



UNIVERSIDAD
COMPLUTENSE
MADRID

ANTI-AVOIDANCE RULES AND LEGAL CERTAINTY: THE BENEFICIAL OWNERSHIP IN SPAIN

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CHALLENGES IN LEGAL CERTAINTY IN A POST BEPS WORLD



- Contradictory international tax policy: ¿Aggressive tax planning? → rules with no clear aim (hard interpretation).
 - Non legal concept → soft law
 - Lack of rigorous definition in soft-law instruments of the BEPS Project
 - Aggressive tax planning → abuse? DNT? Abuse and DNT?
 - Anti-avoidance tax rules are not distinguished from anti-DNT rules
 - “Substance” exclusion in Pilar II
 - “structured arrangement” in hybrid mismatch rules
 - Anti-avoidance rules that objectivize abuse → thin-capitalization rules, CFC rules, LOB clauses...

CHALLENGES IN LEGAL CERTAINTY IN A POST BEPS WORLD



- Bad legislative technique → ruling with general principles of law
 - ☐ GAAR
 - ☐ Interaction GAAR v SAAR
 - ☐ Domestic implementation of international rules

ANTI AVOIDANCE RULES AND LEGAL CERTAINTY IN SPAIN



- Effectivity of tax justice principles (real equality and ability to pay)
- Traditional mechanism to combat abuse:
 - i. General rule for labeling/attribution (art. 13 LGT) → *ex ante* correction
 - Legality principle prohibits an economic interpretation
 - ii. Anti-avoidance measures → *ex post* correction
 - a) GAAR (art. 15 LGT-) → + tax justice and proportionality, - legal certainty
 - b) SAAR (presumptions and legal fictions) → - tax justice and proportionality, + legal certainty

BENEFICIAL OWNERSHIP IN SPAIN



- Interaction between domestic and international rules → A domestic SAAR cannot restrict a tax benefit granted by tax treaty
 - Supreme Court, 23 September 2020 → beneficial ownership clause in tax treaties
 - ❖ Molinos case?
- Supreme Court, 8 June 2023 → PSD dividend exemption
 - Spanish rule cannot establish a *iuris tantum* presumption contrary to the PSD
 - Tax Administration has the burden of proof → it attenuates legal uncertainty

BENEFICIAL OWNERSHIP IN SPAIN



- **Spanish National High Court, 17 October 2024**
 - Facts:
 - Interest payments from a Spanish entity to a Dutch entity, a mere intermediary of an Andorran entity
 - The Spanish exemption does not have a beneficial ownership requirement (contrary to IRD) → The Spanish exemption was prior to the IRD
 - Judgment:
 - It confirms the Tax Administration doctrine (TEAC ruling of 2019)
 - Reception of the ECJ's Danish cases doctrine
 - Even though the beneficial ownership requirement is not contained in the domestic interest exemption rule, EU Directive anti-abuse rule is applicable.

BENEFICIAL OWNERSHIP IN SPAIN



- **Spanish National High Court, 17 October 2024**
 - Issues pending for the appeal:
 - Should be interpreted a Spanish exemption according to a Directive enacted later?
 - The beneficial ownership rule is a genuine anti-abuse rule? If not, may the Spanish legislator broaden the exemption to entities other than the beneficial owner when there is not abuse?
 - If the domestic exemption is not applicable because the beneficial ownership is implicit, may it apply a tax treaty exemption not containing a beneficial ownership requirement → EU primacy?