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Tax avoidance: a General Anti-Abuse Rule

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Summary

UK tax law is specifically targeted rather than purposive: in tackling the exploitation of loopholes in the law, governments have legislated against individual avoidance schemes as and when these have come to light. Often the response to this legislation has been the creation of new schemes to circumvent the law, which in turn has seen further legislative action – an 'arms race' between the revenue authorities and Parliamentary counsel on one side, and on the other, taxpayers aided and abetted by the legal profession.

Over the past twenty years many commentators have suggested having legislation to counter tax avoidance in general; that , a 'General Anti-Avoidance Rule' might dissuade the most egregious efforts to avoid tax, encourage taxpayers and legal counsel to redirect their energies to more productive activities and allow the authorities to simplify the law without fear of it being systematically undermined.

In its first Budget in June 2010 the Coalition Government announced it would consult on this issue,[1] and in December a study group, led by Graham Aaronson QC, was established to explore the case for introducing an anti-avoidance rule.[2] Mr Aaronson completed his report in November 2011, in which he recommended a narrowly focused rule targeted at 'abusive arrangements' only.[3]

In June 2012 the Government launched a consultation exercise with a view to introducing a General Anti-Abuse Rule (GAAR) in 2013,[4] confirming its plans in December 2012.[5] Provisions in the *Finance Bill 2013* for the new GAAR were agreed, without changes, and the new rule came into force on 17 July 2013.[6]

In July 2017 HM Revenue & Customs made an appeal to the independent GAAR Advisory Panel on the application of the GAAR to a specific avoidance scheme for the first time – an appeal that was successful.[7] Since then all those cases referred to the GAAR Advisory Panel have resulted in a Panel opinion in HMRC's favour.[8]

This paper looks at the introduction of the new GAAR, while a second paper looks at earlier debates over the case for a GAAR over the last twenty years.[9] Other developments in the Government's efforts in recent years to tackle both tax avoidance and tax evasion are discussed in a third Library paper.[10]

1 *Budget 2010* HC 61 June 2010 para 2.114
2 HC Deb 6 December 2010 cc1-3WS
3 HC Deb 21 November 2011 cc2-3WS; HM Treasury press notice 130/11, 21 November 2011
4 HMRC, *A General Anti-Abuse Rule (GAAR) - consultation document*, June 2012
5 *Autumn Statement*, Cm 8480 December 2012 para 1.178; see also, *Budget 2013*, HC 1033, March 2013 para 1.211
6 HM Revenue & Customs' detailed guidance is published on Gov.uk.
7 HMRC, *GAAR Advisory Panel opinion: employee rewards using gold bullion*, 7 August 2017
8 The GAAR Advisory Panel publish their decisions on Gov.uk. see also, PQ249975, 8 May 2019; PQs 237714-5, 1 April 2019.
9 *Tax avoidance: a General Anti-Avoidance Rule – background history (1990-2010)*, Commons Briefing paper CBP2956, 16 January 2020
10 *Tax avoidance and tax evasion*, Commons Briefing paper CBP7948, 7 April 2021

1. Establishing the Aaronson Study Group

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

*

In February 2002 Mrs Philippa D'Arcy, a highly successful recruitment consultant, took up a tax avoidance scheme suggested the month before by her tax adviser, Mr Philip Shirley. The scheme involved borrowing £31m worth of government gilts, selling them on the stock market, before, a week later, buying them back, and returning them to the bank from whom she had borrowed them. The transaction created a very considerably-sized tax deduction, which was upheld in the Courts five years on, the judge remarking, "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."[11]

Three years *before* this legal defeat, the Government announced provisions in the 2004 Budget to block this loophole – a page of statute which Mike Truman, then editor of *Taxation*, described as follows:

> [The legislation] was introduced by *FA2004*, Sch 24. That schedule takes up about a page in the Yellow Handbook [the annual publication which collates all current direct tax law]. It is a page of legislation which is designed never to be used. The intention is that, having worked out the tax implications of the scheme, and realising that they will prevent any tax advantage being gained, the adviser will not put forward a scheme such as this. The time and effort that is put into drafting the legislation, debating it in Parliament, printing it, and reading it is therefore totally wasted — the net result is that in future nothing will happen.[12]

Mr Truman cited the *D'Arcy* case as iconic when he delivered the annual Hardman lecture in December 2007, focusing on the questions of tax fairness and simplification:

> I think that the case of D'Arcy is an iconic one for tax avoidance. You'll remember that the taxpayer managed, through a combination of two anti-avoidance provisions, to get a large deduction from her income when there was no commercial loss. Although the transaction was wholly artificial, the Special

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11 *Revenue & Customs Commissioners v Philippa D'Arcy* [2007] EWHC163 (Ch) (para 47). See also, *Tiley & Collison UK Tax Guide* 2018/19 ed para 3.16

12 "It's the clients", *Taxation*, 1 March 2007. The change was announced in Inland Revenue Budget Note REVBN9, *Tax avoidance: UK equity repo or stock loans*, 17 March 2004.

> Commissioner found that it worked. It had to be blocked by a change in the law, and HMRC are not appealing the case. No tax system can operate if it is holed below the waterline by packaged avoidance techniques such as that, and blocking them individually is no answer, because the measures will interact to create more loopholes.[13]

In turn Mrs D'Arcy's tax adviser, Philip Shirley, wrote a response, in which he offered the following observations:

> The transactions in D'Arcy are described by Mr Truman as artificial. It is certainly unusual for private individuals to short securities and, at the time, it was difficult to find institutions that would enter into repo transactions with individuals. However, it is not reasonable to regard the transactions as artificial in the context of the specific statutory regime which the Revenue introduced for shorting transactions … The real issue thrown up by the D'Arcy case is why such defective legislation was introduced in the first place … It is more appropriate to blame clients, says Mr Truman, than advisers for seeking to exploit loopholes. However, it seems to me that neither taxpayers nor their advisers should be blamed if there are successful tax avoidance opportunities. Those responsible for devising the legislation are responsible.

In upholding the legality of the scheme, Mr Shirley continued, the courts had simply been following Parliament's intent, as expressed in statute: "The courts cannot be blamed for their interpretation of legislation, where the scheme of the legislation is flawed or if the legislation is so prescriptive that no scope can be given to interpretation."[14]

Another example was given by Graham Aaronson QC, after he had been commissioned by the Government to consider the case for a General Anti-Avoidance Rule (GAAR); Mr Aaronson was interviewed by the *Tax Journal* in July 2011, and when asked about the potential appeal of a GAAR, cited a tax avoidance scheme known as 'SHIPS 2':

> **Tax Journal editor, Paul Stainforth:** What are the potential advantages of a GAAR?
>
> **Graham Aaronson :** There are two which appeal to me particularly as a lawyer and someone working in tax. And there's one which I think should appeal to everyone. Taking that last one first, there is outrage at flagrant tax avoidance schemes. This is something that the committee emphasised must not be underestimated.
>
> I'm not just talking about public outrage, but also distaste within the profession over the fact that a scheme like 'SHIPS 2' in the Mayes case, for example, is being promoted. It's outrageous that someone should say, I've got an income of £1.7 million, how do I get a loss of £1.7 million? Many of us have seen these schemes, we're asked to advise on them. I think we're all pretty disgusted and it is also a waste of brain power that is being used to generate these abusive schemes. a GAAR can stop that, that in

13 Mike Truman, *"Can a fair tax system ever be simple?" 2007 Hardman Lecture*, ICAEW Tax Faculty, 15 November 2007 p7. Mr Truman discussed the bewildering details of the case in, "Claim of the rose", *Taxation*, 3 August 2006 – and mentioned the case again in, a piece on the avoidance industry in, "Defending the indefensible", *Taxation*, 15 October 2009.

14 "Don't blame us!", *Taxation*, 31 January 2008

> itself is a good thing. I hope every responsible tax professional would agree with that.
>
> The second advantage appeals to me as a lawyer, but others might not necessarily regard it as important as I do. I am getting very upset at the lengths to which judges will go to to stretch the purposive interpretation of tax statutes in order to defeat what they see as tax avoidance schemes. I entirely sympathise with the Courts, but this is leading to a distortion of true purposive interpretation. It leads to uncertainty and it is increasing litigation risk – I do feel strongly about this.
>
> The third advantage concerns something which flows from the GAAR, namely that a GAAR should lead to a serious attempt to strip away from future legislation, and then to strip away from existing legislation, some of the enormous complexities that are introduced in order to deal with anticipated tax avoidance strategies.[15]

Mr Aaronson's final report says a little more about the details of SHIPS 2, and why it may have proved a deal breaker for the future of anti-avoidance legislation. In this, Mr Aaronson mentions the Disclosure of Tax Avoidance Schemes regime. The 'DOTAS' regime, introduced in 2004, requires accountants, financial advisers and other 'promoters' selling tax avoidance schemes to notify the tax authorities of any new scheme they are to offer to taxpayers. Each scheme is given a reference number which, in turn, taxpayers have to use in their tax return, if they have used it. HMRC have used this information to track the take-up of avoidance schemes, challenge individual schemes in the courts if HMRC have assessed that they do not work in the way the promoter claims, or to address unintended loopholes in the law that some schemes seek to exploit.[16] Turning back to Mr Aaronson's report, he noted the failure of DOTAS and other tax avoidance initiatives to tackle "the most egregious tax avoidance schemes":

> 3.20 Regrettably, however, it is clear that purposive interpretation, specific anti-avoidance rules and [the regime for the Disclosure of Tax Avoidance Schemes – 'DOTAS'] are not capable of dealing with some of the most egregious tax avoidance schemes. Such schemes focus on prescriptive tax rules which are not susceptible to contextual interpretation. A recent example is the "SHIPS 2"[17] scheme, which gave UK taxpayers a seven step route to creating an artificial tax loss which could be used to set off against their other tax liabilities. In the High Court Proudman J sympathised "with the instinctive reaction that such an obvious scheme ought not to succeed."[18] However given the prescriptive nature of the statutory rules in question she was unable to find a purposive interpretation sufficient to defeat it.
>
> 3.21 The Court of Appeal[19] reached the same conclusion. In the present context it is particularly pertinent to note the comments of Thomas LJ and Toulson LJ. Thomas LJ said – "I agree with the

15 "Interview: Aaronson on the progress of the GAAR study", *Tax Journal*, 15 July 2011

16 Further background is given in, *Tax avoidance: a General Anti-Avoidance Rule - background history (1997-2010)*, CBP2956, 16 January 2020 (section 2.1).

17 *Mayes v HMRC* [2011] EWCA Civ 407

18 [2010] EWHC 2443 (CH), [2010] STC 1, paragraph 45

19 The judgment of the Court of Appeal is final. Permission to appeal to the Supreme Court was refused on 1st November 2011.

