

A General Anti-Abuse Rule

Consultation document

Publication date: 12 June 2012

Closing date for comments: 14 September 2012

Subject of this consultation:	Proposals to introduce a general anti-abuse rule ("GAAR") targeted at artificial and abusive tax avoidance.
Scope of this consultation:	This consultation seeks comments on the details of the proposal to introduce a GAAR, including draft legislation.
Who should read this:	We would like to hear from businesses, individuals, tax advisers, professional bodies and other interested parties.
Duration:	The consultation will run for 14 weeks from 12 June 2012 to 14 September 2012.
Lead official:	Chris Davidson, Head of Anti-Avoidance Group, HM Revenue and Customs
How to respond or enquire about this consultation:	Written responses should be submitted by 14 September 2012 by e-mail to: study.gaar@hmrc.gsi.gov.uk or by post (email above is preferable) to: HM Revenue and Customs AAG Policy 3 rd Floor 100 Parliament Street London SW1A 2BQ
Additional ways to be involved:	HMRC will consider meeting interested parties to discuss the issues raised during this consultation. Please contact HMRC (contact details above, and on page 37) if you are interested in a meeting.
After the consultation:	Responses will be taken into account in developing the legislation with a summary of responses published in autumn 2012 after the consultation closes. There will be a further consultation on proposed draft legislation in the autumn with a view to introducing legislation in Finance Bill 2013.
Getting to this stage:	In December 2010, Graham Aaronson QC was asked by the Government to report on whether a general anti-avoidance rule would be beneficial for the UK tax system. Graham Aaronson's report was published on 21 November 2011. He concluded that introducing a broad spectrum general anti-avoidance rule would <i>not</i> be beneficial to the UK tax system, and instead recommended the introduction of a rule which is targeted at abusive arrangements. The Government announced at Budget 2012 that it accepted this recommendation and would consult with a view to bringing forward legislation in Finance Bill 2013 that was both effective in tackling artificial and abusive avoidance schemes and also practical both for taxpayers and HMRC.
Previous engagement:	Following publication of Graham Aaronson's report, HMRC has had informal discussions regarding the implications of the conclusions set out in the report with business, tax practitioners and other representative bodies.

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Foreword

This Government has made a firm commitment to tackling tax avoidance. As part of our new approach to tax policy-making, we set out proposals to take a more strategic approach to the risk of avoidance by building in sustainable defences against avoidance opportunities. Through collaborative consultation and well-designed legislation, our aim is to prevent avoidance at the outset, reducing the need for counteraction.

Consideration of a general anti-avoidance rule to tackle avoidance was a key element of those proposals. Since 2010 we have engaged extensively with businesses and tax professionals on the implications of such a rule. In December 2010, I asked Graham Aaronson QC to lead an independent study that would consider whether a general rule could deter and counter tax avoidance, whilst retaining a tax regime that is attractive to businesses. The rule would have to provide sufficient certainty about the tax treatment of transactions without resulting in undue costs for businesses and Her Majesty's Revenue & Customs (HMRC).

In his independent report, Graham Aaronson concludes that a general anti-abuse rule would deter artificial tax avoidance schemes that can only be regarded as wholly unacceptable¹. Furthermore, it would contribute to providing a more level playing field for business.

The Government accepts Graham Aaronson's conclusion, and also agrees that a "broad spectrum" anti-avoidance rule would not be beneficial for the UK tax system. Such a rule would risk compromising the certainty that is vital to provide the confidence to do business in the UK. That is why the Government announced at Budget 2012 that it would consult on a General Anti-Abuse Rule (GAAR) targeted at artificial and abusive tax avoidance with a view to bringing forward legislation in Finance Bill 2013.

This consultation document sets out concrete proposals for tackling the continued risk of artificial and abusive tax avoidance schemes. Through constructive consultation I am confident that these proposals will result in legislation that effectively tackles such schemes whilst minimising the impact on the vast majority of compliant taxpayers and on HMRC. A GAAR will strengthen the Government's anti-avoidance strategy and complement the existing tools HMRC has at its disposal to tackle avoidance. It will act as a deterrent to those engaging in artificial and abusive avoidance schemes and where such schemes persist the GAAR will improve HMRC's ability to tackle them effectively.

I am pleased to publish this consultation document and hope that businesses, individuals, representative bodies and other interested parties will play a full part in the consultation process.

David Gauke

Exchequer Secretary, June 2012

¹ *GAAR Study: A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system*, 11 November 2011: http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm

1. Introduction

Background

- 1.1. In June 2010, the Government outlined its new strategic approach to tackling tax avoidance, as part of the consultation document on tax policy making (*Tax policy making – a new approach*²). Identifying new generic defences against avoidance, including considering the case for a General Anti-Avoidance Rule, was identified as a key element of this new strategic approach.
- 1.2. In December 2010, the Exchequer Secretary to the Treasury, David Gauke, asked Graham Aaronson QC to lead a study that would consider whether a general anti-avoidance rule for the UK could deter and counter tax avoidance, whilst providing certainty and fairness, retaining a tax regime that is attractive to businesses, and minimising costs for businesses and HMRC.
- 1.3. The Study Group Report (the "Report") was published on 21 November 2011.³ The Report sets out the Study Group's recommendation to the Government for the introduction into the UK tax system of a narrowly focused General Anti-Abuse Rule ("GAAR").
- 1.4. The Government has considered the Report in detail, in particular the extent to which its proposals could complement existing legislation to further reduce levels of tax avoidance. The Government has also held informal discussions with business, tax practitioners and representative bodies in order to hear their views on the Report and its recommendations. The Government is very grateful for the contributions that were made during the informal discussions, which have helped to shape this consultation document.
- 1.5. At Budget 2012, the Government announced that it accepted the recommendation of the Report that a GAAR targeted at artificial and abusive tax avoidance schemes would improve the UK's ability to tackle tax avoidance while maintaining the attractiveness of the UK as a location for genuine business investment. The Government announced that it would consult in summer 2012, with a view to introducing legislation in Finance Bill 2013.

General Anti-Abuse Rule

- 1.6. The Government agrees with the Report's conclusion that a "broad spectrum" general anti-avoidance rule would not be beneficial for the UK. The Government has been clear that any GAAR must ensure that sufficient certainty about the tax treatment of transactions could be provided without undue costs for businesses, individuals and HMRC. A broad rule risks compromising the certainty that is vital to provide the confidence to do business in the UK.

² *Tax policy making: a new approach*, HM Treasury and HMRC, June 2010: http://www.hm-treasury.gov.uk/tax_policy_making_new_approach.htm.

³ See note 1.

- 1.7. The Government therefore agrees with the Report that a rule targeted at abusive tax avoidance arrangements would be the right approach for the UK tax system.
- 1.8. **Chapter 2** describes the target of the GAAR; that is, abusive and artificial tax avoidance schemes. This chapter also outlines proposals to include taxes within the scope of the GAAR where inclusion would not add significant complexity to the GAAR or underlying legislation, and where there is significant avoidance risk.
- 1.9. **Chapter 3** outlines the main operative provisions of the draft legislation for the GAAR (“Draft GAAR”), as well as some of the more technical provisions (not discussed separately in subsequent chapters). The GAAR will apply where both a “tax arrangements” test and an “abusiveness” test are met. The tax advantage is then, after procedural requirements are met, counteracted on a just and reasonable basis (and consequential adjustments may be required). These provisions adhere to the principles of the Report, although there are some differences between their drafting and that of the illustrative GAAR in the Report (“Illustrative GAAR”) which are discussed in the chapter. Chapter 3 also sets out the options regarding the commencement provision for the GAAR.
- 1.10. **Chapter 4** outlines proposals for what materials a court or tribunal will take into account when considering the application of the GAAR, and discusses the Report’s proposal that it must be for HMRC to show that the GAAR applies.
- 1.11. **Chapter 5** proposes that the GAAR should, as far as possible, operate within existing tax administration procedures, including Self Assessment regimes (where the relevant tax operates within such a regime). It also explains that the Government accepts the Report’s recommendation against a general clearance system.
- 1.12. **Chapter 6** discusses the role of the proposed Advisory Panel. The Government proposes, as recommended in the Report, that the Panel should fulfil an advisory function, issuing a non-binding opinion to HMRC and the taxpayer. The chapter also outlines proposals for the process of referring matters to the Advisory Panel and the delivery of its opinions.
- 1.13. **Chapter 7** discusses the development and publication of non-statutory guidance on the GAAR.
- 1.14. The Draft GAAR is included in full in Annex D. Whilst some points of detail remain to be drafted post-consultation, the draft contains the main provisions of the GAAR. The consultation also sets out the Government’s proposals for how the GAAR would be implemented, and invites comments on the proposals. Following the consultation, the Government expects to publish in the autumn draft legislation for the 2013 Finance Bill.

