the lectures on "Jurisprudential perspective of taxation law", held on 10-18 September 2015 at the Vienna University of Economics and Business, attended by one of the authors of this article.

[109] See VANISTENDAEL, supra note 5, p.25.

[110] Ibid, p.27.

[111] See for more cases, which in conjunction with the Duke of Westminster case were cited by the courts even in situations of obvious abuse.

[112] *IRC v. Duke of Westminster* (1936) 19 TC 490, [1936] AC 1.

sense, whereas the old doctrine is said to justify the situations where tax consequences were absolutely divergent from the real economic position[113]. The argument against the CCCTB draft GAARS is, nevertheless, that it may be easy for a business to assign a commercial sense to tax arrangements[114] and therefore justify that arrangement as having an economic sense, within the four corners of the law and therefore it should be justified, although it is carried out and structured to mitigate tax not within the spirit of the law.

Summarising on the above opinion, the CCCTB draft GAAR may not be the best example for developing countries, nor for developed ones, since the safeguards provided therein could be used against the rule itself if interpreted incorrectly. The authors of this article understand that the saving clause was most likely included to preserve the right of taxpayers to legitimate tax planning. However, considering the opinion of Prof. Prebble and the influence of the old doctrine in the UK, the wording of the rule as currently drafted may lead to the misuse of the rule and it should be amended. In particular, an effective GAAR should aim to tackle transactions in which "one of the main purposes" of the arrangement is to achieve tax advantages, and should not provide for the opportunity of taxpayers to abuse the provisions of the law to achieve the best possible tax outcome, if the means taken by the taxpayers are abusive and are not falling within the tax planning opportunities intentionally provided by the states.

In 2012, the European Commission has issued an updated non-binding wording of domestic GAARs with its Recommendation on Aggressive Tax Planning (ATP Recommendation)[115] to promote domestic GAARs for member states in situations which may not fall within the scope of Special Anti-Avoidance Rules[116]. The recommended GAAR provision reads as follows:

"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. National authorities shall treat these

[113] HM Revenue and Customs (HMRC) General Anti Abuse Rule (GAAR) guidance (Approved by the Advisory Panel with effect from 30 January 2015), p.4.
[114] J. FREEDMAN, supra note 14, p.170.
[115] Brussels, 6.12.2012 C(2012) 8806 final.
[116] Point 4.1., Commission Recommendation of 6.12.2012 on aggressive tax planning.

arrangements for tax purposes by reference to their economic substance"[117].

The term "sole purpose" in the CCCTB GAAR draft was replaced with the "essential purpose", which in the view of the Commission could be considered as the main purpose of the arrangement, whereas all other purposes would be negligible by comparison.

Additionally, similar to the Aaronson recommendation, the ATP recommends listing the artificial arrangements to assist but not limit the understanding of state officials and taxpayers[118]. The recommendation also proposes that the tax authorities should apply tests to assess whether the tax benefit was actually derived by the taxpayer. To do so, the tax authorities are advised to compare the tax liability due under the special arrangement concerned and the tax liability that would be due without entering into the same arrangement[119]. The saving clause was omitted from the ATP Recommendation.

In the absence of harmonised or coordinated GAARs within the EU, the draft GAAR rule in the ATP Recommendation serves as an inspiration for countries to follow and introduce into their domestic law. This may strengthen the current versions in some of the member states, which have limited experience with the application of GAARs.

Countries like Kazakhstan may similarly consider this ATP recommendation, which is in its essence close to the latest version of the draft GAAR provision under examination in Kazakhstan. However, it should be noted that the recommended GAAR provision should be read in conjunction with the guidelines and explanations to be effective and provide safeguards, otherwise the rule itself is quite broad. In the next section the authors will summarise the critical points required for successful GAARs in Kazakhstan based on the above analysis and discussion.

[117] Point 4.2., Commission Recommendation of 6.12.2012 on aggressive tax planning.
[118] Point 4.4., Commission Recommendation of 6.12.2012 on aggressive tax planning.
[119] Point 4.7., Commission Recommendation of 6.12.2012 on aggressive tax planning.