> judgment of Mummery LJ which sets out with great clarity why the appeal and cross appeal have to be dismissed. However, for the reasons given by Toulson LJ, my concurrence is reluctant. The higher-rate taxpayers with large earnings or significant investment income who have taken advantage of the scheme have received benefits that cannot possibly have been intended and which must be paid for by other taxpayers. It must be for Parliament to consider the wider implications of the decision as it relates to the way in which revenue legislation is structured and drafted" [at paragraph 100].
>
> 3.22 Toulson LJ said – "I also agree. On the corresponding deficiency issue I add a brief summary to explain the reason for my reluctant concurrence in a result which instinctively seems wrong, because it bears no relation to commercial reality and results in a windfall which Parliament cannot have foreseen or intended" [at paragraph 101].[20]

On 6 December 2010 Treasury Minister David Gauke announced the establishment of a study programme to examine a GAAR, as part of a wider statement on anti-avoidance measures; an extract from the statement is given below:

> As announced in the June 22 discussion document "Tax policy making: a new approach", HMRC engaged informally over the summer with a range of interested parties to consider whether there was a case for a general anti-avoidance rule (GAAR) in the UK. Those discussions showed that there was some support for such a rule, but it was clear that there were also concerns that a rule would generate uncertainty about the tax treatment of business transactions and about how that uncertainty could be managed in practice.
>
> I am setting in train a study programme to establish whether a GAAR could be framed to meet the objectives of deterring and countering tax avoidance in a fair way, while providing certainty, retaining a tax regime that is attractive to business and minimising compliance costs for businesses and HMRC and, if so, how the provisions of the GAAR might be framed.
>
> This study will be led by Graham Aaronson QC, supported by a small group of experts. The membership of the group is being finalised, and details will be announced in January. The group will complete its study by 31 October 2011, informing Ministers of its conclusions and, if applicable, providing model provisions and explanatory notes. The Government will consider the outcome of this work as part of the Budget decision-making process, taking account of the impact on certainty for taxpayers as to the tax treatment of transactions and the implications for HMRC in terms of costs and other priorities. The Government would not introduce a GAAR without further formal public consultation.[21]

In January 2011 the Treasury published details of the group's composition, anticipating the group's report in the autumn.[22]

At the time the Lords Economic Affairs Committee welcomed the establishment of the Aaronson Group, while noting the lack of

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[20] HMT, *GAAR Study: report by Graham Aaronson QC*, 11 November 2011 p20

[21] HC Deb 6 December 2010 c3WS

[22] HMT press notice 04/11, 14 January 2011. In an interview at this time Mr Aaronson explained his choice of individuals to be on the group ("Insight: Aaronson on the GAAR study", *Tax Journal*, 18 February 2011).

enthusiasm among the professional tax community for this reform.[23] For that part, the Treasury Committee were also agnostic, when they touched on this issue in a report on tax policy, published in March 2011:

> UK tax law is specifically targeted rather than purposive. This fits with the UK legal tradition and ensures that HMRC's decisions can be challenged in the courts. However, the search for legal certainty in such a system leads to ever more complex and lengthy legislation. This has led to the introduction of a system of targeted anti-avoidance legislation, in which more general provisions are used to target areas of perceived abuse … Such targeted legislation was generally seen to be working, but was not without problems. the Investment Management Association (IMA) told us "[...] as part of the development of taxation policy, all areas should be consulted upon, including anti-avoidance policy. Anti-avoidance policy has greatly exacerbated unpredictability in the development and application of tax policy in recent years. The manner in which highly complex anti-avoidance legislation is introduced has been problematic, with many changes being made piecemeal and without notice [Ev w52]."
>
> The Government is now considering a more general anti-avoidance rule. We note that a study group of lawyers has been set up under the Chairmanship of Graham Aaronson QC, to look into the scope for having a General Anti-Avoidance Rule (GAAR) in the UK tax system. Francesca Lagerberg of Grant Thornton reflected many of the concerns expressed by the accounting profession in relation to the GAAR: "The wording of the GAAR obviously is crucial. If you put it too broadly businesses will have huge uncertainty about the tax implications of what they're doing. Do it too narrowly and it might not hit the mark [Q 112].
>
> The CIOT said: "As most taxes will inevitably not be simple, there must be scope for the taxpayer to confirm their position. This is a key issue for businesses planning investment: we need to have more opportunities for rulings where there is genuine uncertainty [Ev w129, para 2.258]"
>
> Such a stance suggests that if a GAAR is introduced it may be desirable for HMRC to give clearance for certain arrangements in advance. While this would increase certainty for the taxpayers and companies concerned, it might increase HMRC's power effectively to make tax law. It could also increase costs to all involved. Accordingly, the way in which any GAAR might be framed and implemented needs careful consideration and full consultation. While there may be advantages to a General Anti-Avoidance Rule, taxpayers need a safe harbour to operate effectively without the undue uncertainty over their tax liability which an ill thought through or impracticable GAAR might bring.[24]

In an interview with the *Tax Journal* at this time, Stephen Hoyle, head of tax at DLA Piper, expressed doubts about the possibility of a GAAR ever working – in the light of previous efforts by the court to develop a judicial doctrine to counter avoidance:

> Graham Aaronson QC is the leading tax advocate of his generation – but there is a trap that he has to avoid – a trap into

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23 *The Finance Bill 2011*, HL Paper 158, 17 June 2011 pp41-2

24 *Principles of tax policy*, HC 753, 15 March 2011 pp20-21. For more commentary from the profession, see, "GARR: challenging assumptions", "GAAR: a practitioners view", & "GAAR: the overseas experience", *Tax Journal*, 27 September 2010; and, Chartered Institute of Taxation press notice, *GAAR – CIOT final comments*, 15 September 2010.

> which barristers can fall – which is thinking that a problem can be solved by a turn of phrase. A 'turn of phrase' can work well in an opinion or in argument, but be much less successful in a judgement. We have a precedent for this with *MacNiven v Westmoreland Investments Ltd*. Lord Hoffmann's attempt to define the limits of *Ramsay* using a distinction between legal concepts and commercial concepts took us nowhere. In my opinion there is no simple formulation of words which could claim to answer this complex question without falling into a 'Hoffmann' trap.[25]

Ramsay was a key judgement by the House of Lords in the 1980s that, for a time, suggested a new judicial principle in the assessment of whether an avoidance scheme was legal, where it met the strict wording of the tax code, but clearly subverted the legislators' intent.[26] Broadly speaking, the courts would look at whether a transaction forming part of a pre-ordained, circular or self-cancelling transaction was undertaken for no commercial purpose other than obtaining a tax advantage. If so, the scheme could be looked at as a whole and the legislation could then be judged not to deliver the result the taxpayer was hoping for.

Subsequent case law has cast doubt on this approach. In *MacNiven*, the judgement Stephen Hoyle mentioned in his interview, cited above, Lord Hoffman argued that the courts had no constitutional authority to impose some overriding legal principle, as had been suggested by *Ramsay*. In its place, Lord Hoffman put forward another approach:

> If the statutory language is construed as referring to a commercial concept, then it follows that steps which have no commercial purpose but which have been artificially inserted for tax purposes into a composite transaction will not affect the answer to the statutory question …it is first necessary to construe the statutory language and decide that it refers to a concept which Parliament intended to be given a commercial meaning capable of transcending the juristic individuality of its component parts. But there are many terms in tax legislation which cannot be construed in this way. They refer to purely legal concepts which have no broader commercial meaning. In such cases, the Ramsay principle can have no application.[27]

However, making this distinction is not so obvious – as Judith Freedman, Oxford Professor of Taxation Law, noted in a synopsis of *MacNiven*:

> In [Hoffman's] view *some* legislation can be construed in its commercial context. Other statutes refer to purely legal concepts and then cannot transcend their juristic meaning. How do we know which rule applies to a given word in a statute? Hoffmann's answer is that a legal concept is one of which a commercial man would say, if asked what it meant, "you had better ask a lawyer"![28]

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25 "A minute with … Stephen Hoyle", *Tax Journal*, 18 November 2011

26 *WT Ramsay Ltd v IRC* [1982] STC 174. See also, *Tax avoidance: a General Anti-Avoidance Rule - background history (1997-2010)*, CBP2956, 16 January 2020 (section 1.1).

27 [2001] STC 237 paras 48-49

28 Judith Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle", *British Tax Review* [2004] No 4 p351

A detailed analysis of further case law is beyond the scope of this note. That said, it is important to mention one further important judgement by the Lords Judicial Committee delivered the same year that, for some commentators, was the end to *Ramsay*. *Barclays Mercantile Business Finance (BMBF) Ltd v Mawson*.[29]

As a standard text observes, *Barclays* case represented "a process of cleansing in which excresences (or even errors) already revealed [in *MacNiven*] … are removed or downgraded. We are now left with the apparently simple fact that tax law is about interpreting statutes, that statutes should be interpreted purposively and that facts should be analysed realistically … *MacNiven* showed that there was no general overriding judicial anti-avoidance rule of law (or doctrine) to be applied like a principle of EC law. *Barclays* shows that there is no general overriding judicial anti-avoidance approach to construction."[30]

The authors go on to note that "while the judges are adopting a purposive approach to interpreting coherent sets of statutory rules, and so reaching results which are favourable to HMRC … they will not – and cannot – achieve this result where the taxpayer takes advantage of gaps between different sets of rules. It was on this basis that the taxpayer succeeded in ... *D'Arcy*" – the case discussed at the start of this note.[31]

As with other cases of this type, the dispute arose over whether a series of arrangements - that provided a leasing company entitlement to a relief on capital investment and thus a significant tax saving - could be seen as a *single* arrangement motivated *exclusively* by that tax saving. In their discussion of *Ramsay*, the Lords argued that tax lawyers had been encouraged to think it had established a new jurisprudence because of two qualities in which tax law was particularly marked:

> The essence of the new approach [in *Ramsay*] was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description …. As Lord Nicholls of Birkenhead said in [*MacNiven*] para 8: "The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case."
>
> The simplicity of this question, however difficult it might be to answer on the facts of a particular case, shows that the Ramsay case did not introduce a new doctrine operating within the special field of revenue statutes ...
>
> Unfortunately, the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard Ramsay as establishing a new jurisprudence governed by special rules of its own. This tendency has been encouraged by two features characteristic of tax law, although by no means exclusively so. The first is that tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, "in the real world". The second is that a

[29] [2004] UKHL 51, [2005] STC1, HL
[30] *Tiley & Collison UK Tax guide* 2018/19 ed. para 3.12
[31] *op.cit.* para 3.16

> good deal of intellectual effort is devoted to structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge.[32]

The Committee went on to argue that the courts were *not* entitled to ignore the question of whether a scheme met the relevant statutory conditions simply because one transaction within it had been identified as having 'no commercial purpose':

> There have been a number of cases … in which it has been decided that elements which have been inserted into a transaction without any business or commercial purpose did not, as the case might be, prevent the composite transaction from falling within a charge to tax or bring it within an exemption from tax … Cases such as these gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so.[33]

Turning back to *MacNiven*, the Committee argued that the distinction that Lord Hoffman had drawn between legal and commercial concepts was no panacea (**emphasis added**):

> The need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance was shown by [*MacNiven*] … in which the question was whether a payment of interest by a debtor who had borrowed the money for that purpose from the creditor himself and which had been made solely to reduce liability to tax, was a "payment" of interest within the meaning of the statute which entitled him to a deduction or repayment of tax. The House decided that the purpose of requiring the interest to have been "paid" was to produce symmetry by giving a right of deduction in respect of any payment which gave rise to a liability to tax in the hands of the recipient (or would have given rise to such a liability if the recipient had been a taxable entity.) As the payment was accepted to have had this effect, it answered the statutory description notwithstanding the circular nature of the payment and its tax avoidance purpose.
>
> *MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute.
>
> **In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be**

32 [2004] UKHL 51 para 32-34
33 [2004] UKHL 51 para 35-6

> **disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means.**
>
> It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either "commercial" or "legal". That would be the very negation of purposive construction.[34]