2. Target and Scope of the GAAR

Target of the GAAR

- 2.1. The Government agrees with the Report's recommendation to introduce a rule which is targeted at artificial and abusive arrangements (those that the Report refers to as "egregious", "very aggressive" or "highly abusive contrived and artificial"). It accepts the Report's conclusion that introducing a "broad spectrum" general anti-avoidance rule would not be beneficial for the UK tax system.
- 2.2. The GAAR aims to target artificial and abusive tax avoidance schemes which, because they are often complex and/or novel, could not have been contemplated directly when formulating the tax legislation. The GAAR will apply to counteract, on a just and reasonable basis, the tax advantage that would otherwise be obtained.
- 2.3. The proposed GAAR is intended to have narrower application than most general anti-avoidance rules found in other jurisdictions, which usually have potential application to a broad spectrum of tax avoidance.
- 2.4. The GAAR should not affect what the Report describes as "the centre ground of tax planning". To assist understanding of the proposals, Annex B includes some examples of the types of schemes that the Government considers should fall within the GAAR.

Impact of the GAAR on other anti-avoidance measures

- 2.5. The GAAR will be one strand in HMRC's approach to tackling avoidance. It will not affect HMRC's right or ability to challenge in the normal way arrangements which it considers ineffective in achieving a tax avoidance purpose. If arrangements do not fall within the GAAR, they may still be regarded as avoidance. HMRC will challenge and, where it can, counteract all forms of tax avoidance:
 - using the GAAR, where it applies, as an additional tool alongside existing anti-avoidance tools; and
 - using existing anti-avoidance tools where the GAAR does not apply.
- 2.6. The Report states that the GAAR will operate most effectively where the principles underlying specific tax rules are clear. The Draft GAAR refers directly to the principles and policy objectives of the relevant tax provisions. The Government has already indicated in "*Tax policy making: a new approach*"⁴ that when embarking on significant reforms it will set out the policy objectives and wider context. The GAAR will therefore support this wider approach to tax policy by looking to the underlying principles and intended objectives of tax legislation. This focus will in turn encourage the development of future tax legislation that is clearer in its purpose and underlying principles.

⁴ See note 2 above.

- 2.7. The Report suggests that a GAAR may lead to a simpler tax regime for the UK, by: enabling future tax rules to be drafted more simply and clearly; reducing the need for specific remedial legislation; and in time (once confidence in the effectiveness of the GAAR is established), paving the way for a reduction and simplification of the existing body of detailed anti-avoidance rules.
- 2.8. The Government intends that the GAAR will be an effective deterrent against artificial and abusive tax avoidance, and will over time influence the culture of tax planning. To the extent that it deters and discourages taxpayers from entering into artificial and abusive schemes and the future development of such schemes, the need for further targeted anti-avoidance rules (“TAARs”) may be reduced.
- 2.9. TAARs are still likely to be required, particularly until such time as the GAAR has proved to be effective in countering artificial and abusive avoidance schemes. It is also important to note that TAARs apply to a wide range of tax avoidance, including tax avoidance which would not be considered to be at the “abusive” end of the spectrum of tax avoidance that is the intended target of the GAAR. The need for TAARs is therefore likely to remain, although the existence of a GAAR may obviate the need for some TAARs and enable others to be simpler and more clearly focused.
- 2.10. Similarly, other measures that are part of the overall approach to tackling tax avoidance will remain in place, including the requirements relating to tax planning placed on banks under the *Code of Practice on Taxation for Banks*.⁵ Under the *Code*, banks make a commitment to comply with the spirit, as well as the letter, of tax law. This commitment encompasses refraining from entering into or promoting both abusive tax avoidance (to which the GAAR should apply) and also forms of tax avoidance to which the GAAR may not apply (for example, schemes where it is reasonable to assume the likely Ministerial response will be a change in tax legislation).

Taxes to which the GAAR applies

- 2.11. The Government agrees with the Report that the GAAR should apply to Income Tax, Corporation Tax, Capital Gains Tax (“CGT”), Petroleum Revenue Tax (“PRT”) and National Insurance Contributions (“NICs”), and that VAT should be excluded due to potentially difficult interactions with the doctrine of abuse of law.
- 2.12. The Government proposes that the GAAR should also apply to tax charges that are linked to corporation tax, such as the oil supplementary charge and the Bank Levy (which, although a separate tax, is treated as if it were Corporation Tax).

⁵ See <http://www.hmrc.gov.uk/thelibrary/bank-code-practice.htm>.

- 2.13. In order for the GAAR to apply to NICs, separate legislation will be required. Abusive avoidance schemes can involve both NICs and the related income tax, or can be specifically focused on the NICs aspect. The Government intends that the GAAR should, with suitable adaptations, apply the same criteria and be administered in the same way for NICs as for the main taxes.
- 2.14. Further consideration will be given to specific issues for NICs ahead of the publication of draft NICs legislation.

Stamp Duty Land Tax (“SDLT”)

- 2.15. The Chancellor announced at Budget 2012 that SDLT would be included within the scope of the GAAR in the light of widespread and abusive SDLT avoidance. The GAAR will therefore also apply to SDLT, and to the new enveloped property annual charge when it is introduced.

Other taxes and duties

- 2.16. In keeping with the concept of the GAAR as a general rule, it would, in principle, be desirable to include other taxes, duties, levies and charges, where there is significant avoidance risk and where inclusion would not add significant complexity to the GAAR or underlying legislation.
- 2.17. The Government proposes that the GAAR should cover Inheritance Tax (“IHT”). If it did not, there could be difficult interactions with, for example, CGT (if CGT were to be included in the GAAR and IHT were not). However, the Government recognises that IHT operates differently to the other direct taxes and has complex interactions with legislation around trusts and estates. Arrangements for estates may be put in place a long time before the event that triggers a tax charge. There may therefore be particular issues to consider around how the GAAR will operate in relation to IHT. The Government welcomes views in relation to the application of the GAAR to IHT.
- 2.18. The Government does not propose to apply the GAAR initially to taxes and duties not discussed above, due to the additional complexity that this might add (particularly for taxes that operate under very different regimes). However, this is something that the Government will keep under review.

Summary

- 2.19. In summary, the Government proposes that the GAAR should initially apply to the following taxes:
- Income Tax;
 - Corporation Tax (including taxes linked to Corporation Tax, such as the Bank Levy);
 - Capital Gains Tax;
 - Petroleum Revenue Tax;
 - Inheritance Tax; and
 - SDLT and the enveloped property annual charge.

- 2.20. The GAAR will also apply to NICs, but this will require separate legislation and this is likely to be enacted after the GAAR has been introduced. To the extent that they are not specific to tax or to specific taxes, the questions and issues raised in this document should also be considered in relation to NICs.

Question 1 - Do you agree that the GAAR should be limited to these taxes and duties initially? Are there any particular issues relating to how the GAAR would function in relation to the taxes (including NICs) that are proposed to be included?

Double taxation agreements

- 2.21. The Report recommended that the GAAR should apply to abusive arrangements where tax advantages have been obtained under "relevant" double taxation agreements ("DTAs")⁶. Paragraph 17 of the Illustrative Draft Guidance Note in Appendix II of the Report noted that:

"the expression "relevant double taxation arrangements" is used to make it clear (by reference to the definition provisions in section 15) that the GAAR does not operate in respect of double taxation arrangements (or articles in double taxation arrangements) in any case where the provisions of section 2 of the Taxation (International and Other Provisions) Act 2010 would prevent its application. This may depend upon the precise terms of the double taxation arrangement and of the relevant OECD commentaries applicable to the arrangement".

- 2.22. Some views have been expressed that if the GAAR were to disapply the effect of DTAs, this would conflict with the UK's duty to abide by the terms of its agreements with other countries.

- 2.23. The proposed GAAR would be consistent with the Organisation for Economic Co-operation and Development (OECD) commentary on the Model Tax Convention. Paragraph 9.4 of the OECD commentary on Article 1 of the Model Tax Convention confirms that:

States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.

- 2.24. Therefore, the Government considers that the GAAR should apply to artificial and abusive arrangements where UK tax advantages have been obtained through rights or benefits under any DTA, and there is no requirement to distinguish between different DTAs (i.e. "relevant" DTAs or otherwise).

⁶ Section 1(2) of the Illustrative GAAR in the Report.

2.25. Annex C contains some more detailed comments in relation to the application of the GAAR to DTAs.

Question 2 - Do you agree that the GAAR should be capable of counteracting UK tax advantages obtained under double taxation agreements?

3. The Draft GAAR legislation

Introduction

- 3.1. This Chapter is in two parts. The first part covers the main operative provisions of the Draft GAAR, while the second provides an explanation of some of the more technical provisions that are included in the Draft (which have not been discussed separately in subsequent chapters).
- 3.2. The Report included an Illustrative GAAR, which, as the Report emphasises, is one possible way to achieve the key objective that the legislation should put a stop to the abusive schemes at which it is targeted.
- 3.3. The Draft GAAR (Annex D) sets out the Government's proposed approach. It adopts many of the principles of the Report, and is structured in a way that the Government believes is an effective way of delivering the overall policy objective of a GAAR that is focused on artificial and abusive tax avoidance schemes. In particular, what has come to be known as the "double reasonableness test" in clause 4 of the Illustrative GAAR has been reformulated to be the key provision that drives the application of the GAAR.
- 3.4. The Draft GAAR includes a reference to a Schedule, which will contain procedural requirements that must be satisfied for the GAAR to apply. As noted in paragraph 1.14 above, the Government expects to publish in the autumn draft legislation for the 2013 Finance Bill and expects to publish the Schedule for consultation then.

Part one: Key provisions

Clause 1(1): Statement of purpose

This Part has effect for the purpose of counteracting tax advantages arising from tax arrangements that are abusive.