3.4 Suggested amendments to the proposed draft GAAR in Kazakhstan

Considering the level of abusive practices taking place in Kazakhstan that are not covered by SAARs, the authors of this article support the intention of the country to adopt GAARs. In this connection, the authors also endorse the widely held view that the current draft GAAR should be amended to provide more certainty for taxpayers and incorporate the principles of successful and GAARs providing adequate safeguards.

Returning to the recommendations of Aaronson and Shome, the rule should provide for more guidance on its applicability. In particular, the legislator in Kazakhstan may consider including in the rule:

- Definitions or rather *indications* of what would constitute an "act or failure to act, which has no economic purpose", as well as of other critical terms included further in the rule. This should be in the form of a non-exhaustive list of examples and explanations, rather than strictly defined terms, so that taxpayers gain an understanding of the kind of transactions the GAAR is intended to address, while at the same time not limiting the tax authorities excessively with strictly defined terms.
- The procedures the tax authorities should adopt to invoke the GAAR. In particular, the rule may guide tax authorities in their actions: how they should notify the taxpayer about the suspicious transactions, the way the taxpayer is expected to act on such notice, and the requirements the tax authorities need to fulfil to invoke the rule.

With regard to the substance of the rule, at present the rule is proposed to apply only to arrangements which have no economic justification. In this respect, coming back to the notion that the arrangement may have some economic justification but still be abusive, the authors suggest considering adopting an additional requirement so that the rule not only covers the transactions with no economic justification, but also arrangements with an economic justification, but that are abusive at the same time. This raises the question as to whether the abusive arrangement should be defined or indicated in the rule or whether the reference in the Tax Code should be

made to Civil Law doctrines on the abuse of law[120]. In the view of the authors, it may be better to provide a specific indication of abusive transactions in the Tax Code. This is also because the current wording of civil law doctrines is fairly subjective and may cause additional interpretative issues if used as the main point of reference.

At present, the draft provision does not contain any subjective element, with reference to "the intention of the party" or "main purpose of arrangement", which is desirable, also in the opinion of the authors, since these elements are difficult to prove for the parties and, as a result, the inability to provide proof may limit the effectiveness of the rule. This opinion is shared by Freedman who finds subjective tests to be problematic in the context of tax law, given its complexity and the constant reliance of taxpayers on advisors. He therefore believes it to be better to provide safeguards in the rule rather than including subjective elements[121].

Another safeguard suggested by Aaronson[122] and Shome and in the view of the authors worth considering is Kazakhstan concerns the placing of the burden of proof on the tax authorities. This safeguard would also be in keeping with public expectations and as a result the rule may be better accepted by the public.

The last safeguard recommended by Aaronson concerns the establishment of a special Advisory Panel that would independently assess whether the GAAR should apply. In Aaronson's view such a panel should be independent from the tax authorities (at least some of the panel members)[123] and have expertise in tax matters. The authors support the idea that a special independent GAAR panel with the authority to issue non-binding opinions at the request of the tax authorities on the arrangements adopted by taxpayers may be necessary in Kazakhstan to provide guidance and understanding for both the tax authorities and taxpayers.

Currently Kazakhstan has a Consulting Council on tax matters, which was set up in accordance with the Tax Code[124] at the end of 2008[125] and to a

[120] See part 2.3 of this article for a discussion of civil law anti-abuse principles in Kazakhstan.
[121] J. FREEDMAN, supra note 14, p.171.
[122] Aaronson, supra note 83, p.49.
[123] Ibid, p.58.
[124] Article 11 Tax Code of the RK.

certain extent functions as an advisory panel. Its main responsibility is to propose recommendations and amendments to the tax legislation,[126] as well as giving recommendations on the prevention of tax avoidance and evasive schemes[127]. In this connection, the Council has the power to invite tax specialists from the central state and local bodies, as well as international experts[128].

The Council consists of permanent members, who are representatives of business and state bodies, and is chaired by the Prime Minister[129].