In a 2012 article on attitudes to tax avoidance, Mike Truman predicted that *Barclays* would have a much wider impact on tax avoidance in the next few years:

> Ever since the House of Lords made its fateful decision in *Barclays Mercantile Business Finance v Mawson* [2005] STC 1 to undermine the *Furniss v Dawson* [1984] STC 153 principle, a much wider range of entirely artificial tax planning 'solutions' has been pushed aggressively to taxpayers.
>
> Like the original Rossminster schemes of the 1970s, these involve going into the provider's office; signing lots of documents as securities are issued, contracts are made, and boards of directors reach carefully pre-prepared conclusions; and walking out three hours later with cramp in your writing hand and a tax loss worth ten times as much as you have paid.
>
> While they are both legal (assuming the purposive interpretation principle is passed), there is a clear distinction between these sorts of schemes and the level of tax planning which finds the least-taxed path of several that a transaction or series of transactions could legitimately go down.
>
> The risk to the Exchequer of the former is significantly greater, and it is therefore not unreasonable that taxing authorities say they need greater protection from such predation; not bolting yet another strut to the scaffolding buttressing the walls of the tax system a year after that area of the rampart has fallen into the moat.[35]

Three years on, in a valedictory piece which appeared in *Taxation* in March 2015, Mr Truman recalled that "the immediate result of *Barclays* was a surge in tax avoidance schemes, often marketed by boutiques, sometimes to the clients of very large firms, but increasingly to less sophisticated taxpayers and sometimes through IFAs rather than tax specialists." In a wide-ranging discussion of both case law and public attitudes to tax avoidance, Mr Truman uses the same example as Mr Aaronson – 'SHIPS 2' – in exploring the ethical question of avoidance – that is, "what are we going to call 'tax dodging' and therefore unethical, regardless of whether it is illegal?":

> A pre-packaged scheme or strategy that conjures a free-standing tax reduction out of thin air, such as the SHIPS 2 scheme based on second-hand life insurance bonds, is tax dodging because of its effect on the common good. On any interpretation of the golden

34 [2004] UKHL 51 para 37-8
35 "How far would you go?", *Taxation*, 5 July 2012

rule, the justification for such schemes falls apart because my ability to reduce my tax bill while enjoying the benefits of a society that is funded by substantial tax payments depends on you not doing the same as I have done.

I am entirely comfortable with choosing the genuine, commercial, structure for a business or investment that results in the lowest tax liability being paid. The only alternative is to suggest that I either have to choose the structure which means I pay the highest level of tax, or else to delve into the quagmire of whether a particular structure is more or less "artificial".

So I had no problem advising in lectures that partnerships with corporate members seemed to offer significant advantages. On the other hand, I have no issue at all with the principle of them being stopped by legislation when the government decided to do so (the mechanics were another issue).[36]

[36] "So long …", *Taxation*, 4 March 2015

2. The Report by the Aaronson Study Group

On 21 November 2011 Treasury Minister David Gauke gave a statement on tax avoidance, and as part of this, gave details of the conclusions to Mr Aaronson's assessment and how the Government would proceed:

> Mr Aaronson has recommended a narrowly focused GAAR which should initially apply to the main direct taxes—income tax, capital gains tax, corporation tax, and petroleum revenue tax, as well as national insurance contributions. The report sets out in detail how a GAAR could be introduced, and includes an illustrative draft rule. It also includes a summary of the views of representative bodies in the tax sector.
>
> The Government will consider the report in detail and the extent to which the proposals could add to HMRC's existing legislative and administrative approaches and further reduce levels of tax avoidance. The Government will discuss the implications of the proposed rule with business and tax groups and respond fully at Budget 2012, setting out their plans for further, formal public consultation, if appropriate.[37]

In his report Mr Aaronson argued that a 'broad spectrum' GAAR would *not* be beneficial: it would threaten to undermine "sensible and responsible tax planning", which, in his view was "an entirely appropriate response to the complexities of a tax system such as the UK's." In addition, to be fair to taxpayers, a broad spectrum GAAR would have to be supported by a comprehensive system for obtaining advance clearance for tax planning transactions:

> But an effective clearance system would impose very substantial resource burdens on taxpayers and HMRC alike. It would also inevitably in practice give discretionary power to HMRC who would effectively become the arbiter of the limits of responsible tax planning.[38]
>
> By contrast a moderate rule targeted at abusive arrangements *would* be beneficial for the UK tax system, for a number of reasons:
>
> - It would "deter (and, where deterrence fails, counteract) contrived and artificial schemes which are widely regarded as an intolerable attack on the integrity of the UK's tax regime."
> - It should "contribute to providing a more level playing field for business" and for tax professionals attracting clients.
> - It would help tax tribunals and the Courts when assessing if tax schemes were successful or not. Under the current dispensation "judges inevitably are faced with the temptation to stretch the interpretation, so far as possible, to achieve a sensible result; and this is widely regarded as

[37] HC Deb 21 November 2011 cc2-3WS. See also, HM Treasury press notice 130/11, 21 November 2011. A copy of the report was deposited in the Commons Library (Dep2011-1844, 21 November 2011).

[38] *GAAR Study: report by Graham Aaronson QC*, 11 November 2011 paras 1.5-6

producing considerable uncertainty in predicting the outcome of such disputes."

- The existence of an anti-abuse rule would promote simpler, clearer tax rules – given that, "a significant contributing factor to the length and complexity is the need for the drafting of any given set of rules to anticipate attempts by some taxpayers to avoid the application of those rules, or exploit their application, in a way that Parliament could not rationally have contemplated." It would allow the Government of the day to "reduce and simplify the existing body of detailed anti-avoidance rules.

- The "centre ground of responsible tax planning" would be unaffected, though "a mechanism such as an independent advisory panel would be a quick and cost-effective way of helping taxpayers and HMRC identify the location of [the outer limit of this centre ground" without running the risk of giving greater discretionary powers to HMRC. Crucially this would mean there would be "no need for a comprehensive system of clearances, with the resource burdens which such a system would require."

- Finally, a targeted GAAR should "inform the public debate" and "build trust between taxpayers and HMRC."[39]

As noted in the previous section, Mr Aaronson argued that the existing approaches to preventing avoidance had proved incapable of dealing with some of the most egregious tax avoidance schemes. Following *Ramsay*, the Courts' purposive interpretation of tax statute had been a "very positive development", but "in some cases the Courts, under the guise of purposive interpretation, have been prepared to stretch[40] the interpretation of tax legislation in order to thwart tax avoidance schemes which they regard as abusive."[41] The use of specific anti-avoidance provisions was long-established, but had resulted in the tax code being long and complex:

> Specific anti-avoidance provisions have been part of the UK tax legislation landscape for more than fifty years. An early example of this was section 28 *FA 1960*, which was designed to counteract the use of dividend stripping and bond washing to create tax losses where no economic loss was suffered. In the meantime the volume and complexity of anti-avoidance legislation has increased exponentially and now forms a substantial portion of the body of the UK's tax legislation. The most recent example, dealing with so called "disguised remuneration" takes up more than 68 pages of the statute book (Schedule 2, *FA 2011*)[42] and it is estimated that

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[39] *op.cit.* para 1.7

[40] "Stretching" statutory language in this context has been recognised in the recent Supreme Court judgment in *HMRC v DCC Holdings* [2010] UKSC 58. Lord Walker, delivering the judgment of the Court, at paragraph 25 noted – "argument has focused, in particular, on whether and how far the words in section 84(1) [FA 1996]….can be stretched (or need to be stretched) in order to avoid the absurd result of….".

[41] *op.cit.* para 3.13

[42] The disguised remuneration rules are consolidated in Part 7A of the *Income Tax (Earnings & Pensions) Act 2003*.

> there are now more than 300 targeted anti-avoidance rules (or "TAARs").[43]

Finally, in Mr Aaronson's view, the disclosure regime ('DOTAS') was "plainly a useful source of information for HMRC", but it placed additional burdens on taxpayers, resulted in more complex anti-avoidance legislation, and had not prevented cases "where counteracting legislation comes too late to deal with early users of particular schemes: by their nature these schemes are often complex, and HMRC have to apply a great deal of intellectual effort in determining whether the scheme would be effective under existing rules and, if not, precisely what changes to the rules are needed to deal with them."[44]

Mr Aaronson proposed that the GAAR would be a statutory rule – a rule which would *override* the consequences which would otherwise flow from tax legislation. Critically, the GAAR would have to be "supported by the simple proposition that where there can be reasonable doubt as to which side of the line any particular arrangement falls on, then that doubt is to be resolved in favour of the taxpayer."[45] In addition, the potential power of such a rule required two 'unconventional' approaches to ensure it would work in the public interest:

> The GAAR is not to be regarded as a rule of construction, or interpretation, of statutory language. Rather, it operates on the hypothesis that the particular tax rules engaged by the arrangement would, on conventional purposive interpretation, succeed in achieving the advantageous tax result which it set out to obtain …
>
> [The GAAR] is not to be wielded as a weapon to intimidate taxpayers in relation to arrangements to which it could not apply. Nor should it be allowed to become a means of increasing HMRC's discretionary powers.
>
> I consider it appropriate to adopt two unconventional approaches in order to secure those objectives, bearing in mind that the GAAR itself would be an unconventional type of tax legislation.
>
> The first of these is to provide for an authoritative source of guidance as to the sort of cases to which the GAAR should apply. This could 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 … To serve as an ongoing source of guidance, such guidance notes would need to be updated from time to time [and] … it would be appropriate for [this] … to be the responsibility of an independent body.
>
> Secondly, in any potential dispute relating to the application of the GAAR there should be available all material which may help to determine whether a particular arrangement falls within the intended target area of the GAAR or, conversely, falls within the unaffected centre ground. This material should include available evidence, as at the time of the arrangement, in the form of official material or HMRC practice or widespread taxpayer practice, which

43 *GAAR Study*, November 2011 para 3.14-15. In 2009 HMRC consulted on the use of this targeted legislation, though this did not lead to any major policy change (*Simplifying Unallowable Purpose Tests - Discussion Document*, 31 July 2009).
44 *GAAR Study*, November 2011 para 3.17
45 *op.cit.* para 5.2

> is capable of throwing light on the inquiry; and this should be admissible even if it would not otherwise be admissible under the normal rules of evidence.[46]

The report provided an illustrative text for the GAAR and the accompanying guidance. It is not proposed to reproduce them here. Rather, the next paragraphs sketch out the general approach Mr Aaronson took, and his answer to some of the principal objections that have been raised to a statutory rule of this type.