- 3.5. This opening statement makes clear at the outset that the purpose of the GAAR is to counteract tax advantages arising from abusive arrangements. The GAAR is by nature a general rule, and this statement, by setting out a clear overall purpose, should make it easier for taxpayers and their advisers to consider and interpret the provisions that follow, and in many cases help them to conclude quickly that the GAAR has no application.
- 3.6. The provision also introduces three concepts that are key to the operation of the GAAR: "tax arrangements", "abusive" and "tax advantage". These concepts are discussed in the following paragraphs.

Clause 2(1): Tax arrangements

Arrangements are “tax arrangements” if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

- 3.7. The threshold for the purpose tests in the Illustrative GAAR included in the Report (clauses 3(2) and 6(1)(b)) was “have as its sole purpose, or as one of its main purposes”. The Draft GAAR uses the more familiar formulation of “main purpose or one of the main purposes”. If an arrangement has a “sole purpose”, that purpose will be the “main purpose”, and it is therefore not necessary to refer to “sole purpose” specifically.
- 3.8. The “main purpose or one of the main purposes” test recognises that incidental steps taken to minimise a tax liability arising from an arrangement will not usually constitute a main purpose. Whether a purpose is a main purpose of an arrangement is a question of fact.
- 3.9. This purpose test is not significantly different from the standard “main purpose” rules embedded in some existing TAARs. This means that in itself it would be too broad to capture only the abusive and artificial schemes at which the GAAR is targeted. Although there may be an argument for a narrower purpose test, to narrow the initial net for application of the GAAR, a purpose test which is narrow enough to give certainty to taxpayers risks being circumvented by abusive schemes. Therefore, the Government considers that the better approach is to rely on the key requirement in clause 2(2) to (5) (discussed below) that the tax arrangement must also be “abusive” so as to narrow the application of the GAAR to abusive schemes.

Exclusion for arrangements without tax intent

- 3.10. The Report envisaged a specific exclusion from the GAAR for any arrangement where the party who benefits from the tax advantage can prove that the arrangement was entered into entirely for non-tax reasons, and was not designed or carried out to receive the relevant tax advantage, and no step or feature was included in the arrangement with that intention.
- 3.11. However, the requirement in the Draft GAAR that there must be tax arrangements (i.e. the requirement that it would be reasonable to conclude that the arrangement has a main purpose of obtaining a tax advantage) should make it unnecessary to include an additional provision of this nature, as arrangements that are entered into without tax intent would automatically be excluded from the GAAR.

Question 3 - Do you agree that: (1) the proposed “main purpose” rule serves as a useful filter, when coupled with the concept that arrangements must also be “abusive”; and (2) a specific exclusion for arrangements without tax intent is not required? If you think a specific exclusion is required, please explain why.

Clause 2(2) to (5) – “Abusiveness” requirement

- (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, having regard to all the circumstances including –
- (a) the relevant tax provisions,
 - (b) the substantive results of the arrangements, and
 - (c) any other arrangements of which the arrangements form part.
- (3) In subsection (2)(a) the reference to the relevant tax provisions includes –
- (a) any principles on which they are based (whether express or implied),
 - (b) their policy objectives, and
 - (c) any shortcomings in them that the arrangements are intended to exploit.
- (4) Each of the following is an indication that tax arrangements might be 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,
 - (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,
 - (d) the arrangements involve a transaction or agreement the consideration for which is an amount or value significantly different from market value or which otherwise contains non-commercial terms.
- (5) Subsection (4) is not to be read as limiting in any way the cases in which tax arrangements are regarded as abusive.
- 3.12. This rule is based on the principles of clause 4 of the Illustrative GAAR. The Illustrative GAAR expressed the principle in terms of “a reasonable exercise of choices of conduct afforded by the provisions of the Acts”. The Government considers that the concept of the Acts affording choices of conduct is problematic; rather, the Acts attach outcomes to choices of conduct made by taxpayers.
- 3.13. The draft GAAR instead refers to what can “reasonably be regarded as a reasonable course of action”, and what is regarded as a reasonable course of action *must* take into account the matters in subsections (2)(a)-(c) and (3). These are intended to give some context for deciding whether it is reasonable to regard entering into or carrying out an avoidance arrangement as reasonable, and clarify that it is necessary to take into account considerations that are wider than just the economic interests of the parties to the arrangement.
- 3.14. Subsections (2) and (3) refer to the tax provisions relevant to the arrangement, including the principles and policy objectives of those provisions, and also any shortcomings in those provisions that the arrangements are intended to exploit.

- 3.15. The GAAR is intended to be capable of altering the tax consequences of abusive arrangements if the consequence claimed is one that manifestly would not have been countenanced by Parliament, had it foreseen the arrangement and the claimed tax consequences. Such arrangements inevitably seek to take advantage of perceived limitations of, or shortcomings in, the tax legislation. Subsections (2) and (3) are intended to make clear that both Parliamentary intent and limitations in the relevant tax provisions are key considerations in the application of the GAAR.
- 3.16. Subsection (4) gives some specific indications that an arrangement is abusive. The indications are neither sufficient⁷ nor necessary⁸ for a tax arrangement actually to be an abusive one. Some of these indicators are likely to be less relevant to event-based taxes such as SDLT or IHT, and the indicators are not intended to be exhaustive.
- 3.17. The matters identified in subsections (2) to (4) are not the only matters that are relevant to whether a tax arrangement is an abusive one. Subsection (2) makes clear that all circumstances must be taken into account. This ensures that consideration can be given to the wider circumstances of a particular arrangement; for instance, as well as documentation relating to the particular arrangement, the taxpayer or HMRC may wish to rely on published material from an authoritative text indicating how a particular arrangement is normally structured (so as to compare or contrast it with the actual arrangement).

Question 4 - Do you agree that the proposed “double reasonableness” test operates as intended to counteract only artificial and abusive schemes (such as those described in Annex B)?

Clause 3 - Definition of “tax advantage”

A “tax advantage” includes -

- (a) relief or increased relief from tax,
- (b) repayment or increased repayment of tax,
- (c) avoidance or a reduction of a charge to tax or an assessment to tax,
- (d) avoidance of a possible assessment to tax,
- (e) a deferral of a payment of tax or an advancement of a repayment of tax, and
- (f) avoidance of an obligation to deduct or account for tax.

- 3.18. The definition of “tax advantage” is intended to have a very wide meaning, to cover any form of tax benefit (for example, increasing deductions or losses or debits, decreasing income or gains or credits, timing advantages, repayments of tax etc.). The drafting confirms that the list included is not exhaustive.
- 3.19. On the other hand, given the scope of the GAAR, it is clear that “tax” is limited to the taxes to which the GAAR applies.

⁷ The phrase “an *indication* that tax arrangements *might* be abusive” in subsection 4 confirms this.

⁸ As confirmed by subsection 5.

- 3.20. The concept of a “tax advantage” is common in UK tax legislation. The language suggests that in ascertaining whether an advantage arises, the actual tax position should be compared with another tax position (commonly known as the “Wilberforce” test⁹, or comparator). The appropriate comparator or alternative tax position will depend on the facts, but will usually derive from the arrangements that would have occurred absent the relevant tax purpose (which may include no arrangement at all).
- 3.21. The Illustrative GAAR used the term “advantageous tax result” (defined in clause 15(2) of the Illustrative GAAR). The use of the term “tax advantage” by the Draft GAAR, and its definition, is the more usual formulation found in the tax legislation, with which taxpayers, HMRC and the courts are familiar. However, the Government does not consider that there is a substantive difference between the two.
- 3.22. One difference between the two definitions is that the definition of “advantageous tax result” in the Illustrative GAAR incorporated the concept of a “significant” advantage (for example, a “significant” reduction in receipts or a “significant” increase in deductions). The definition of “tax advantage” in the Draft GAAR does not incorporate this concept of significance in relation to “tax advantage”, because the Government considers that it adds unnecessary complexity and may give rise to difficult comparative issues (for example, it may be that the tax at stake as a consequence of the abusive arrangements may be significant in absolute terms, but not significant in the context of the particular taxpayer).

Clause 7: Definition of “arrangements”

“In this Part - ... arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)

- 3.23. The Draft GAAR adopts a definition of “arrangements” commonly used in anti-avoidance legislation, and this term is intended to have a broad meaning.
- 3.24. The definition of “arrangements” is important to the consideration of the purpose test. As the weighting of purposes can be manipulated, such as by combining a tax scheme with a commercial transaction, it is important that the GAAR can apply to an arrangement which is itself a step in, or a part of, a wider arrangement, and HMRC considers that this definition achieves this.
- 3.25. The Illustrative GAAR, in its definition of “arrangement” (clause 15(3)) referred specifically to steps or features included as an element of an arrangement, whether or not they are factually inevitable. HMRC considers that the standard definition would encompass this concept without the need to include it explicitly.

⁹ Based on Lord Wilberforce’s comments in *Commissioners of Inland Revenue v Parker* [1966] AC 141.

Part two: Other provisions (not dealt with separately in subsequent chapters)

Clause 4(1) and (2): Counteraction

4 Counteracting the tax advantages

(1) If –

(a) there are tax arrangements that are abusive, and

(b) the procedural requirements of [the Schedule]¹⁰ have been complied with, the tax advantages arising from the arrangements are to be counteracted on a just and reasonable basis.