The potential of this Council to act as a GAAR Advisory Panel is however doubtful in the view of the authors. This is because, first of all, tax evasion cases occur quite often and it would be complicated to constantly engage high-level officials to consider each case. Moreover, not all of the current representatives of the Council may be familiar with tax legislation in sufficient detail to examine highly technical tax problems. Additionally, most of the current members represent the interest of the state and cannot thus put forward an independent opinion.

However, in general, the authors of this article believe that the establishment of a GAAR advisory panel as advocated by Aaronson may be necessary in Kazakhstan, and the existence of a Consulting Council is an advantage. In the view of the authors, the successful functioning of the

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[125] Decree of the Government of the RK No.1314 dated 31 December 2008 on the "Establishment of the Consulting Council on tax matters".

[126] Art. 1 of the Decree of the Government of the RK No.1314 dated 31 December 2008.

[127] Art. 2 Ibid.

[128] Art. 2 Ibid.

[129] Current members in accordance with Decree of the Government No.970 dated 4 September 2014 are:

1. Prime Minister of the RK (chairman)
2. First deputy of the Prime Minister (deputy chairman)
3. First Prime Minister of national economy (secretary)
4. Minister of the National Economy
5. Minister of Agriculture
6. Minister of Finance
7. Minister for Investment and Development of the RK
8. Judge of the Supreme Court
9. Deputy of the Chairman of the Agency of the RK on civil services and anti-corruption matters
10. Deputy of the chairman of the Association of the financiers of the RK
11. Chairman of the Forum of entrepreneurs of the RK
12. Chairman of the Association of taxpayers of the RK
13. Chairman of the National Chamber of Entrepreneurs of Kazakhstan
14. Chairman of the Working group on tax matters of the Foreign investors' Council chaired by the President of the RK.

GAAR Advisory Panel could be achieved by establishing a permanent advisory panel on GAAR under the Consulting Council, that would report to the Council, but be independent and consist of both tax official with extensive expertise in dealing with tax cases (as requested by the public) and independent experts from business and even international experts to ensure wide-ranging expertise and neutrality. At this point, the authors find interesting the idea put forward in India to appoint a retired High Court judge as chair of the Panel[130]. First of all, it may be possible to find a retired judge who has acquired expertise of working with tax cases and who can represent an independent position from the state. From another point of view, a retired judge in Kazakhstan could be used to interpret the law formally, rather than for purposive interpretation necessary for the application of GAAR.

Although such a panel is proposed to act as an advisory body only, issuing non-binding opinions, it is nevertheless important to ensure the quality and reliability of the work undertaken by the panel, should it be established.

Another recommendation would be to consider the introduction of a "grandfathering" provision that would prevent application of the rule to transactions undertaken before a certain date. Thus India provided selective immunity for income from the "transfer of investments" made before 30 August 2010, whereas the Shome committee proposed granting immunity for all investments (but not arrangements) made prior to or on the date of commencement of GAAR[131]. Should there be strong public resistance in Kazakhstan to GAAR in relation to transactions taking place in the recent past, that resistance could perhaps be overcome by establishing a later effective date, which would allow the abusive transactions to come under the statute of limitations. This may not be an ideal outcome from the point of view of the tax administration, but would ensure the implementation of GAAR, rather than having no GAAR and continuing the debate for another 10 years or more.

The authors would also like to comment selectively on certain public positions on the proposed GAAR. Business leaders propose that GAAR

[130] Shome Report, supra note 84, p.6 and p.54.
[131] Shome Report, supra note 84, p.7.

should be applicable only to transactions between related parties. In our view this proposal should not be taken up by the legislator, since abusive transactions may take place also between two independent parties, and the legislator should not limit the scope of the rule by excluding independent parties' transactions. If the rule is enacted, in the view of the authors it will most likely target both related and unrelated parties, in the same way as transfer pricing legislation does in Kazakhstan (though this legislation has attracted criticism).