The central question to establishing a GAAR is how one would draw a line between 'sensible and responsible tax planning' on one side and, on the other, avoidance schemes which, while satisfying the relevant provisions of the tax code, should be struck down. Notably Mr Aaronson *rejected* an approach used by many other countries where a GAAR exists:

> In many overseas GAARs, and indeed in many of the UK's specific anti-avoidance rules, the approach has been to target arrangements which have the sole or main purpose of achieving a tax advantage. There are many variants in the language, but the underlying concept is the same: if one of the objects of the arrangement is to achieve a tax advantage, then for that very reason the tax advantage should be denied …
>
> The insuperable problem is that the UK tax rules offer, and indeed in many instances positively encourage, the opportunity for taxpayers to reduce their tax liability …
>
> Obvious examples are arrangements designed to access capital allowances for investment in plant, or enhanced reliefs for scientific research expenditure, or tax incentives given for investment in enterprise zones. There are myriad other more subtle instances where there are different tax regimes for different, but not very distant, types of transactions (e.g. loan relationships, repos, derivatives etc.).[47]

As an alternative, any arrangement that was "abnormal, in the sense of having abnormal features specifically designed to achieve a tax advantageous result" would be treated as a *potential* target for the GAAR. If an arrangement had no such feature it would be "immediately dismissed from consideration."[48]

The next step to applying the GAAR *reverses* the traditional position of the Courts in assessing whether a scheme was legal or not. Instead of trying to assess if the intention of Parliament in framing the law was to frustrate the workings of this particular scheme, the GAAR would look at what tax benefits Parliament *intended* to bestow in fashioning the law (**emphasis added**):

> Placing an arrangement on this notional shortlist is a preliminary step. This leads to the critical stage of determining whether the arrangement does in fact fall within the GAAR's intended target area.
>
> At first blush one might think this could be achieved by asking whether the arrangement is designed to achieve a tax result

46 *op.cit.* para 5.4-5.11
47 *GAAR Study*, November 2011 paras 5.13-4
48 *GAAR Study*, November 2011 para 5.15

> which Parliament, or the legislation, did not intend. The insuperable problem here, though, is the established principle of statutory interpretation in the UK which holds that the intention of Parliament can be discerned only from the language of the legislation itself. Ex hypothesi the GAAR is designed to deal with cases where the language of the legislation would, under normal principles of interpretation, indeed achieve a favourable tax result (e.g as in the SHIPS 2 scheme). So this question could never be answered in the affirmative.
>
> Variants of this approach have been examined in an attempt to avoid the paradox created by that principle of statutory interpretation: for example, using criteria such as whether the tax result which the arrangement seeks to achieve is a result which is inconsistent with the "scheme of the legislation", or with the intention of the legislation "viewed as a whole", or "having regard to the wider context".
>
> The insuperable problem here is that the very essence of conventional purposive interpretation is to have regard to the context in which the particular provisions are set.
>
> I have reached the conclusion that **the better approach is to identify what it is that makes the centre ground of responsible tax planning unobjectionable; and to use this as the way to exclude from the shortlist of abnormal transactions those which come within that centre ground …** [thus referring] to arrangements made to secure tax benefits which can be regarded as a reasonable response to choices afforded by the legislation.[49]

Any uncertainty as to whether the GAAR applied or not could be reduced substantially by applying a number of safeguards:

- First, as mentioned above, the benefit of the doubt, if doubt remained, would be with the taxpayer. "This would be achieved by placing on HMRC the burden of demonstrating that the arrangement *can not* reasonably be regarded as a reasonable exercise of choice."[50]

- Second, as also already mentioned, an independent advisory panel "with a majority of non-HMRC members … [receiving] written representations from the taxpayer as well as from HMRC … would advise HMRC whether there are reasonable grounds for invoking the GAAR in the case of any particular arrangement."

- Third, although the GAAR would **not** be underpinned by a new clearance system, "existing clearance arrangements (such as for company reorganisations or de-mergers) … [could] extend to confirmation that the GAAR would be inapplicable to the arrangement concerned."

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49 *op.cit.* paras 5.16-21. Mr Aaronson referred to the approach taken Court of Final Appeal in Hong Kong, dealing with its GAAR, as underpinning this view (*Ngai Lik Electronics Company Ltd v Commissioner of Inland Revenue*, FACV No.29 of 2008, paragraph 101)

50 [Later on in the report Mr Aaronson noted, "this may be seen as a high hurdle which the GAAR needs to clear. Indeed, it is intended to be a high hurdle. However, I am satisfied that the GAAR will clear this hurdle when dealing with the highly artificial tax avoidance schemes, of which SHIPS 2 is a very visible example, which it is designed to deter or defeat." para 6.4]

- Finally, although unlikely to arise in practice, arrangements entered into with no tax saving intent at all would be excluded from the scope of a GAAR.[51]

Despite these safeguards, there would remain cases where the taxpayer was uncertain if the arrangements they had entered into would be frustrated by a GAAR – but this was a fact of commercial life:

> There will inevitably be cases where tax planning arrangements test the outer limits of the centre ground, giving rise to uncertainty as to whether the GAAR applies. However, in most if not all of these cases it is likely that there would in any event be uncertainty as to whether such tax planning would succeed in achieving its objective on the basis of the tax rules themselves, without any consideration of the GAAR. The comments of Lord Walker in the recent Supreme Court *Tower MCashback*[52] case are a powerful reminder of this fact of life.
>
> "The composite transactions in this case, like that in *Ensign*[53] (and unlike that in *BMBF*[54]) did not, on a realistic appraisal of the facts, meet the test laid down by the [Capital Allowances Act], which requires real expenditure for the real purpose of acquiring plant for use in a trade. Any uncertainty that there may be will arise from the unremitting ingenuity of tax consultants and investment bankers determined to test the limits of the capital allowances legislation."[55]

Mr Aaronson went on to discuss the question of counteraction – the consequences for the taxpayer where the GAAR applied – and implementation. For tax arrangements which were self-cancelling, the decision on counteraction should be left to the Tribunal. In situations with some real commercial or personal purpose, tax would be paid "hypothetical equivalent transaction which would achieve the same commercial or personal result but without the abusive tax result." HM Revenue & Customs should not have any powers to impose special penalties or penal rates of interest to tax recovered under a GAAR, as "such provisions would be seen as presenting an irresistible temptation to HMRC to wield the GAAR as a weapon rather than to use it, as intended, as a shield."

If the Government decided to introduce a GAAR, it should be applied first just to the main direct taxes – possibly being extended to other taxes, such as stamp duty land tax – but it would not be appropriate to apply it to VAT, as, under EU VAT law, it has its own (still developing) abuse of law doctrine. As a considerable amount of consultation would have to have occurred before a GAAR took effect, it would be entirely fair for the rule to apply to arrangements that taxpayers had entered into, but not completed.[56]

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51 *GAAR Study*, November 2011 para 5.23-27; para 5.31-3. Mr Aaronson gives an example of this type of case - *Five Oaks Properties Ltd v HMRC* [2006] STC (SCD) 769. As noted in a summary of the report in *Taxation*, counsel for the taxpayers in this case was one Graham Aaronson QC! ("Carefully targeted", 1 December 2011).

52 [2011] UKSC 19, paragraph 80

53 *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655

54 *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684. As noted above, this case is also referred to as, *Barclays*.

55 *GAAR Study*, November 2011 para 5.2

56 *GAAR Study*, November 2011 para 5.37, para 5.48, para 5.45-6, para 5.43

3. Responses to the Aaronson Report

Initial reactions to the Aaronson Study Group were quite positive,[57] though some commentators raised concerns that it would be hard for the GAAR to operate in the focused way that Mr Aaronson envisaged. The Chartered Institute of Taxation argued, "the acid test will be whether a GAAR can really focus on the egregious tax schemes that Graham Aaronson rightly has in mind."[58] The Institute of Chartered Accountants said the report was "a helpful addition to the consideration of how best to deal with what the Government considers to be unacceptable tax avoidance."[59] The Institute of Directors expressed concern that "the boundary between abuse and non-abusive planning … must not be so hazy that people are wary of undertaking the legitimate tax planning that is needed to allow decent post-tax returns being made in the UK."[60] The CBI stated "if this proposal can successfully be targeted at preventing abusive arrangements without creating uncertainty in relation to the tax treatment of normal commercial arrangements … it should be supported",[61] while the TUC noted that it had "long called for such a provision to be introduced and we urge the government to act on these proposals."[62]

Further to its initial comments, the CIOT published a detailed response in which it argued that the Government would have to be clear what a GAAR could achieve, given that many of the examples of 'tax dodging' highlighted in the media would *not* be caught by such a rule:

> There is a clear political wish (need?) to take action (and be seen to take action). Those who oppose (or seem to oppose) taking action risk being portrayed as friends/promoters of avoiders. Given recent comments, it seems that the decision may already have been taken to bring in a GAAR to meet this perceived need. The target of the politicians (and the public) seems to be such things as corporate excesses/bonus culture, the high profile corporate and individual cases highlighted by campaigns such as 'UK uncut', the way HMRC operates the tax system and 'the ability of the wealthy to manage their affairs to pay less tax'.
>
> Apart from stopping the occasional use of a Mayes scheme, the GAAR will not affect these situations. In particular, it would not stop an 'abuse' recently featured in various newspapers, namely a high-profile footballer reducing his tax bill by investing in an enterprise zone. This is, after all, surely the sort of investment that

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57 eg, "Report to unveil tax avoidance curbs", *Financial Times*, 21 November 2011

58 CIOT press notice, *GAAR must prevent flagrant abuses whilst not worrying everyday transactions, say tax advisers*, 21 November 2011

59 ICAEW (Tax Faculty), *The GAAR study group findings are published*, 21 November 2011. For more comment see, "Anti-abuse rule intended to safeguard the tax planning 'centre ground'" & "Perspectives on the GAAR report", *Tax Journal*, 25 November 2011 & 2 December 2011

60 Institute of Directors press notice, *Tax avoidance report cautiously welcomed by IoD*, 21 November 2011

61 "CBI supports moves on tax avoidance", Financial Times, 27 February 2012; CBI, *Tax and British business: making the case*, April 2012 p10

62 TUC press notice, *Calling time on tax avoidance*, 21 November 2011

> the government wants to happen, given its introduction of the relief![63]

A variety of views were given in a series of pieces by tax practitioners published in *Taxation* over the next weeks. David Heaton argued that the Study Group "seem to have gone out of their way to make the GAAR palatable to those of us outside HMRC, limiting its application to the plainly egregious and, in the view of some, outrageous schemes … [though] there is … a legitimate concern among some advisers about the potential for mission creep … the proposals [are] better than the current situation."[64] John Watson was more sceptical: "the language is immaculate and the logic is seductive … [but] the proposal that the scope of the GAAR should be defined by a series of five different tests – each no doubt developing its own jurisprudence – seems to owe more to the process of consulting with nine different tax representative bodies than it does to common sense."[65]

David Kirk argued that the absence of a clearance system or any programme to simplifying the law undermined the proposal: "[a] fundamental objection to the proposed GAAR is that it does not give us anything meaningful in return … having a clearance system is the only way of putting sufficient pressure on HMRC to make them want to simplify the law. It is an essential quid pro quo for that reason too."[66] In turn Keith Gordon suggested that it would be very hard to recruit candidates for an advisory panel which could determine exactly what schemes should fall under a GAAR. Citing the 'SHIPS 2' case that the Study Group singled out for discussion, the author argued "a sensible approach might be just to patch the perceived gap in the legislation as identified in such cases, rather than add a new layer of complexity and uncertainty to the entirety of the tax code."[67] Similar points were made by Patrick Cannon, writing after the Budget in the *Tax Journal*:

> [Quoting the views of the judges in the SHIPS 2 case] Aaronson uses [Justice Thomas'] words .. to elide the difference between Parliament simply adopting a more intelligent approach to the drafting of legislation and the adoption of a GAAR … The outcome [in this case] … is now very much the exception with the tribunals and courts having come to adopt a firm approach which goes against tax planning which they perceive to offend against the intention of the legislation … [In *Ramsay* and subsequent judgements] the judges have shown themselves more than capable of adapting the rules of interpretation to deal with egregious tax schemes and … from time to time encounter the odd hard case where the legislation is frankly rubbish and they ask for Parliament to take extra care in drafting this type of highly technical legislation.