(2) The counteraction may be made in respect of the tax in question or any other tax to which the general anti-abuse rule applies.

3.26. The Draft GAAR proposes that the abusive tax advantage would be counteracted on a just and reasonable basis.

3.27. This approach follows the basic principle of the Report's recommendations regarding counteraction, which was that it should produce a result which is reasonable and just. The general concept of "just and reasonable" is familiar to taxpayers, advisers and HMRC, and there is long experience of operating such a principle across a number of provisions in the tax legislation.

3.28. Clause 8 of the Illustrative GAAR also added additional detail to the principle of counteraction on a reasonable and just basis, such as including the concept of a hypothetical equivalent transaction ("corresponding non-abusive arrangement"), and providing that if an arrangement has no significant purpose other than to achieve the abusive tax advantage, it may be appropriate to treat the arrangement as if it did not take place. HMRC considers that it is sufficient to provide for counteraction on a just and reasonable basis.

3.29. In practice, what is "just and reasonable" would depend upon the facts of the particular case and the tax provisions being exploited. For example, in the context of the schemes described in Annex B, counteraction would involve denial of relief for the artificial losses that are said to arise from the schemes.

3.30. Clause 4(2) allows counteraction to apply, where appropriate, across those taxes covered by the GAAR. This could mean, for example, that an arrangement to obtain a tax advantage in relation to IHT might, if it is just and reasonable to do so, involve counteraction adjustments in respect of CGT.

Question 5 – Do you agree that the counteraction provision in the draft GAAR is appropriate?

¹⁰ See paragraph 3.4 above.

3.31. If there is a dispute about whether HMRC's proposed counteraction is appropriate, on appeal a tribunal or court should be able to reach its own conclusion as to what would be the appropriate counteraction. As discussed in Chapter 5, the GAAR is intended to operate within existing processes, and the appropriate appeal rights will apply. The tribunal or court will have the power to increase or reduce assessments and adjust claims to an amount that it considers correct. Further details in relation to appeals and related procedural aspects will be developed and published later in the year.

Clause 4(3) and (4): Consequential Adjustments

(3) An officer of Revenue and Customs must make, on a just and reasonable basis, such consequential adjustments in respect of any tax to which the general anti-abuse rule applies as are appropriate.

(4) These consequential adjustments -

(a) may be made in respect of any period, and

(b) may affect any person (whether or not a party to the arrangements).

3.32. Clause 4(3) and (4) ensure that when counteraction under the GAAR has occurred, consequential adjustments can be made by HMRC on a just and reasonable basis. This may mean adjustments to the computation and assessment of other periods of the same taxpayer who has suffered a counteraction. It may also mean adjustments to the computation and assessment of other persons (for that period or other periods). This provision is intended to ensure fairness, i.e. to ensure that overall there is not excessive taxation. For example, if counteraction involved acceleration of a tax charge, then double taxation would result if tax was later charged again in respect of the same amount. As with counteraction, consequential adjustments could potentially apply across those taxes covered by the GAAR. The adjustments are most likely to be relieving but could, in appropriate circumstances, increase or create a tax charge.

3.33. Clause 4(3) confirms that it is *HMRC* that must make consequential adjustments, where appropriate – consequential adjustments could not be self-assessed by the taxpayers concerned. A taxpayer will be able to appeal any decision of HMRC in relation to consequential adjustments to the Tribunal, and the Tribunal would be able to decide on what consequential adjustments (if any) are just and reasonable. Further details in relation to appeals and related procedural aspects will be developed and published later in the year.

Question 6 – The Government is continuing to develop its analysis regarding the appeals processes in relation to counteraction and consequential adjustments under the GAAR, and welcomes views which may inform detailed proposals to be published later in the year.

Clause 6: Relationship of the GAAR with other tax provisions

- (1) The general anti-abuse rule is to be ignored in applying other provisions made by or under an Act relating to a tax to which that rule applies.
- (2) But any priority rule has effect subject to the general anti-abuse rule (despite the terms of the priority rule).
- (3) A “priority rule” means a rule (however expressed) to the effect that particular provisions have effect to the exclusion of, or otherwise in priority to, anything else.
- (4) Examples of priority rules are-
 - (a) the rule in section 464, 699 or 906 of CTA 2009 (priority of loan relationships rules, derivative contracts rules and intangible fixed assets rules for corporation tax purposes), and
 - (b) the rule in section 6(1) of TIOPA 2010 (effect to be given to double taxation arrangements despite anything in any enactment).

3.34. The GAAR will apply only where a tax advantage would arise as a result of applying tax provisions other than the GAAR. Where counteraction is made under the GAAR then this might mean that tax provisions that would normally apply to a particular arrangement might not be in point. For instance, disallowance of amounts under the GAAR might mean that an adjustment (of a smaller amount) that would have been made under transfer pricing rules will not be made under those rules. This in turn would mean that corresponding adjustments could not be made. Clause 6(1) confirms that the GAAR would be ignored in giving effect to the corresponding adjustments.

3.35. As a matter of process, in any dispute or litigation proceedings, HMRC would normally expect to consider the application of the GAAR and the particular relevant tax rules in parallel, or to be “argued in the alternative” (i.e. HMRC does not first have to prove, or agree with a taxpayer, that the tax advantage in question has arisen).

3.36. Subsections (2) to (4) of clause 6 of the draft GAAR confirm that the GAAR cannot be excluded by other “priority rules” within the tax legislation.

Commencement

3.37. The Government recognises that the commencement rule for the GAAR will need careful consideration. The legislation operates in relation to “arrangements” and a “tax advantage”, either of which could be used as the trigger for the GAAR to apply. Each of these has implications.

3.38. The Government proposes that the GAAR should apply fully to tax advantages arising from arrangements entered into on or after the proposed

commencement date of 1 April 2013; and it should not apply to tax advantages arising from arrangements fully completed by that date.

- 3.39. There is then a question as to whether there should be a transitional rule for arrangements that are already in place at that date, but not completed, and what that rule should be.
- 3.40. On the one hand, if the rules do not apply where some part of the arrangements is already in place on the commencement date, then this risks placing considerable delay on the impact of the GAAR. It would give those who had planned tax avoidance schemes the opportunity to start those schemes and continue to realise the tax advantage after the GAAR comes into effect.
- 3.41. On the other hand, the GAAR is a significant development in the Government's approach to tackling tax avoidance, and it may therefore be more appropriate for there to be a suitable lead-in to its introduction, particularly as some arrangements may have been in place over a long period, and it may be unreasonable to have to consider whether or not the GAAR applies to them.
- 3.42. The Government wants to ensure that the commencement rules strike a reasonable and proportionate balance between these competing pressures and welcomes comments on what the appropriate rule should be for arrangements that have been put in place before 1 April 2013 but have not been completed by that date. The Government would also welcome comments on whether this rule should be different for different taxes.

Question 7 – The Government would welcome views on these commencement options, how transitional arrangements should be dealt with, and whether there should be different rules for different taxes where appropriate.

National Insurance contributions (“NICs”)

- 3.43. As discussed above, the Government agrees with the Report's recommendation that the GAAR should apply to NICs. This will require separate legislation in a NICs Bill.

4. Proceedings before a court or tribunal

HMRC must show that the GAAR applies

- 4.1. The Report recommended that it should be for HMRC to show that (essentially) the key requirements for the GAAR to apply are met and that the counteraction is reasonable and just (referred to in the Report as “safeguard 3”; clause 9 of the Illustrative GAAR).
- 4.2. The Government accepts this recommendation, and clause 5(1) of the Draft GAAR provides as follows:
- 5 Proceedings before a court or tribunal
- (1) In proceedings before a court or tribunal in connection with the general anti-abuse rule, HMRC must show –
- (a) that there are tax arrangements that are abusive, and
- (b) that the counteraction of the tax advantages arising from the arrangements is just and reasonable.
- 4.3. The Government considers that at a practical level, clause 5(1) will not usually make a material difference to the way a Tribunal or Court reaches its decision on the GAAR. Its effect is likely to be limited to circumstances where HMRC’s and the taxpayer’s cases are evenly balanced.
- 4.4. Clause 9 of the Illustrative GAAR in the Report provided explicitly that the civil standard of proof should apply to HMRC. The Government considers that the usual civil standard of proof should apply and that it is not necessary to state this in the legislation.

Question 8 – The Government welcomes views on clause 5(1) of the Draft GAAR.

Admissibility of evidence

- 4.5. The Report recommends that in any potential dispute relating to the application of the GAAR, to help determine whether or not the GAAR applies there should be available all relevant material which was in the public domain at the time of the arrangement, including evidence of practice (both HMRC and non-HMRC) at the time of the arrangement. This should be admissible in tribunal or court proceedings even if it would not otherwise be admissible under the normal rules of evidence.