Business leaders are also concerned to have clear guidance, which would clarify whether domestic or tax treaty provisions will prevail over the domestic GAAR. In this respect, the authors would recommend the legislator to include in the rules a clear statement that the GAAR should apply equally to domestic and cross-border situations irrespective of the treaty applications, as well as applying to all types of taxes and payments covered by the Tax Code, notwithstanding other provisions of the Tax Code. At this point, the authors' view diverges from the recommendation of the Shome committee. That committee recommended not overriding treaties with GAARs if the treaty concerned includes an anti-abuse clause,[132] a recommendation that was not taken up by the Indian government[133]. Transactions based on abuse of tax treaties should not be tolerated by GAAR provisions and while tax treaties generally prevail over domestic law, it is understood and also accepted by the international tax community that domestic provisions, including GAARs, can be used to determine the facts of the case to which the tax treaties are subsequently applied[134].

Business leaders in Kazakhstan are also willing to have a special group within the tax authorities responsible for consulting taxpayers on GAAR. In the view of the authors, this may be not possible in Kazakhstan at present due to the limited resources available to the tax authorities, as well as the non-existence of a similar approach with respect to other rules and types of taxes. However, this role may be gradually taken over by the GAAR

[132] Ibid, p.6.
[133] See, A. KUMAR, R. SAWHNEY, *Structuring Transactions – Watch out for 10 important features of Indian GAAR,* 2013.
[134] See para.22 and further, Commentaries to Article 1 of the OECD Model Tax Convention 2010.

Advisory Panel, should one be established. As the authors indicated above, the Advisory Panel could be a special body set up under the umbrella of the Consulting Council, with the composition would be suitably determined to address the needs of the Advisory Panel.

Another public proposal was to establish a monetary safeguard for the application of GAAR[135]. In the view of the authors, it would be better not to use monetary safeguards for GAAR purposes, since acts that may be subject to GAAR may equally consist of one or of more transactions. Thus if too high a threshold is established, individual transactions may be automatically beyond the scope of the rule due to the comparatively lower volume involved, while at the same time it may provide a loophole for taxpayers to arrange related transactions in such a way as to make these transactions look separate, thus not reaching the established threshold when considered individually. Given the complexity of potential abusive structures, and the difficulties the tax authorities may encounter in identifying certain transactions, or rather, arrangements (sets of transactions) as abusive, the authors of the present article believe it would be better not to exclude transactions due to the comparatively lower volume of funds involved, since transactions should be considered as a set of arrangements if undertaken with one purpose rather than as distinct operations, and thus certain steps in the chain of the transaction should not be excluded due to the monetary threshold. There is an argument in favour of a threshold – which would also be effective in administrative terms, as it would clearly discriminate certain taxpayers from others – as small taxpayers could continue legally to carry out tax avoidance while others due to the size of their transactions would be prosecuted.

4. Conclusion

In this article the authors discuss the need for Kazakhstan to introduce GAAR and the reasonableness and suitability of the draft rule proposed in recent years. The authors take the position that there is a need for Kazakhstan to introduce GAAR. There are abusive tax practices taking place

[135] As established in India.

in the country that cannot be currently tackled by the existing SAARs and civil law doctrines on abuse of law, unless they are permanently amended and adjusted. However, that is exactly the objective of a GAAR provision: to introduce a principle that would allow the tax authorities to challenge abusive tax practices taking advantage of the loopholes in the tax law or circumventing existing SAARs.

As a result of these practices, similar to many other developing countries, Kazakhstan continues to lose potential tax revenue due to its inability to effectively challenge tax avoidance.

Several advanced developing economies including BRICS (Brazil, Russia, India, China, and South Africa) are ahead of Kazakhstan in this respect and in recent years they have introduced GAARs or incorporated judicial doctrines to the same effect. Similarly, in the EEU region, in addition to Russia, Belarus has introduced various anti-avoidance rules in addition to SAARs.