Mr Cannon went on to argue that the introduction of legislation with retrospective effect, as had been done in the past, provided a workable alternative to a GAAR:

63 CIOT, *A General Anti-Avoidance Rule for the UK*, January 2012 para 6.1-2
64 "Got an alternative response?", *Taxation*, 12 January 2012
65 "Other side of the coin", *Taxation*, 19 January 2012
66 "Careful what you wish for!", *Taxation*, 26 January 2012
67 "Righting wrongs", *Taxation*, 15 March 2012

> There is also one other factor which would avoid the need for a GAAR and which Aaronson seems to have overlooked: retrospective legislation. There are now several precedents in the UK tax system and two stand out. First, the ['Primarolo statement' made by Dawn Primarolo when Paymaster General in December 2004, announcing legislation to frustrate schemes used primarily to avoid tax on City bonuses, and the Government's intent that any future schemes that came to light could be struck down retrospectively.]
>
> At the time the Treasury Select Committee noted that this came very close to a GAAR. Second, the Chancellor's statement in the Budget on 21 March 2012 that retrospective legislation would be used to counteract aggressive SDLT avoidance which emerges following the Budget measures.
>
> Such an approach should not only deter avoidance behaviour but would deal with the problem (if it exists to any material extent) of judges not being able to deal with aggressive avoidance schemes. If a scheme successfully navigates its way past the judges and is thought abusive then it risks getting shot down by retrospective legislation. If there is a need for an advisory panel then it is probably here where such a committee could be used to decide on suitable candidates for retrospective treatment but only once they escape the Court of Appeal ... For reasons of constitutional propriety such a panel should probably be a committee of MPs with a clerk who would keep a watching brief and alert them as and when a SHIPS 2 type case arose. Such a response would be far more 'quick and cost-effective' than a GAAR and its committee.[68]

From another perspective the Association of Revenue & Customs criticised the Study Group's work, on the grounds that a targeted GGAR "may widen perceptions of what is responsible tax planning and so make it harder to tackle tax avoidance":

> A more general GAAR, with a properly resourced clearance system, allows avoidance to be identified and tackled, whilst leaving responsible tax planning untouched. We also believe this avoids the need for an Advisory Panel of an uncertain nature which does not offer taxpayers any certainty of outcome. It also ensures that any decisions are fully transparent and can be adjudicated via the legal process.[69]

A similar argument was made by the Tax Justice campaigner Richard Murphy: a targeted GAAR would "stop the very worst excesses of the tax planning industry that most people in their right minds never went near. But the normal abuse that ensures the wealthiest in this country will carry on avoiding their liabilities will continue, completely unabated."[70]

There was limited discussion of the Study Group's proposals in the House, though in December 2011 Stephen Williams MP put down an EDM supporting the introduction of a GARR "within the next Finance

68 "Budget analysis: Anti-avoidance: the proposed GAAR", *Tax Journal*, 30 March 2012. For a discussion of this approach see, *Retrospective taxation*, Commons Briefing paper CBP4369, 27 August 2020.
69 Association of Revenue & Customs, *Response to GAAR Report*, April 2012 p1, p4
70 Tax Research blog, *George Osborne will NOT be announcing a general anti-avoidance rule tomorrow*, 20 March 2012

Bill", which 90 Members signed.[71] Prior to the Budget the then Shadow Exchequer Secretary, Owen Smith, wrote an article in which he argued that "unless strengthened significantly, the new anti-avoidance measures will be a toothless tiger":

> The judgment of the last Labour government, when considering a GAAR, was that a weak general rule with no real substance and only addressing the most specific circumstances was no substitute for targeted anti-avoidance legislation combined with a properly resourced Revenue & Customs.
>
> If this government's rhetoric on tax avoidance is to become reality, ministers must make clear that HMRC has got the resources it needs to do its job to tackle tax avoidance … They must explain why their GAAR is set to challenge only "the most egregious tax avoidance schemes", with the overwhelming majority of tax avoidance measures deemed "reasonable responses to the choices afforded by (tax) legislation"?
>
> Why will there be no special rates of interest or penalties on tax recovered by use of the GAAR – as there is in every other country where one has been adopted? And why, inexplicably, are property taxes explicitly excluded from the draft legislation, including stamp duty land tax about which there are significant concerns?[72]

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71 EDM 2501 of 2010-12, 1 December 2011

72 "Comment: The government's anti-avoidance tax rule is a toothless tiger", *Guardian*, 28 February 2012

4. Budget 2012: consultation on an anti-abuse rule

In his Budget speech on 21 March 2012 the then Chancellor George Osborne announced a series of measures to counter tax avoidance – including, as noted above, a statement that the Government would consider retrospective legislation if necessary. He also confirmed that the Government had decided to introduce a GAAR on the lines suggested by the Aaranson Study Group from 2013. An extract from his speech is given below:

> I regard tax evasion and, indeed, aggressive tax avoidance as morally repugnant. We have increased both the resources and the number of staff working on evasion and avoidance at HMRC. Taken together, the anti-avoidance measures in this year's Finance Bill will increase tax revenue over the next five years by around £1 billion, and protect a further £10 billion that could have been lost. This week we have signed a further agreement with the Swiss to stop UK residents evading tax.
>
> We have done all these things, but today we do even more. On coming to office, I asked Graham Aaronson QC to establish whether a general anti-avoidance rule could work in the UK tax system. He recommended that such a rule would improve our ability to tackle tax avoidance without damaging the competitiveness of the UK as a place to do business. We agree, so we will introduce one. We will consult on the details of the new rule and legislate for it in next year's Finance Bill.
>
> A major source of abuse, and one that rouses the anger of many of our citizens, is the way in which some people avoid the stamp duty that the rest of the population pays, including by using companies to buy expensive residential property. I have given plenty of public warnings that this abuse should stop, and now we are taking action. I am increasing the stamp duty land tax charge applied to residential properties over £2 million that are bought into a corporate envelope. The charge will be 15%, and it will take effect today.
>
> We will also consult on the introduction of a large annual charge on those £2 million residential properties that are already contained in corporate envelopes, and, to ensure that wealthy non-residents are also caught by these changes, we will be introducing capital gains tax on residential property held in overseas envelopes. We are also announcing legislation today to close down the subsales relief rules as a route of avoidance.
>
> Let me make this absolutely clear to people. If you buy a property in Britain that is used for residential purposes, we will expect stamp duty to be paid. This is the clear intention of Parliament, and I will not hesitate to move swiftly, without notice and retrospectively if inappropriate ways around these new rules are found. People have been warned. It is fair when money is tight, and so many families could do with help, that those buying the most expensive homes contribute more. From midnight tonight, we will introduce a new stamp duty land tax rate of 7% on properties worth more than £2 million.[73]

[73] HC Deb 21 March 2012 c804

The Budget report confirmed that a consultation would be launched in the summer, "with a view to bringing forward legislation in Finance Bill 2013." The report noted that the GAAR would be extended to stamp duty land tax (SDLT), and that "the Government is committed to ensuring that this legislation effectively tackles artificial and abusive tax avoidance schemes and that the supporting guidance is practical both for taxpayers and for HMRC."[74]

In general initial reactions to the Budget focused on other measures. That said, following the Budget, John Whiting at the Chartered Institute of Taxation & then director of the Office of Tax Simplification, said, "we think the Government is right to press ahead with a narrowly-targeted GAAR aimed at truly artificial schemes."[75] In a speech on business taxation some days after the Budget the CBI's Director-General, John Cridland, said, "some have claimed [the proposal for a targeted GAAR] … has no teeth. On the contrary, the proposals look both proportionate and effective, focused on highly abusive, artificial avoidance schemes which serve no commercial purpose. These schemes should be weeded out and the GAAR will play an important role in doing so."[76]

Some practitioners raised the issue of there being no proposals for a clearance system; the *Financial Times* quoted Chris Morgan, head of tax at KPMG, saying "a GAAR with no system for agreeing whether a business structure is agreeable to the tax authorities prior to implementation would mean that corporates would face significant uncertainty and would be a backwards step."[77] In a presentation on business taxes and anti-avoidance, as part of the Institute for Fiscal Studies' assessment of the Budget, Stuart Adam suggested the impact of a GARR would depend on how the courts interpreted it. In addition, it was unlikely that it would see a reduction in specific anti-avoidance law, given the risk, from a government perspective, of relying on the courts alone to police the boundary between what was legitimate tax planning and what was abusive.[78]

HMRC launched its consultation on a general anti-abuse rule on 12 June.[79] Responses were invited by 14 September. In the consultation document the Government agreed with Aaronson's conclusion that a 'broad spectrum' GAAR would not be beneficial to the UK; rather, the new rule would be targeted at "abusive and artificial tax avoidance schemes" – such as the cases of D'Arcy and SHIPS 2 mentioned above.[80] Similarly, in line with Aaronson, the Government proposed that the new rule would not be underpinned by a new formal clearance process, but

74 *Budget 2012* HC 1853 March 2012 p76
75 CIOT press notice, *Cautious welcome for GAAR from tax advisers*, 21 March 2012
76 CBI, *Speech to CBI/Policy Exchange Event 'Tax and British Business'*, 19 April 2012
77 "Osborne pledges to tackle 'morally repugnant' tax abuses", *Financial Times*, 22 March 2012
78 "Business tax, stamp duty and anti-avoidance," *IFS Budget 2012 presentations*, 22 March 2012
79 HC Deb 12 June 2012 c13WS
80 Examples of schemes that would be captured by the rule were given in appendix B to the report (HMRC, *A General Anti-Abuse Rule (GAAR) - consultation document*, June 2012 pp39-42).

that additional safeguards for taxpayers would be given by the creation of an Advisory Panel.

The document set out a draft text for the new statutory rule. This is not examined in detail here, though one point is worth making. While the approach followed Aaronson in broad terms, the Government proposed a different test to the circumstances in which a GAAR would 'bite'. Aaronson had suggested that this could be done by specifying that a GAAR would not apply to the 'centre ground of tax planning'. Clause 4 of his illustrative text for a GAAR states that any arrangement shall not be treated as achieving "an abusive tax result" - and thus potentially subject to a GAAR - "if it can reasonably be regarded as a reasonable exercise of choices of conduct afforded by the provisions of the [relevant Taxes] Acts."[81] HMRC argued that "the concept of the Acts affording choices of conduct is problematic; rather, the Acts attach outcomes to choices of conduct made by taxpayers."

Consequently the consultation document proposed a new "double reasonableness" test:

- first, that an arrangement could not "reasonably be regarded as a reasonable course of action" with regard to the relevant tax provisions and the results of the arrangement, and,
- second, that in the assessment of what a "reasonable course of action is", certain factors must be taken into consideration.

This part of the department's draft text was as follows:

> **(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,

81 *GAAR Study: report by Graham Aaronson QC*, 11 November 2011 p45

> (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.