- 4.6. The Report explains that this recommendation is to address concerns that the GAAR might otherwise be used by HMRC in an attempt to counteract arrangements where official material, or evidence of widespread practice, could demonstrate that the arrangement was not at the relevant time regarded as abusive.
- 4.7. The Government agrees that relevant evidence of material which is in the public domain at the time arrangements are entered into or established practice at that time should be available to a tribunal or court in considering whether or not the GAAR applies. Consequently, clause 5 of the Draft GAAR provides as follows:
- (2) **In determining any issue in connection with the general anti-abuse rule, a court or tribunal must take into account-**
 - (a) **HMRC's guidance about the general anti-abuse rule that has been approved by the GAAR Advisory Panel, and**
 - (b) **any opinion of the GAAR Advisory Panel about the arrangements.**
 - (3) **In determining any issue in connection with the general anti-abuse rule, a court or tribunal may take into account-**
 - (a) **guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that is in the public domain at the time the arrangements were entered into, and**
 - (b) **evidence of established practice at that time.**
- 4.8. The provision above follows the approach taken in the Illustrative GAAR¹¹ that the GAAR guidance and the opinion (or opinions, if not unanimous) of the Advisory Panel¹² should carry more weight than the other matters or materials specified in subsection (3) of the provision (i.e. they “must”, rather than “may”, be taken into account). Chapters 6 and 7 provide more detail on the status of the opinions of the Advisory Panel and the role of the GAAR guidance.

Question 9 - Do you agree that it is appropriate for particular weight to be given in the legislation to the GAAR guidance and the opinion(s) of the Advisory Panel on the arrangements?

- 4.9. Clause 5(3)(a) provides that guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that is in the public domain when the arrangements were entered into may be taken into account by a court or tribunal. This provision enables a broad range of materials to be taken into account, and HMRC considers that it is not necessary for there to be any express reference to Parliamentary material¹³. The reference to statements of Ministers means that a court or tribunal may take into account not only statements made by Ministers in debate in Parliament, but also Ministerial

¹¹ Clause 10(1)(a) and 14(4) of the Illustrative GAAR.

¹² The GAAR guidance and the Advisory Panel are discussed in chapters 7 and 6 (respectively) of this document.

¹³ Clause 10(3)(a) of the Illustrative GAAR included an express reference to Parliamentary material.

statements made when a tax avoidance scheme was closed down that are in the public domain at the time the relevant arrangements were entered into (for example, a statement that had previously been made in relation to a similar scheme).

- 4.10. The Illustrative GAAR also provided that published determinations of the Advisory Panel may be taken into account. As discussed in paragraph 6.19 below, significant taxpayer confidentiality issues arise from the proposal to publish Advisory Panel decisions. The Government proposes (see paragraph 6.20) that the Advisory Panel should publish a digest of key principles emerging from the opinions delivered, and as it is envisaged that these would subsequently be incorporated into GAAR guidance the principles will therefore be taken into account by a Tribunal or Court (albeit indirectly).

5. Administration

Self Assessment

- 5.1. The Government's intention is that the GAAR should, as far as possible, operate within existing Self Assessment regimes (where the relevant tax operates within such a regime). Tax recovered under the GAAR should be treated as tax which should have been self-assessed in the relevant return of the taxpayer, and all of the usual consequences of the Self Assessment regime should follow.
- 5.2. This means that the GAAR would operate in a way that is familiar to taxpayers and advisers, and would help to minimise any additional costs and administrative burdens for taxpayers and for HMRC.
- 5.3. This would also mean that taxpayers would be responsible for considering the application of the GAAR when filing their Self Assessment tax return.

Taxes not within Self Assessment

- 5.4. Other taxes proposed to be covered by the GAAR (principally, PRT, SDLT and IHT) have their own specific administration rules. As a general principle, HMRC expects to operate the GAAR within the existing administrative rules for those taxes and to apply the effects of any counteraction accordingly. Similarly, the GAAR will operate within existing NICs processes as far as possible – the Government proposes to publish separate details in the autumn.

Question 10 – The Government welcomes comments on whether particular issues arise in relation to Self Assessment (where the relevant taxes operate within a Self Assessment regime) or within the existing administrative rules for those taxes that do not operate within a Self Assessment regime.

Other administrative issues

- 5.5. As far as possible, any action needed to recover tax as a result of applying the GAAR should fit within existing tax administration procedures. This includes the amendment of tax returns under the income tax Self Assessment and corporation tax Self Assessment regimes, making assessments where appropriate, withholding repayments, or taking the relevant action under the rules for specific taxes.
- 5.6. All existing administrative provisions (mainly set out in the Taxes Management Act 1970 ("TMA"), Schedule 18 to Finance Act ("FA") 1998 and Schedule 36 to FA 2008) should apply unchanged as far as possible. This includes information

powers, assessing procedures, appeals, enquiry windows, etc. However, some aspects of the GAAR, including particularly the interaction with the proposed Advisory Panel (see chapter 6), may necessitate some modification to these rules.

- 5.7. HMRC should also be able to exercise its existing administrative powers (for example, in relation to enquiry and assessing powers, time limits, withholding of repayments etc) while any counteraction (or procedural steps preceding counteraction) under the GAAR is taking place.
- 5.8. The Government does not envisage a need to amend the existing rules which allow taxpayers to apply to the Tribunal for a direction that HMRC issue a closure notice within a specified period.
- 5.9. HMRC currently undertakes reviews of its decisions if the taxpayer wishes (see sections 49A to 49I of TMA). The Government does not propose to amend this legislation in relation to the GAAR.

Question 11 – The Government invites comments on the general proposal that the GAAR should as far as possible operate within existing administration rules for the taxes involved; and on what adaptations may be necessary to existing administrative rules to ensure that the GAAR operates with as little as possible additional administration cost and burden for taxpayers, advisers and HMRC. Is there a case for having a new type of assessment given the cross-regime range of the GAAR?

Penalties

- 5.10. As set out above, under these proposals taxpayers would be responsible for considering the application of the GAAR when making their tax returns or in discharging their responsibilities in relation to the relevant taxes. This means that existing penalty provisions and their criteria would apply as they do at present.
- 5.11. While noting that a penalty regime would increase its deterrent effect, the Report recommended that no additional or specific penalties should apply to the GAAR. The Government accepts this recommendation but will keep the matter under review as experience of the application of the GAAR develops over time.

Clearances

5.12. Two of the key terms of reference for the GAAR study were to:

- ensure that sufficient certainty about the tax treatment of transactions could be provided without undue compliance costs for businesses and individuals; and
- keep any increase in resources for HMRC to an acceptable level and ensure that there would be a minimal need for resources to be diverted from other priorities.

5.13. The Government agrees with the recommendation of the Report that there should not be a formal statutory clearance process in relation to the GAAR.

5.14. Although the Government recognises that taxpayers require certainty, it agrees with the conclusions of the Report that sufficient certainty should be provided by the legislation (which is targeted only at artificial and abusive schemes), properly drafted guidance, and the inclusion of various safeguards (including, in particular, the Advisory Panel). Where there is genuine uncertainty as to whether the GAAR applies to a particular arrangement, there would also be uncertainty as to whether the arrangement definitely secures the tax benefits sought.¹⁴ In these circumstances HMRC would not currently offer any form of clearance.

5.15. The Report suggested that existing statutory clearance procedures could be expanded to enable confirmation to be sought regarding application of the GAAR. The Government's view is that a partial clearance system would not be beneficial as it would only operate in specific circumstances, and there is a significant risk that HMRC's costs would increase considerably if additional clearances were sought under existing statutory provisions in order to obtain a clearance for the GAAR.

5.16. HMRC has a customer relationship management model for large businesses and wealthy individuals which is based on openness and transparency. As part of its model of direct engagement with these customers, HMRC discusses commercial arrangements and confirms where appropriate that it does not regard particular arrangements as tax avoidance. However, HMRC will not give formal or informal clearances that the GAAR does not apply.

¹⁴ See paragraph 5.29 of the Report.

6. The Advisory Panel

- 6.1. One of the taxpayer safeguards suggested by the Report was the proposal for an Advisory Panel, to provide a quick and cost-effective way of helping taxpayers and HMRC identify the borderline of where the GAAR applies. The Report suggested that such an Advisory Panel could reduce areas of uncertainty by:
- having an independent member with expertise in the relevant area - this would reduce the risk of HMRC invoking the GAAR as a result of misinterpreting the nature or purpose of the transaction;
 - publication of opinions of the Advisory Panel in anonymised form to build up a database enabling taxpayers and tax professionals to calibrate their own response to tax planning;
 - providing a mechanism for updating and expanding the guidance on the GAAR.
- 6.2. The GAAR represents a significant new approach to tackling tax avoidance in the UK, and the Government agrees that it warrants additional taxpayer safeguards which would not be appropriate elsewhere in the tax code. The Government agrees that there are benefits in establishing an Advisory Panel.
- 6.3. The Government also agrees that the Panel should involve members from HMRC and from outside HMRC. One of the purposes of the Panel is to develop a body of knowledge and guidance about the GAAR – HMRC has an important role to play in bringing its knowledge and experience of developing and applying tax law.
- 6.4. The following paragraphs give an outline of the proposed Advisory Panel process and invites comments. Further details, including draft legislation and details of how the Panel will be administered, will be developed and published later in the year.

Function of the Advisory Panel

- 6.5. The Report envisaged that the Advisory Panel would have two key functions. The first is to provide opinions to HMRC and the taxpayer on the potential application of the GAAR to any particular arrangement. The second is to update and expand the guidance (see Chapter 7).
- 6.6. The Report recommended that the Advisory Panel would operate on an advisory basis only, and its opinions would not be binding on either HMRC or the taxpayer. Some suggestions have been made that the opinions of the Advisory Panel should be binding on HMRC, and that HMRC should not be able to proceed any further with application of the GAAR in a particular case if the Panel delivers an opinion that the GAAR should not be applied.