The authors suggest that along the lines of the rest of the developing world and taking account of the fact that major economies in the region have started to apply judicial doctrines or administrative practices to combat tax avoidance, Kazakhstan would not damage its FDI prospects if it were to introduce a GAAR provision. As a result, assuming the GAAR is properly designed and works well, it should not undermine the attractiveness of the Kazakh tax system, but instead could inspire other EEU member states, and other countries in the region to do the same.

Kazakhstan could thus be an innovator if it were to introduce the legislative GAAR into the Tax Code as a legislative rule, which could also set a precedent for other countries in the region, which may follow this example.

Legislative GAAR, as currently under consideration in Kazakhstan, should result in greater certainty for legitimate taxpayers, rather than the sudden adoption of judicial doctrines on abuse of law, as in Russia or in the administrative practice of Belarus. The legislative rule should lay down clear guidelines about the situations when it can be invoked and it should also lay down certain administrative procedures for administering the rule, considering that judicial doctrines do not provide such guidance.

As a result, the authors support the view that investors who are considering legitimate and long-lasting investments in Kazakhstan will not be discouraged from making future investments by GAAR, as long as they do not have the intention to minimise taxes in the country as part of their investment strategy. It is more important for such investors to consider the other factors a developing economy as Kazakhstan can provide – e.g. access to natural recourses, skilled, but comparatively low-cost labour, good infrastructure and so on.

In the view of the authors, the ongoing efforts of the Kazakh tax authorities to introduce a general anti-avoidance rule mean that sooner or later the GAAR provision will be introduced in Kazakhstan. At the same time, the authors propose that the introduction of GAAR should comply with best practices and take into account the fact that Kazakhstan is a developing country, where neither administrative bodies, nor the courts are experienced in purposive interpretation of the law and are not prepared to deal with this. Therefore the GAAR should provide safeguards and guarantee the compliance of the state authorities with the rule of law.

The authors assessed the currently proposed draft GAAR in relation to the principles that successful GAAR should contain. As a model of good GAARs the authors studied the experience of the UK, India and the EU. As a result of the comparative analysis, it is recommended for Kazakhstan to amend the proposed GAAR, so that the rule provides for greater certainty and safeguards for taxpayers.

In particular, the rule should be as follows:

- it should contain indications (non-exclusive definitions) of the critical terms contained in the rule (for example "transaction having an economic effect");
- it should apply to transactions that have an economic justification but that are tax abusive in their nature;
- the burden of proof should be placed on the tax authorities;
- the rule should provide a clear procedural order to invoke GAAR;
- the rule should provide for the setting up and functioning of a special Advisory Panel to monitor the application of GAAR under the umbrella of the Consulting Council. The advisory panel should be

independent, and consist of both independent tax practitioners and experienced tax authority officials;

- additional learning and training on GAAR should be provided by the state to practising tax judges and to tax authority officials dealing directly with taxpayers;
- should there be strong public resistance to the rule, the legislator may consider introducing a "grandfathering" provision that would prevent application of the rule to transactions taking place before a certain date;
- the rule should apply equally to transactions between both related and unrelated parties;
- a monetary threshold should not be adopted, since it could provide another loophole to avoid application of the rule.

What remains to be seen is the exact wording of the provision and the extent to which the business community will manage to water down the effectiveness and clear up the uncertainty resulting from the GAAR provision.

Evidently, business leaders wish to limit the scope of application of the provision as well as situations and circumstances to which it will be applicable. However, in the view of the authors, some concerns expressed by the taxpayers in Kazakhstan are reasonable, reflecting in many cases the best principles formulated by western scholars with respect to effective GAARs, and thus considered by the authors when drafting recommendations for the amendment of GAAR in Kazakhstan

In the view of the authors the discussion is no longer about whether to adopt a GAAR or not, but about how such a provision should be drafted. As noted by the authors, it is highly recommended for Kazakhstan to amend the currently proposed GAAR and include additional safeguards for taxpayers and clarifications about the procedures for the application of the rule.

The authors also believe that should GAAR be introduced in Kazakhstan, it is likely that this example will be followed by other countries in Central Asia and the Commonwealth of Independent States (CIS).