The document went on to explain the reasons for taking this approach:

> 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.
>
> 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.
>
> 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.
>
> Subsection (4) gives some specific indications that an arrangement is abusive. The indications are neither sufficient[82] nor necessary[83] 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.
>
> 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).[84]

In turn the consultation document asked respondents if, in their view, the double-reasonable test "operates as intended to counteract only artificial and abusive schemes."[85]

Initially tax professionals raised familiar concerns about the potential threat of uncertainty for taxpayers in response to the consultation

[82] The phrase "an *indication* that tax arrangements *might* be abusive" in subsection 4 confirms this.
[83] As confirmed by subsection 5.
[84] *A General Anti-Abuse Rule (GAAR) - consultation document*, June 2012 pp14-15
[85] *op.cit.* p15

document,[86] though there were more detailed discussion of aspects of the proposed GAAR in the technical press.[87] The Aaronson Study Group also published a short response, stating that it was "agreed that the consultation draft GAAR embodies all of the main principles which we consider need to be incorporated in, and to form the framework of, a GAAR that would be appropriate for the UK":

> Without wishing to appear condescending, we also consider that the consultation GAAR is very well drafted, and is both succinct and lucid. Given the view just expressed, we do not consider it necessary for us, as a Study Group, to recommend any amendments to the draft. However, it is of course true that any draft can be refined, and members of the Study Group may suggest particular refinements during the course of the consultation process.[88]

Finally, while the debate over the merits of a GAAR was largely confined to the professional community,[89] there was some discussion of the issue by Members.

In a backbench debate on tax avoidance and evasion in September 2012, Catherine McKinnell, then Shadow Exchequer Secretary, raised concerns that the GAAR was "disappointingly narrow, designed by its own admission to tackle only the most egregiously abusive avoidance schemes, whatever that means … [The 'double reasonableness' test] provides neither clarity on the matter, nor armour for HMRC, which is more concerning."[90] In response Treasury Minister David Gauke said, "I am confident that, unlike other suggested approaches, the Government's approach strikes the right balance between protection against avoidance and clarity for taxpayers."[91] Michael Meacher MP, who had initiated the debate, has also sponsored a Private Members' Bill, to introduce a general anti-avoidance principle, on the grounds that the Aaronson approach would be entirely ineffective. The Bill was considered briefly by the House on 14 September, but did not complete its second reading.[92]

More generally, the problem of tax avoidance and evasion was much in the news in the latter half of 2012.

In June 2012 the *Times* ran a series of articles on avoidance schemes used by the wealthiest individuals, which sparked a much wider debate about what constituted legitimate tax planning or abusive evasion, and

86 "Experts criticise proposed tax rule changes", *Financial Times*, 13 June 2012; and, CIOT press notice, *GAAR needs to tackle abuse without creating uncertainty*, 12 June 2012
87 "Special focus: the proposed GAAR", *Tax Journal*, 29 June 2012
88 *GAAR Study: supplementary report by Graham Aaronson QC*, 25 June 2012 para 2.1-3
89 See also, "The fiscal clampdown", *Taxation*, 2 August 2012; "The GAAR: where do we go from here?" & "The draft GAAR : 'double reasonableness' test", *Tax Journal*, 10 & 31 August 2012; CIOT press notice, *Independent panel is key to making GAAR work*, 17 September 2012.
90 HC Deb 13 September 2012 c525
91 *op.cit.* c529
92 HC Deb 14 September 2012 cc609-11. Further details on the Bill are collated on the Parliament site.

how the Government should seek to tackle the problem.[93] Many commentators have argued that the scale of avoidance may be traced to the complexity of the law,[94] so that simplifying the law would effectively reduce its incidence: as an editorial in the *Times* argued "taxes should be lower. They should be simpler. And people should be made to pay them."[95] There was also a good deal of discussion as to how and when avoidance can be seen as immoral, and whether, when it is, it is best countered by public censure. Writing in the *Times*, David Aaronovitch argued the wealthiest individuals unbothered by their use of these schemes "should be shamed and ridiculed by the rest of us. Sorry, but that's the way a good society works. Conscience first. Shame second. Law third."[96]

Some reading of the history to tax avoidance might give one pause in proposing that the solution to the problem lies is making the law simpler: as Mike Truman, editor of *Taxation*, argued at this time, "our tax law is so long precisely because people keep trying to get round its provisions":

> I used to have a standard lecture on share incentives that started with a simple transfer of shares and the tax consequences which followed, and then went through the various inventive ways that employers have tried to avoid the tax but still pass on the shares. That took at least three hours, or, if you were really unlucky, you had to listen to me for a whole day. The result is whole swathes of the law which are only there to stop people doing things, rather than to tax transactions that will actually be carried out. No one is really meant to be taxed under *ITEPA 2003*, ss 446A-Z (shares acquired or sold other than at true market value), any more than they are meant to be taxed under the disguised remuneration provisions of Part 7A. That's about 40 pages of the Yellow Book designed solely to put up 'Keep out' notices around some clever tax planning schemes.

Mr Truman went on to make the point that *public* perceptions of the dividing line between avoidance and evasion were likely to be shaped by reports of the amounts of money wealthier clients have saved through entirely legal means:

> We have always argued that it is important to distinguish between the avoidance schemes which do legally work (once they have been tested in the courts) and outright evasion. I would still support that, but with a couple of caveats … I have a strong suspicion many taxpayers do not. I have argued before that the tax profession raises far more tax by stopping evasion than it loses the Exchequer by coming up with avoidance schemes. If 'ordinary' taxpayers see those with well-paid advisers avoiding tax successfully, they will think they are merely joining in if they fail to declare a bit of cash-in-hand part-time income. In law the two are

93 "The tax avoiders", 19 June 2012; "Taxman vs Take That", 20 June 2012; "Screen play: how movie millions are moved offshore", 21 June 2012; "Doctors and dentists: the taxman will see you now", 22 June 2012; "The cost of tax avoidance", 25 June 2012. See also, "Bound by the call of duty", *Financial Times*, 27 June 2012.

94 "When tax dodging becomes dodgy", *Sunday Times*, 24 June 2012; "Public shaming is the best way to tackle our tax cheats: it is time to reform our hopelessly unwieldy tax code", *Financial Times*, 23 June 2012;

95 "Leader: A fair share", *Times*, 19 June 2012

96 "Pay tax according to conscience, not the law", *Times*, 20 June 2012

> entirely different; in practice to many people they are more or less identical.[97]

In July 2012 Treasury Minister David Gauke gave a major speech on tax avoidance, in which he proposed some reforms to the disclosure regime, arguing that "as the avoidance landscape changes, so must [the disclosure regime]."[98] Mr Gauke also sought to bring some clarity to the debate on what is or is not avoidance:

> For those not immersed in matters relating to tax, the debate on tax avoidance can be a confusing one, not least because the term 'tax avoidance' can be used somewhat loosely. Legitimate use of reliefs is not tax avoidance:
>
> Claiming capital reliefs on investment is not tax avoidance – when those reliefs were introduced precisely to encourage the investment in question.
>
> Claiming reliefs against double taxation is not tax avoidance – when the alternative would be taxpayers paying tax twice on the same income.
>
> Claiming back tax on legitimate charitable donations is not tax avoidance – any more than ticking the 'gift aid' box is.
>
> Not paying tax on your pension contributions is not tax avoidance.
>
> Taking out a tax free ISA is not tax avoidance.
>
> Clearly, the examples I have listed represent perfectly reasonable tax planning – making use of reliefs for the purpose they were intended, and ensuring one pays only what one is liable for. Now I would hope this would be obvious to anyone who understands the purpose of reliefs. Yet some estimates of the tax gap count use of these reliefs as 'avoidance'. That is what avoidance is not. But artificial structures that aggressively exploit reliefs contrary to parliament's intended purpose through contrived, artificial schemes fall very clearly into the definition of avoidance.
>
> Buying a house for personal use through a corporate entity to avoid SDLT is avoidance. Channelling money backwards and forwards through complex networks for no commercial reason but to minimise tax is avoidance. Paying loans in lieu of salaries through shell companies is avoidance. And using artificial 'losses' deliberately accrued to claim back tax is avoidance.
>
> These kinds of schemes are where we are focussing our efforts, and they are all, to borrow a phrase from the Chancellor, 'morally repugnant'.[99]

In an interview with the BBC the Minister went on to suggest that it was 'morally wrong' for householders to pay cash in hand for plumbing and similar services so as to get a discount, since it was implicit that the discount was funded by the plumber not declaring this payment on his

97 "How far would you go?", *Taxation*, 5 July 2012. Mr Truman goes on to make the point about the success of tax planning schemes such as D'Arcy and SHIPS 2, due, in part, to the courts' reluctance to whole-heartedly adopt the Ramsay principle.

98 HM Treasury press notice, *Speech by Exchequer Secretary to the Treasury, David Gauke MP; Where next for tackling tax avoidance?*, 23 July 2012. Full details were set out in a consultation document issued alongside the Minister's speech: HMRC, *Lifting the Lid on Tax Avoidance Schemes*, 23 July 2012

99 HM Treasury press notice, 23 July 2012

tax return.[100] This proved quite controversial as a number of prominent politicians were then asked to confirm that they had, indeed, paid trades people cash in hand, though not with the intention of boosting the hidden economy.[101]

The debate illustrates, perhaps, a wider point that Mr Gauke made in his speech: noting the Government's consultation on a GAAR, the Minister observed that "it's important to realise that there is no tax avoidance 'magic bullet'. No single rule can ever wipe out avoidance completely." Similarly, it would appear that there is no magic description of tax avoidance that will fit every taxpayer's views as to what is legal, proportionate or fair.

[100] "Paying a plumber cash in hand morally wrong, says Tory minister", *Guardian*, 24 July 2012

[101] "Cash-in-hand confessions stir debate on tax morality", *Financial Times*, 25 July 2012

5. Finance Act 2013: the new GAAR

In December 2012 the Government confirmed its plans to introduce a General Anti-Abuse Rule.[102] In a document summarising the responses to its consultation, HMRC noted that "the majority of respondents" had supported this approach, though many "were concerned that the draft legislation had the potential to have wider application than the stated target."[103] Looking at the new rule in detail, a "key concern for nearly all respondents" was that the double reasonableness test "introduces a level of moral judgement" and that there would be "scope for potential mission creep" with too much discretion being placed in HMRC's hands. In response the Government proposed three main changes to the test:

> The first change is clarification of the circumstances to be taken into account in determining whether arrangements are abusive. These circumstances now include:
>
> - whether the substantive results of the arrangements are consistent with the principles and objectives of the relevant tax rules;
> - whether the means of achieving those results involves contrived or abnormal steps;
> - whether the arrangements are intended to exploit shortcomings in the relevant tax rules.
>
> The second change makes it clear that the specific indications that an arrangement might be abusive are not relevant if it is apparent that the relevant tax rules were intended to secure that outcome.
>
> The third change is the inclusion of an additional indicator that arrangements may not be abusive where they are in accord with established practice and HMRC has indicated its acceptance of that practice.[104]

Respondents were also concerned about *when* the new rule would take effect, and if its scope would extend to arrangements that were in the process of being agreed. In response the Government proposed that the new GAAR should take effect from the date of Royal Assent to the *Finance Act 2013*, rather than the start of the 2013/14 tax year. Only arrangements "entered into on or after that date" would risk being assessed in this way.[105]

In his report, Graham Aaronson had anticipated that initially a 'narrow' GAAR should apply to only the main direct taxes, though it might be extended to other taxes, such as stamp duty land tax, once it had 'bedded down'. As noted above, Aaronson argued that it would not be appropriate to apply the new rule to VAT, as, under EU VAT law, it had