- 6.7. The Government does not agree with this view. The tribunals and the courts are responsible for delivering judicial decisions about the application of tax law. It would be inappropriate for an Advisory Panel set up outside those bodies to have a similar level of authority, albeit binding in one respect only. Therefore, the Government's view is that the Advisory Panel should provide opinions and not deliver binding decisions, in line with the recommendation of the Report.

Advisory Panel Process

- 6.8. In summary, the proposed Advisory Panel process would work as follows:

Stage one: Written notification to a taxpayer that a designated HMRC officer considers that the GAAR may apply (with reasons and proposed counteraction), and inviting a written response.

Stage two: Written response from the taxpayer.

Stage three: If the taxpayer provides a written response, the designated HMRC officer must consider the response. If the officer is still of the view that the GAAR may apply, he or she must refer the matter to the Advisory Panel.

Stage four: The Advisory Panel will give its opinion to HMRC and to the taxpayer.

- 6.9. A "designated officer" would be an officer of HMRC who has been designated by the HMRC Commissioners for the purposes of the GAAR. Requiring the officer to be designated is intended to ensure consistency in the way that the GAAR is used by HMRC.
- 6.10. There is inevitably a balance to be struck between having a process that progresses matters without undue delay, and giving all parties a fair and reasonable opportunity to undertake the process effectively.

Question 12 – The Government invites comments on whether time limits should be set for each of stages two, three and four and if so what those time limits should be.

- 6.11. The Advisory Panel should be a relatively inexpensive and quick method of providing opinions on the application of the GAAR. The Government does not propose that it should perform a judicial function or that the process would involve formal hearings where cases will be presented and heard. Instead, it is proposed that the Advisory Panel will consider only written representations from HMRC and the taxpayer.
- 6.12. The Advisory Panel would deliver an opinion, not a judicial decision. In keeping with its intended role, the Panel should be able to deliver its opinions in whatever form is relevant to the circumstances. This could, for example, include advice and analysis about how the GAAR applies to the particular circumstances put before it, and it should be open to it to conclude that its

opinion is neutral as to whether the GAAR may apply or not. These issues will need to be clarified in developing more detailed terms of reference for the Advisory Panel.

- 6.13. The Advisory Panel may consider that it has not been provided with sufficient information to enable it to form an opinion. The Government does not propose to provide information powers for the Advisory Panel as this would conflict with its advisory role and would require further administrative legislation. Instead, the Advisory Panel should be able to refer cases back to HMRC if it considers there is insufficient information to give an opinion, to allow taxpayers and/or HMRC time to provide additional written information to the Advisory Panel.
- 6.14. As explained in Chapter 5, the GAAR proposals should operate as far as possible within the existing tax administration framework and powers. This includes the information powers in Schedule 36 to FA 2008. HMRC would therefore be able to deploy those powers in accordance with the legislation, for example in obtaining information necessary to form a view as to whether the GAAR should apply. Where the Advisory Panel considers that HMRC requires further information in order to support its reasoning, it will be for HMRC to consider whether and how it pursues that information, including the use of its information powers where appropriate.
- 6.15. The Advisory Panel may, even after referring back, conclude that it does not have enough information on which to give its opinion. In order to avoid the risk of an open-ended process without resolution, it is proposed that:
- If the Panel considers that HMRC has not delivered sufficient information to demonstrate that the GAAR should apply then that should be the opinion of the Panel.
 - If the Panel considers that the taxpayer has not provided sufficient information to demonstrate that HMRC should not proceed further, then that should be its opinion.
- 6.16. If, following a decision of the Advisory Panel that the GAAR does not apply or that it is neutral as to whether it applies or that it does not have enough information to determine whether it applies, further relevant information comes to light then it is proposed that HMRC should have the right to refer the matter back to the Panel.

Other matters relating to the Advisory Panel

- 6.17. The Advisory Panel would draw its expertise from a range of individuals, who will not necessarily be the same on each occasion. There is an emphasis on considering the business, commercial and economic aspects of the arrangements. At least one of the non-HMRC members should, wherever possible, have experience relevant to the arrangement (or experience which is as close to the area as possible). For example, if the arrangements concerned an insurance business, at least one of the Panel members should have experience relevant to insurance.

- 6.18. Advisory Panel members will need to be subject to confidentiality obligations in accordance with section 18 of the Commissioners of Revenue and Customs Act 2005, with an appropriate gateway permitting HMRC to pass information to Panel Members while limiting their use of it.
- 6.19. The Report suggests that while the Advisory Panel procedure would be in private, opinions of the Advisory Panel might be published in anonymised form in order to build up a body of material on the GAAR's application. However, publication of individual opinions risks compromising taxpayer confidentiality. This is the case even if opinions are anonymised, because cases will turn on their particular facts. Publication of those facts, even if anonymised, may enable taxpayers to be identified.
- 6.20. The Government therefore proposes that the Advisory Panel should produce a periodic report containing a digest of key principles emerging from the opinions delivered, which can subsequently be incorporated into GAAR guidance. It would also contain statistical information such as the number of referrals, the areas of legislation covered, and the outcome of opinions given.
- 6.21. Chapter 7 discusses the proposed role of the Advisory Panel in connection with published guidance.

Question 13 – The Government welcomes comments on the proposals relating to the Advisory Panel.

7. Guidance

- 7.1. Guidance on the GAAR is an important element of the Report's proposals. As the GAAR is, by its nature, a general rule, it is important that guidance is provided on how the principles underpinning the GAAR should operate. Properly drafted guidance should, therefore, assist taxpayers, advisers and HMRC in how the GAAR is to be applied in practice. HMRC officers would apply the principles in the guidance in determining whether the GAAR could be applied in particular cases.

Authoritative source of guidance

- 7.2. The Report suggested that providing an authoritative source of guidance as to the sort of cases to which the GAAR should apply might be achieved by having guidance notes included as a Schedule to the Finance Act which enacts the GAAR itself, so that it gains the authority attaching to legislation.
- 7.3. There are problems with such an approach. The guidance will need to be developed and updated over time, and at a practical level this means that giving it legislative effect is likely to be too inflexible and unwieldy to be an effective means of providing relevant and contemporary guidance. Further, the guidance is not intended to have the same status as legislation, but if it were enacted within a Schedule to the Finance Act or by Statutory Instrument it would have legislative effect and be subject to the rules of statutory interpretation.
- 7.4. The Draft GAAR instead proposes that the court or tribunal must take the guidance into account in considering any issue in connection with the GAAR.
- 7.5. There is a concern that giving the guidance greater weight than it would otherwise carry risks putting inappropriate power in the hands of persons other than Parliament. Ultimately, it is for the tribunal and the court to apply the GAAR legislation as enacted by Parliament and while the guidance must be taken into account, it is up to the tribunal or court to weigh this evidence as with any other evidence and apply the law in the normal way.
- 7.6. The Government agrees with the Report's recommendation that, in order for the guidance to have a more authoritative status, the Advisory Panel should play a role in developing, updating and expanding the GAAR guidance. As outlined in Chapter 6, the Advisory Panel is not expected to be a standing body but will be drawn on each occasion from a range of different individuals. The most practical and workable solution would be for the Advisory Panel to have responsibility for reviewing and approving the guidance, with the drafting work handled within HMRC.
- 7.7. This solution seeks to retain the essence of the Report's proposal, whilst keeping the resource costs in producing the guidance to a manageable level.

Timing of initial guidance

7.8. It would clearly be optimal for the first version of the guidance on the GAAR to be produced by the time the GAAR is enacted. Under the approach proposed above, HMRC would draft a first set of guidance ahead of the creation of the Panel, with the aim that the Panel would review and approve it as its first act.

What should the guidance contain?

- 7.9. The guidance would need to meet certain requirements, for example:
- The guidance should be clear and easy to understand, and written in plain English.
 - The guidance must be consistent with the principles set out in the legislation, i.e. that the purpose of the GAAR is to counteract tax advantages from abusive tax arrangements.
 - The guidance should provide further explanation of the various technical requirements of the GAAR, including the central “double reasonableness” test (clause 2(2) of the Draft GAAR).
 - The guidance should provide insight into how the principles underlying the GAAR would be applied to transactions.
 - The guidance should include examples of how the GAAR might apply in certain scenarios. However, any such examples would be illustrative of the application of the core principles, rather than seeking to provide categorical guidance in all possible situations.

Question 14 – The Government would welcome views on the proposals for producing and updating the guidance.

8. Taxes Impact Assessment

- 8.1. This chapter provides a draft tax impact assessment (“TIA”) that sets out the current understanding of the costs and impacts of the GAAR proposals in this consultation. The Government recognises the importance of gaining a thorough understanding of the effects that these proposals could have, and will continue to develop this assessment through consultation with interested parties. Comments on all aspects of the TIA are welcomed.
- 8.2. In line with the Government’s tax policy making approach, an updated TIA will be published alongside the draft legislation in autumn 2012.