102 *Autumn Statement*, Cm 8480, December 2012 para 1.178
103 HMRC, *A General Anti-Abuse Rule : summary of responses*, 11 December 2012 p5
104 *A General Anti-Abuse Rule: summary of responses*, 11 December 2012 pp10-11
105 *op.cit.* p14

its own (still developing) abuse of law doctrine.[106] In its consultation, the Government accepted the case for excluding VAT, but took the view that the new GAAR should apply, from its inception, both to stamp duty land tax, and to inheritance tax – though it acknowledged "that IHT operates differently to the other direct taxes and has complex interactions with legislation around trusts and estates."[107]

As a consequence the anti-abuse rule would cover: income tax; corporation tax (including taxes linked to corporation tax, such as the bank levy); capital gains tax, petroleum revenue tax, inheritance tax (IHT), stamp duty land tax, the annual residential property tax (ARPT) due to be introduced in 2013; and National Insurance contributions.[108] In the latter case, separate legislation would be required – Parliamentary convention prevents the annual Finance Bill including provisions relating to national insurance – though in its response document the Government noted 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."[109]

Several respondents to the consultation exercise raised had concerns about the decision to apply the new rule to IHT:

> The main reasons given [by respondents] for excluding IHT were:
>
> - Arrangements are often entered into many years before the IHT liability arises (typically on death) causing transitional problems in establishing when a potentially abusive element of an arrangement takes place.
>
> - The indicators in the draft legislation of "abusiveness" had a commercial tenor that is frequently not relevant to IHT arrangements, which generally do not have any form of commercial background.[110]

In answer to these concerns, the Government proposed two changes:

> - the GAAR will not apply to tax arrangements that have already been entered into before the commencement date; and
>
> - the draft legislation has been amended so that transactions or agreements that include non-commercial terms are no longer highlighted as indicators of abusiveness.[111]

Finally, the consultation exercise had shown a "strong feeling from many respondents that the authority and independence of the Advisory Panel's opinions may be compromised if HMRC were to be represented

[106] *GAAR Study: …* , November 2011 paras 5.44-6
[107] *A General Anti-Abuse Rule (GAAR): consultation document*, June 2012 para 2.17.
[108] It was not proposed to apply a GAAR to other taxes and duties "due to the additional complexity that this might add (particularly for taxes that operate under very different regimes)", though this would be kept "under review" (para 2.18).
[109] *A General Anti-Abuse Rule (GAAR): consultation document*, June 2012 para 2.13. The consultation document went on to state, "further consideration will be given to specific issues for NICs ahead of the publication of draft NICs legislation (para 2.14)
[110] *A General Anti-Abuse Rule: summary of responses*, 11 December 2012 para 2.1.2
[111] *op.cit.* para 2.1.5

on the panel."[112] At this time the Government confirmed that the Advisory Panel would *not* include any members from HMRC – something that had been announced the month before, when an interim group was established to review HMRC's draft guidance.[113]

Along with the response document, HM Revenue & Customs published the first version of this draft guidance, dealing with the scope of the legislation, examples of how the rule would apply, and the procedure for its use, as well as draft provisions for inclusion in the *Finance Bill 2013*, and a short tax information and impact note.[114]

The changes announced by the Government were welcomed by the Chartered Institute of Taxation, as "an example of good consultation", particularly in respect to the decisions over an implementation date,[115] though, as before, there was also criticism from some in the profession that the new rule would undermine taxpayer confidence and impact reasonable tax planning.[116]

Following the publication of these provisions, the House of Lords Economic Affairs Committee considered the Government's proposals for an anti-abuse rule, as part of their enquiry into selected provisions of the draft Finance Bill.[117] The Committee noted that the double reasonableness test would be "the key provision in achieving the targeting of the GAAR on abusive tax arrangements":

> The draft Finance Bill defines tax arrangements as "'abusive' if they are arrangements the entering into or carrying out of which cannot **reasonably** be regarded as a **reasonable** course of action in relation to the relevant tax provisions, having regard to all the circumstances …" (**emphasis supplied**). The test goes on to set out examples of circumstances which must be taken into account in determining whether tax arrangements are abusive, though these examples are not exhaustive.
>
> In interpreting this provision, a decision has to be taken, ultimately by a court, on whether there can be a reasonably held view that the tax arrangements are a reasonable course of action in relation to the relevant tax provision, having regard to all the circumstances. The personal view of the judge is irrelevant. So even if the judge thinks the tax arrangements are not a reasonable course of action, if, in the judge's opinion, based on the available evidence, a reasonable view can be held to the contrary (i.e. that the arrangements are a reasonable course of action), the arrangements cannot be considered abusive and the GAAR cannot apply to them. Therefore, if a court heard expert evidence which conflicted, and both views were reasonable, it is clear that the GAAR could not be applied to the arrangements in question.[118]

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112 *op.cit.* p5
113 HC Deb 7 November 2012 c39WS; HM Treasury press notice 108/12, 7 November 2012. The membership of this panel was agreed in January.
114 HMRC, *General Anti-Abuse Rule (TIIN4754)*, December 2012.
115 CIOT press notice, *Anti-abuse rule 'evolving sensibly'*, 11 December 2012
116 "Analysis – Finance Bill 2013: the GAAR", *Tax Journal*, 18 December 2012. For a contrary view see Graham Aaronson's piece: "The GAAR", in this issue.
117 *The draft Finance Bill 2013*, HL Paper 139, 13 March 2013 paras 10-117
118 *op.cit.* para 63-4. The Committee used the acronym 'GAAR' to refer to the General Anti-Abuse Rule, as proposed by Aaronson and adopted by the Government, as distinguished from a "as a general anti-avoidance rule or principle" (fn2).

In an assessment of the GAAR published in 2019, Judith Freedman, Oxford Professor of Tax Law, discussed the double reasonableness test, noting that "this looks fairly cumbersome as a method of drafting but, in a UK context, achieves its aim":

> The main purpose test is converted to an objective test by prefacing it with a requirement that it should be reasonable to conclude that the obtaining of a tax advantage was the motivation. It is not, therefore, dependent on the views of the particular taxpayer. This is drafting born of experience of the difficulties caused by applying a purely subjective test in tax matters.[119]

Turning back to the Lords Committee's report on the draft Bill, HMRC provided the Committee with a summary of the changes made to the draft legislation,[120] and in evidence, Mr Aaronson provided the following gloss:

> The differences between the version published in June and that published a month or so ago could be described as cosmetic, but there are important cosmetic changes. In our report and in our draft, we began with the concept of artificial and contrived transactions. In essence, our draft worked by reference to what Malcolm Gammie has referred to and everyone is now calling the double reasonableness test, ie. that if something can reasonably be regarded as reasonable tax planning then it is not caught. But we opened our draft with expressions such as contrivance and artificiality.
>
> Those were dropped by the parliamentary draftsman's draft in June because, as a matter of logic, they were not necessary but as a matter of flavour or colour they are quite significant and they have now come back into the later, December draft. You will find the expressions 'artificial' and 'contrivance', not tucked away but as factors to be taken into account in determining whether something can be regarded as abusive. So the flavour and colour have come back. That will help assuage people's fears that the parliamentary draftsman's version of our GAAR is wider than we intended.[121]

As noted, the Government proposed that the new GAAR would cover all the major direct taxes, including IHT. The Committee noted some concerns that IHT was included, though Mr Aaronson suggested that this was a reasonable response on the Government's part to the way public debate of tax avoidance had evolved:

> In our discussions, we thought it sensible since we were introducing something that would be highly controversial and novel to limit its scope to the main direct taxes in order to allow a bedding-down period where people could see that this form of legislation would not have the dire consequences that so many people forecasted. If I can invite you to go back two years, before Jimmy Carr hit the headlines, the preponderance of views about a GAAR was, "This will cause problems for business and for people". Now, where every newspaper is full of tax avoidance and

119 Judith Freedman, "The UK General Anti-Avoidance Rule: Transplants and Lessons", *Bulletin for International Taxation*, June/July 2019 p336
120 *The Finance Bill: Oral & Written Evidence*, March 2013 pp152-3
121 *The draft Finance Bill 2013*, HL Paper 139, 13 March 2013 para 67 (Q2)

> that is the No. 1 public enemy, the flavour of the month is entirely different …
>
> The Government have responded by saying, "If we are to introduce a general anti-abuse rule, let it apply more widely to other taxes". Had we been asked at the time whether we thought that was a sensible approach, we would have been completely agnostic and said, "That is a practical matter: can HMRC handle it and put sufficient resources into it?" Plainly, it has done so in response to public concern about tax avoidance.[122]

As part of the Committee's evidence sessions Lord Hollick asked Ms Judith Knott (then HMRC Director, Corporation Tax International Anti-Avoidance) about the application of an anti-abuse rule to arrangements that had often been put in place many years before:

> **Lord Hollick:** As you say, IHT arrangements usually last for decades so it would be unfortunate to say the very least if an arrangement that had been put in place and was considered to be acceptable tax planning found that, somewhere along its journey, it was viewed for whatever reason as being abusive. Would it be the case that between when the arrangements were put in place and when they became abusive would stand, so that new arrangements would have to be put in place? How would that work?
>
> **Judith Knott:** In practice, when the GAAR advisory panel looks at such a case, if the arrangements were acceptable when they put in place, it is most unlikely that it would regard them as being unreasonable in their totality. It is difficult to give a view on a specific instance, but if views over a period of time have changed it would be a good indication that the arrangements are not something that could not reasonably be regarded as reasonable.
>
> **Lord Hollick:** You have made a powerful case for the benefits of clearance because that gives certainty over time.
>
> **Judith Knott:** With the GAAR pitched at the abusive end, we think that it does. If the GAAR were wider, the clearance point would come into play, but we feel that it should be clear enough not to warrant clearances.[123]

The Committee argued that it would be important for HMRC's guidance "to include a variety of specific examples of both abusive and non-abusive IHT planning", and that it should "set out clearly that, where arrangements extend over a long period, it is the view at the time those arrangements were entered into that should prevail."[124]

Most of the Committee's witnesses supported the 'narrow' focus of the anti-abuse rule, with the exception of Richard Murphy, the Tax Justice campaigner. Mr Murphy acknowledged that a wide-ranging anti-avoidance principle would require a comprehensive clearance system, and other witnesses argued that such a system would give HMRC too much discretion in determining the meaning of the law; as Bill Dodwell, chairman of the CIOT's Technical Committee, said, "tax should be levied

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[122] *The Finance Bill: Oral & Written Evidence*, March 2013 p8 (Q6)
[123] *op.cit.* p137 (Q120)
[124] *The draft Finance Bill 2013*, HL Paper 139, 13 March 2013 para 155

clearly by law, enforced by the tax administration and then disputes about its application resolved by the judiciary."[125]

Mike Williams, Director of Business and International Tax at HM Treasury, brought up another difficulty with a much wider anti-avoidance principle, which other countries had experienced: "if we did try to apply a broad rule in circumstances where in reality we may want or seek to make quite fine distinctions, that might cause difficulties for the courts. Other countries have introduced more general anti-avoidance rules … but they are finding that the courts are struggling to work out exactly what it is that the legislature intended."[126]

However, while an anti-abuse rule might avoid these practical difficulties, the Committee noted that, by itself, it would *not* be an effective answer to public anger over tax avoidance. This was because, as witnesses confirmed, this type of GAAR would not deal with the tax planning carried out by certain companies – Starbucks, Amazon, Google. (In late 2012 the ability of multinationals to arbitrage competing tax jurisdictions had been the focus of media reports,[127] and the subject of an enquiry by the Public Accounts Committee.[128]) Tim Davies (UK Head of Tax, Mazars) put the issue this way:

> If you try to categorise the public anger, it falls into perhaps three areas. You have the multinationals … which I agree the GAAR was never intended to and certainly will not touch that. You have high profile individuals who adopt what many consider to be highly aggressive schemes to mitigate income tax. I think the GAAR will successfully attack those. The third area probably is around bonuses, timing of bonuses and taking advantage of different tax rates. Personally, I do not believe the GAAR should attack that.[129]

The Committee agreed that reforming the taxation of multinational groups should be dealt with "by negotiation at the EU, OECD, G8 or G20 level." It went on to recommend that the operation of the anti-abuse rule should be formally reviewed after its introduction:

> We recommend that HMRC should plan for an independent, post-implementation review after 5 years. It would be for consideration whether such a requirement should be built into the legislation or, failing that, a firm Ministerial commitment should be made in the House of Commons at the time the legislation is being considered.
>
> We recommend that this review should cover all aspects of the operation of the GAAR during its early years. In particular … the review should cover:

125 *op.cit.* para 75

126 *op.cit.* para 77 (Q116)

127 For example, *Financial Times*, "Pressure mounts over level of tax paid by multinationals", 5 November 2012 & "Starbucks ground down", 8 December 2012. For another view as to whether these companies were engaged in aggressive tax avoidance see, "Politicians should stop posturing on corporate tax", *Financial Times*, 31 January 2013 & "Looking for avoidance", *Taxation*, 28 February 2013.