Summary of Impacts

Exchequer impact	The GAAR will support the Government’s aim of reducing tax avoidance and will both raise and protect revenue. The revenue impact will reflect the targeting on artificial and abusive avoidance schemes, but will depend on the final design of the proposal. Any final Exchequer impact will be assured by the Office for Budget Responsibility.
Economic impact	The GAAR is targeted at artificial and abusive tax avoidance schemes and is not therefore expected to have any significant effects on the macro-economy.
Impact on individuals and households	The impact on individuals will be on those participating in artificial and abusive avoidance schemes. These are expected to be a small number of relatively affluent taxpayers. For some the GAAR compliance process will be easier and cheaper and for others it may add to costs (though this may not be material, those costs already reflect the consequences of complex avoidance).
Equalities impacts	The GAAR targets avoidance behaviours rather than particular types of individuals or businesses. There is no evidence to suggest that the GAAR will have any adverse equalities impacts.
Impact on businesses and Civil Society Organisations	The GAAR may be pro-competitive for some businesses that otherwise would be competing against those enjoying an unfair tax advantage. The GAAR will only impact on businesses participating in artificial and abusive tax avoidance schemes. For some the GAAR compliance process will be easier and cheaper and for others it may add to costs (though this may not be material, those costs already reflect the consequences of complex avoidance). There is likely to be no impact on Civil Society Organisations.

Impact on HMRC or other public sector delivery organisations	The impact on HMRC's costs is expected to be limited. Significant costs could have arisen from extending clearances but this is not proposed. There will be a cost of running the GAAR Advisory Panel and producing guidance but, in the longer term, there is a possibility of cost savings when abusive avoidance is countered more effectively.
Other impacts	Small firms will only be affected by the GAAR to the extent that they participate in artificial and abusive tax avoidance schemes. A negligible number of small firms may be expected to be affected.

Evaluation and Monitoring

- 8.3. The policy will be monitored through regular communication with taxpayers and practitioners affected by the measure.

Question 15 – HMRC would welcome comments or evidence that can improve the TIA assessment of impacts, costs and yield of the GAAR proposals.

9. Summary of Consultation Questions

1. Do you agree that the GAAR should be limited to the taxes and duties set out in clause 1(3) of the Draft GAAR initially? Are there any particular issues relating to how the GAAR would function in relation to the taxes (including NICs) that are proposed to be included?
2. Do you agree that the GAAR should be capable of counteracting UK tax advantages obtained under double tax agreements?
3. Do you agree that (1) the proposed “main purpose” rule serves as a useful filter, when coupled with the concept that arrangements must also be “abusive” and (2) a specific exclusion for arrangements without tax intent is not required? If you think a specific exclusion is required, please explain why.
4. Do you agree that the proposed “double reasonableness” test operates as intended to counteract only artificial and abusive schemes (such as those described in Annex B)?
5. Do you agree that the counteraction provision in the draft GAAR is appropriate?
6. The Government is continuing to develop its analysis regarding the appeals processes in relation to counteraction and consequential adjustments under the GAAR, and welcomes views which may inform detailed proposals to be published later in the year.
7. The Government would welcome views on the options set out regarding commencement, how transitional arrangements should be dealt with, and whether there should be different rules for different taxes where appropriate.
8. The Government welcomes views on clause 5(1) of the Draft GAAR.
9. Do you agree that it is appropriate for particular weight to be given in the legislation to the GAAR guidance and the opinion(s) of the Advisory Panel on the arrangements?
10. The Government welcomes comments on whether particular issues arise in relation to Self Assessment (where the relevant taxes operate within a Self Assessment regime) or within the existing administrative rules for those taxes that do not operate within a Self Assessment regime.
11. The Government invites comments on the general proposal that the GAAR should as far as possible operate within existing administration rules for the taxes involved; and on what adaptations may be necessary to existing administrative rules to ensure that the GAAR operates with as little as possible additional administration cost and burden for taxpayers, advisers and HMRC. Is there a case for having a new type of assessment given the cross-regime range of the GAAR?

12. The Government invites comments on whether time limits should be set for each of stages two, three and four and if so what those time limits should be.
13. The Government welcomes comments on the proposals relating to the Advisory Panel.
14. The Government would welcome views on the proposals for producing and updating the guidance.
15. HMRC would welcome comments or evidence that can improve the TIA assessment of impacts, costs and yield of the GAAR proposals.

10. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

- Stage 1 Setting out objectives and identifying options.
- Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
- Stage 3 Drafting legislation to effect the proposed change.
- Stage 4 Implementing and monitoring the change.
- Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 9.

Responses should be sent by 14 September, by e-mail to study.gaar@hmrc.gsi.gov.uk

or by post (email above is preferable) to:

HM Revenue and Customs
AAG Policy
3rd Floor
100 Parliament Street
London SW1A 2BQ

Telephone enquiries 020 7147 0087 or 020 7147 0086 (from a text phone prefix this number with 18001)

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from the HMRC Internet site at <http://www.hmrc.gov.uk/consultations/index.htm>. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

Annex A

The Code of Practice on Consultation

About the consultation process

This consultation is being conducted in accordance with the Code of Practice on Consultation.

The consultation criteria

1. When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.
2. Duration of consultation exercises - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Accessibility of consultation exercise - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. The burden of consultation - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you feel that this consultation does not satisfy these criteria, or if you have any complaints or comments about the process, please contact:

Amy Burgess, Consultation Coordinator, Budget & Finance Bill Coordination Group,
H M Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ

Email hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Annex B

Examples of abusive schemes

The following are examples of artificial and abusive tax avoidance schemes that HMRC considers would be appropriate targets for application of the GAAR.

Schemes which exploit unforeseen interactions between unrelated legislative provisions

Example: *HMRC v D'Arcy*¹⁵

In *D'Arcy*, the taxpayer entered into an avoidance scheme that exploited the interaction between two discrete areas of tax legislation, the accrued income scheme (AIS) rules and the income tax rules on manufactured payments. The AIS rules were exploited so as to provide the taxpayer with a tax-free gain, while the manufactured payment rules gave rise to an equal and opposite tax deductible loss. So while economically the taxpayer made neither a profit nor a loss (in fact a small profit), the net effect of the scheme was to reduce her overall liability to tax.

The Special Commissioners and High Court decided that the operation of the relevant legislation did not depend on whether the taxpayer had a tax-avoidance motive. The problem was that the two sets of rules were enacted at different times and with different statutory purposes. Although Parliament could not have intended this outcome, the scheme worked.

In deciding that the scheme worked, Henderson J commented (at paragraph 47):

In short, this is in my view one of those cases, which will inevitably occur from time to time in a tax system as complicated as ours, where a well-advised taxpayer has been able to take advantage of an unintended gap left by the interaction between two different sets of statutory provisions.

Mechanistic legislation

Example: *HMRC v Bank of Ireland Britain Holdings Ltd*¹⁶

The scheme used the tax legislation for “repo” (sale and repurchase) agreements to generate an artificial tax deduction.

The scheme comprised a number of preliminary steps performed outside the UK followed by a series of UK transactions. Following the receipt by a non-resident person of dividends from another non-resident company (Company A), the shares in Company A were transferred to a UK company (Company B). When the arrangement

¹⁵ [2007] EWHC 163 (Ch). The Special Commissioners and the High Court found in favour of the taxpayer.

¹⁶ [2008] EWCA Civ 58.

ended, the tax rules for repos and manufactured payments deemed Company B to pay a manufactured payment equal to the dividends that the non-resident person had received from Company A. Company B sought a tax deduction for this amount. The Courts decided that the company was entitled to relief for the deemed payment even though it did not correspond to any economic loss. Although the scheme had been designed to exploit the relevant tax rules and while acknowledging that the outcome sought by the taxpayer had “bizarre results”, the court’s view was that the legislation could not be construed to prevent the company getting the deduction.

Example: *Mayes v Revenue and Customs Commissioners*¹⁷

The scheme was designed to minimise a UK resident individual’s liability to income tax and CGT.

The scheme involved a seven-step series of transactions, under which all of the steps were pre-determined and some were self-cancelling. The scheme had no commercial purpose whatsoever. The transactions were structured in order to produce, using prescriptive rules in the legislation dealing with life assurance bonds, a deductible loss for income tax purposes and CGT loss relief.

Other schemes to create artificial losses or deductions

Example 1: Accounting tricks

The scheme was designed to use the loan relationship rules to obtain relief for “losses” that have no economic basis.

The scheme involves a company, which holds a valuable loan relationship on its balance sheet, issuing an instrument to a connected company that transfers to that connected company all the risks and rewards of ownership of the loan. In consequence, the company is required under generally accepted accounting practice to “derecognise” the loan relationship in its accounts, even though legally it remains party to the loan.

The company then claims that the loan relationship rules mean that it is entitled to relief for an amount equal to the principal value of the loan in the company’s balance sheet immediately before it was derecognised. Even though the company is economically level or neutral, it claims relief for a substantial tax loss.

Example 2: dividend buying

This scheme used legislation that had been introduced in 1938 to prevent dividend stripping to create an artificial loss.

¹⁷ [2011] EWCA Civ 407. The Court of Appeal found in favour of the taxpayer, and the Supreme Court refused to hear an appeal.

The 1938 legislation provided that where a company sold rights to a dividend without selling the underlying shares, then the dividend income was treated as that of the vendor (V), and not as the income of the purchaser (P). Similarly if P subsequently sold the rights to receive the dividend then that income was deemed not to be income of P.

The scheme exploited this legislation under an arrangement in which V was a non-resident company (so could not be taxed under the 1938 legislation), while P was a UK bank. P subsequently sold its right to the dividend for an amount almost identical to the purchase price, but claimed that while the cost of acquiring it was an ordinary trading deduction, the sale proceeds could not be treated as its taxable income as it was deemed to be the income of the vendor. Hence, the UK bank claimed that it was entitled to a substantial tax loss, even though it had not suffered any actual loss.

The payer of the dividend was a special purpose vehicle that formed for no other purpose than to secure the desired tax outcome. The effect of the scheme was that the UK taxpayer could manufacture whatever size of deduction it wanted, at no economic cost to itself other than the scheme fees.

When the scheme was closed down in 2006, the Treasury Minister commented on the wholly artificial nature of the arrangements:

Legislation will be included in the next Finance Bill to stop financial institutions and share dealers claiming wholly artificial losses by buying and selling the right to a dividend on shares and claiming that the sale proceeds are exempt from tax.

Schemes have been disclosed to HM Revenue and Customs (HMRC) under the legislation in Part 7 Finance Act 2004 which seek to exploit a perceived weakness in section 730 of the Income and Corporation Taxes Act. HMRC believes that the schemes may not work, but to put the matter beyond doubt, subsection (3) of section 730 will be repealed.

The repeal will be effective in relation to any sale, transfer or other realisation of a right to receive a dividend taking place on or after today.

Example 3: “Gifts” to charity

This scheme was another wholly artificial arrangement where a taxpayer, who sustains no economic loss, claims relief for a gift to a charity which in reality receives almost no value.

An individual acquires gilts, which are ‘gifted’ to a charity once the charity has granted put options to two trusts. The beneficiary of the trusts is the individual making the ‘gift’. The put options allow one of the two trusts to acquire the gilts at 1% of the market value subject to certain conditions.

The gilts are then sold by the trusts, and the sale proceeds are returned to the individual by way of interest free loans.

The individual claims relief for the gift of the shares. By setting the market value of the gilts against his income for the year, the individual effectively receives relief at 40% of the market value of the gilts.

Annex C

Double taxation agreements

1. HMRC considers that the proposed GAAR would be consistent with the OECD commentary on the Model Tax Convention. Paragraph 9.4 of the OECD commentary on Article 1 of the Model Tax Convention confirms that:

States do not have to grant the benefits of a double taxation convention where arrangements that constitute an abuse of the provisions of the convention have been entered into.

2. Paragraph 9.5 expands on this concept:

It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.

3. General anti-abuse rules are discussed specifically at paragraph 22:

22. *Other forms of abuse of tax treaties (e.g. the use of a base company) and possible ways to deal with them, including “substance-over-form”, “economic substance” and **general anti-abuse rules have also been analysed, particularly as concerns the question of whether these rules conflict with tax treaties**, which is the second question mentioned in paragraph 9.1 above.*

22.1 *Such rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability; these rules are not addressed in tax treaties and are therefore not affected by them. **Thus, as a general rule and having regard to paragraph 9.5, there will be no conflict. For example, to the extent that the application of the rules referred to in paragraph 22 results in a recharacterisation of income or in a redetermination of the taxpayer who is considered to derive such income, the provisions of the Convention will be applied taking into account these changes.***

(Emphases added).

4. The proposed GAAR is targeted at abusive schemes, and accordingly, it accords with international law.¹⁸ The proposed GAAR contains a number of safeguards for taxpayers which justify the view that it could not be applied lightly. Although the test for the GAAR is formulated differently, it would seem to be consistent with the guiding principle set out above. HMRC anticipates that the GAAR guidance could clarify that, in the context of arrangements seeking to abuse DTAs, the GAAR would be applied consistently with the OECD commentary on the Model Tax Convention.
5. HMRC considers that failure to provide for the GAAR to apply to arrangements which seek to exploit DTAs risks increased avoidance in this area. HMRC continues to encounter schemes which erode the UK tax base by exploiting the provisions of DTAs. Examples of schemes in this area that have previously been litigated (and which resulted in the enactment of remedial legislation) are *Padmore v Inland Revenue Commissioners* [1989] STC 493 and *R (on the application of Huitson) v Revenue and Customs Commissioners* [2011] STC 1860.
6. Although the relationship between DTAs and domestic anti-abuse laws was clarified in the 2003 edition of the OECD Commentary on Article 1 of the Model Tax Convention, as set out above, no distinction should be made between treaties negotiated and signed before and after 2003 regarding the application of the GAAR. HMRC's view is that the 2003 commentary simply clarified the existing position. This view is supported by the introduction to the Model Convention, which states (paragraph 33 to 36.1) that existing DTAs should be interpreted as far as possible in the spirit of revised Commentaries.

¹⁸ Other jurisdictions such as Australia, Canada and South Africa with general anti-avoidance rules (which generally have a wider scope than the proposed GAAR), take the view that their rules override DTAs.

Annex D

Draft legislation

PART 1

GENERAL ANTI-ABUSE RULE

1 General anti-abuse rule

- (1) This Part has effect for the purpose of counteracting tax advantages arising from tax arrangements that are abusive.
- (2) The rules of this Part are collectively to be known as “the general anti-abuse rule”.
- (3) The general anti-abuse rule applies to the following taxes –
 - (a) income tax,
 - (b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
 - (c) capital gains tax,
 - (d) petroleum revenue tax,
 - (e) inheritance tax,
 - (f) stamp duty land tax, and
 - (g) [the new tax on ownership of high-value residential properties or dwellings to be created by FA 2013].

2 Meaning of “tax arrangements” and “abusive”

- (1) Arrangements are “tax arrangements” if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.
- (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, having regard to all the circumstances including –
 - (a) the relevant tax provisions,
 - (b) the substantive results of the arrangements, and
 - (c) any other arrangements of which the arrangements form part.
- (3) In subsection (2)(a) the reference to the relevant tax provisions includes –
 - (a) any principles on which they are based (whether express or implied),
 - (b) their policy objectives, and
 - (c) any shortcomings in them that the arrangements are intended to exploit.
- (4) Each of the following is an indication that tax arrangements might be 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,
 - (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,
 - (d) the arrangements involve a transaction or agreement the consideration for which is an amount or value significantly different from market value or which otherwise contains non-commercial terms.
- (5) Subsection (4) is not to be read as limiting in any way the cases in which tax arrangements are regarded as abusive.

3 Meaning of “tax advantage”

A “tax advantage” includes –

- (a) relief or increased relief from tax,
- (b) repayment or increased repayment of tax,
- (c) avoidance or a reduction of a charge to tax or an assessment to tax,
- (d) avoidance of a possible assessment to tax,
- (e) a deferral of a payment of tax or an advancement of a repayment of tax, and
- (f) avoidance of an obligation to deduct or account for tax.

4 Counteracting the tax advantages

- (1) If –
- (a) there are tax arrangements that are abusive, and
 - (b) the procedural requirements of [the Schedule] have been complied with,
- the tax advantages arising from the arrangements are to be counteracted on a just and reasonable basis.
- (2) The counteraction may be made in respect of the tax in question or any other tax to which the general anti-abuse rule applies.
- (3) An officer of Revenue and Customs must make, on a just and reasonable basis, such consequential adjustments in respect of any tax to which the general anti-abuse rule applies as are appropriate.
- (4) These consequential adjustments –
- (a) may be made in respect of any period, and
 - (b) may affect any person (whether or not a party to the arrangements).

5 Proceedings before a court or tribunal

- (1) In proceedings before a court or tribunal in connection with the general anti-abuse rule, HMRC must show –
- (a) that there are tax arrangements that are abusive, and
 - (b) that the counteraction of the tax advantages arising from the arrangements is just and reasonable.

- (2) In determining any issue in connection with the general anti-abuse rule, a court or tribunal must take into account –
 - (a) HMRC’s guidance about the general anti-abuse rule that has been approved by the GAAR Advisory Panel, and
 - (b) any opinion of the GAAR Advisory Panel about the arrangements.
- (3) In determining any issue in connection with the general anti-abuse rule, a court or tribunal may take into account –
 - (a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that is in the public domain at the time the arrangements were entered into, and
 - (b) evidence of established practice at that time.

6 Relationship of the GAAR with other tax provisions

- (1) The general anti-abuse rule is to be ignored in applying other provisions made by or under an Act relating to a tax to which that rule applies.
- (2) But any priority rule has effect subject to the general anti-abuse rule (despite the terms of the priority rule).
- (3) A “priority rule” means a rule (however expressed) to the effect that particular provisions have effect to the exclusion of, or otherwise in priority to, anything else.
- (4) Examples of priority rules are –
 - (a) the rule in section 464, 699 or 906 of CTA 2009 (priority of loan relationships rules, derivative contracts rules and intangible fixed assets rules for corporation tax purposes), and
 - (b) the rule in section 6(1) of TIOPA 2010 (effect to be given to double taxation arrangements despite anything in any enactment).

7 Interpretation

In this Part –

- “abusive”, in relation to tax arrangements, has the meaning given by section 2(2) to (5),
- “arrangements” includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable),
- “the GAAR Advisory Panel” has the meaning given by [the Schedule],
- “the general anti-abuse rule” has the meaning given by section 1,
- “HMRC” means Her Majesty’s Revenue and Customs,
- “tax advantage” has the meaning given by section 3, and
- “tax arrangements” has the meaning given by section 2(1).