128 *HMRC Annual Report and Accounts*, HC 716, 3 December 2012. See also, "Taxation of multinationals and avoidance", *The Institute for Fiscal Studies Green Budget*, February 2013 pp 288-301.

129 *The draft Finance Bill 2013*, HL Paper 139, 13 March 2013 para 88 (Q94)

- the scope of the GAAR in the light of practical experience of its operation, including how the double reasonableness test has been applied and whether there is significant evidence of the deterrent effect that is claimed for the GAAR; and

- whether there is evidence that uncertainty in the operation of the GAAR is damaging the UK economy; if so, the need for a clearance system will have to be re-examined.[130]

The Committee also expressed concerns that, "every effort should be made to communicate, particularly to the press and the public, why the GAAR is not an appropriate mechanism to address all problems with the tax system."[131]

Although the Committee acknowledged concerns about the scope of the anti-abuse rule, it commended "HM Treasury, HMRC and all those involved in the development of the GAAR on an exemplary tax policy-making process."[132] It quoted Mr Aaronson on the benefits of the new rule, going on to underline Malcolm Gammie's view: that the establishment of the new GAAR represents "the crossing of the Rubicon":

> In Mr Aaronson's view, the main benefits of such a rule would include deterring (or counteracting) "contrived and artificial schemes which are widely regarded as an intolerable attack on the integrity of the UK's tax regime", "providing a more level playing field for business" and making it possible "by eliminating the need for a battery of specific anti-avoidance sub-rules, to draft future tax rules more simply and clearly."…
>
> It is important to bear in mind that the [Aaronson study group] did not see the GAAR as "a rule of construction, or interpretation, of statutory language", but rather as one "which overrides the consequences which would otherwise flow from tax legislation which brings an advantage." Or, as Mr Gammie remarked, "the fundamental aspect of a GAAR is that it purports to charge tax (or more tax) in circumstances in which (absent the GAAR) tax is not payable or less tax is payable. In other words, it purports to override 'black letter' law even when construed purposively and in accordance with the *Ramsay* judicial anti-avoidance approach." He saw this as "the crossing of the Rubicon."[133]

In his Budget speech on 20 March 2013 the then Chancellor, George Osborne, set out a number of measures to tackle tax avoidance, including the introduction of the GAAR.[134] Alongside the Budget report HM Revenue & Customs published a 'progress report' on its approach to tackling avoidance and evasion, as well as taxpayer debt. The report suggested that the GAAR would be "one of the most significant changes in modern UK tax law" that would "have a considerable deterrent effect on those considering abusive tax avoidance schemes." Notably the report went on to note that the new GAAR "does not do

130 *op.cit.* para 104, paras 168-9
131 *op.cit.* para 106. The Committee was also concerned that HMRC and the interim Advisory Panel should ensure the GAAR guidance was "as timely, clear and comprehensive as possible" (*op.cit.* para 121).
132 *op.cit.* para 171
133 *op.cit.* para 50-51
134 HC Deb 20 March 2013 c940

away with other anti-avoidance rules that address specific types of avoidance or specific parts of the tax system", and made no mention of how it might allow for aspects of the tax code to be simplified.[135]

The Budget report estimated that the GAAR would increase revenues by £60m in 2014/15, which was quite small compared with other avoidance provisions.[136] Some critics argued that this figure illustrates the flaws of an anti-abuse rule,[137] though writing in a blog post Ben Saunders, a tax practitioner noted that if the GAAR's purpose "is to ensure that other pieces of legislation collect the amounts of tax intended", then, "the amount directly raised by it *should* be minimal. If the GAAR works perfectly, it won't raise any money directly whatsoever."[138]

A summary of the changes required to incorporate the new GAAR was given in HMRC's tax information and impact note:

> The GAAR will provide an additional means for HM Revenue & Customs (HMRC) to tackle abusive tax avoidance schemes. No changes are proposed to current tax rules except to the extent needed to fit with the new legislation. All forms of tax avoidance (including both abusive tax avoidance to which the GAAR may apply, and tax avoidance that does not fall within the meaning of abusive tax avoidance that is the target of the GAAR) will continue to be challenged and counteracted using existing means.
>
> Legislation will be introduced in *Finance Bill 2013* whereby the GAAR will provide for the counteraction of tax advantages arising from tax arrangements that are abusive. Counteraction by HMRC must follow certain procedural requirements: counteraction must first be notified by a designated HMRC officer and, unless having considered any representations made by the taxpayer a designated HMRC officer decides that counteraction ought not to apply, the arrangements must be referred to an Advisory Panel, to be established by the Commissioners for HMRC for the purpose, for its opinion(s).
>
> Counteraction will be on a just and reasonable basis and may take a number of forms, appropriate to the particular tax in question. Where counteraction has taken place, it will be possible for taxpayers to claim such consequential relieving adjustments as are just and reasonable.

The note went to explain that, "separate NICs legislation will be introduced after the Royal Assent to *Finance Bill 2013* when parliamentary time allows."[139]

With the publication of the Finance Bill, HMRC confirmed that Patrick Mears, formerly a partner and Head of Tax at Allen & Overy, had been

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135 HMRC, *Levelling the tax playing field: compliance progress report*, March 2013 p6

136 *Budget 2013*, HC 1033, March 2013 p65 (Table 2.1 – item 51)

137 eg, TUC press notice, *General Anti-Avoidance Rule (GAAR) will fail to stop tax avoidance*, 2 December 2013, which cited a report written for the TUC by the campaigner Richard Murphy.

138 "A few comments on the TUC's GAAR research", Ben Saunders blog, 3 December 2013. Mr Saunders went on to suggest that HMRC's assessment could hardly have included "the amount of tax on behaviours that haven't happened because they have been deterred by, and only by, the GAAR."

139 HMRC, *General anti-abuse rule*, March 2013. Provision was made by ss10-11 of the *National Insurance Contributions Act 2014 Act*, discussed below.

appointed Chair of the GAAR Advisory Panel. The final version of HMRC's guidance on the GAAR was published on 15 April.[140]

On 17 April the House debated, and approved, the provisions in the *Finance Bill 2013* for the new GAAR.[141]

Speaking for the Opposition, Catherine McKinnell welcomed the new rule in principle, but moved two amendments, in light of concerns about how it would work in practice: first, that there should be a formal review of the GAAR's operation two years after it came into force; and second, that the Government should review how the GAAR might be used to provide information on tax avoidance schemes used by multinationals that affected revenues for other nations – in particular, developing countries. Treasury Minister David Gauke opposed both of these measures: first, in the Government's view, "a two-year period would not be practical for a general evaluation … just because of how our tax system operates"; second, that "as a matter of practicality it is difficult for HMRC to perform the roles required by [this amendment] as [it would require] assessments not of our tax rules but of the tax rules of developing countries. That takes us outside what HMRC can realistically do."[142] Both amendments were negatived, and these provisions agreed without any further changes.

As noted above, the GAAR applies to abusive tax arrangements that have been entered into on or after Royal Assent to the *Finance Act 2013*, which was 17 July 2013.[143] In a review of the avoidance landscape the following month, the *Financial Times* quoted a spokesman at HMRC saying, "we are well aware that there will be some who would very much like to find a way around the GAAR but we won't hesitate to use all the resources necessary to stop them."[144] On the launch of the new GAAR, the Chartered Institute of Taxation published a press notice, arguing that "the success of the GAAR will be judged on whether the marketing of abusive schemes is reduced and far fewer taxpayers choose to enter into them. A sustained review of the GAAR's effectiveness will be crucial."[145]

140 Full details are collated on Gov.uk, along with the membership of the GAAR panel. See also, "Analysis: Examining HMRC's GAAR guidance" & "HMRC's guidance on the GAAR", *Tax Journal*, 26 April & 17 May 2013.

141 by the Committee of the Whole House at the start of the Bill's Committee stage (HC Deb 17 April 2013 cc406-456). These provisions form ss206-215 & schedule 43 of the *Finance Act 2013*.

142 HC Deb 17 April 2013 cc446-7

143 With the Queen's Speech given on 8 May, the Bill was carried over to the 2013/14 Session, a precedent set by the 2010/12 Session (see, *The Budget and the annual Finance Bill*, Commons Briefing Paper CBP813, 11 August 2020).

144 "When tax avoidance is more trouble than it's worth", *Financial Times*, 3-4 August 2013

145 CIOT press notice, *A GAAR is born!*, 16 July 2013. The experience of the UK as well as several other countries introducing a GAAR is examined in, Waerzeggers & Hillier, *Introducing a General Anti-Avoidance Rule (GAAR) : Ensuring That a GAAR Achieves Its Purpose*, International Monetary Fund, January 2016.

5.1 The GAAR and international tax treaties

One aspect of the GAAR is its application it has to the bilateral agreements the UK has, in common with very many other countries, to avoid double taxation (where two countries claim the right to tax the same income, gain or profit) and prevent fiscal evasion. As HMRC explain, the intention of these double taxation agreements (DTAs) "is to secure that, as far as possible, the taxpayers of each country may trade or invest in the other country without the deterrent of unrelieved double taxation. An equally important objective is to try to ensure that taxpayers do not exploit the terms of the agreements and differing tax systems in each country for tax avoidance purposes." [146]

HMRC's current guidance on the GAAR discusses its application to these arrangements:

> **B5 International tax arrangements**
>
> **B5.1** There is a network of treaties between states setting out rules that govern the taxation of investment and business activities involving more than one state. These treaties (which are typically based on an Organisation for Economic Co-operation and Development (OECD) Model Treaty) are usually referred to as 'double tax treaties', and their purpose is to avoid subjecting such investments or activities to tax in more than one state and to prevent tax evasion. The United Kingdom has entered into over 100 such treaties, and they are given effect in domestic tax law.
>
> **B5.2** Many of the established rules of international tax are set out in double taxation treaties. These cover, for example, the attribution of profits to branches or between group companies of multi-national enterprises, and the allocation of taxing rights to the different states where such enterprises operate. The fact that arrangements benefit from these rules does not mean that the arrangements amount to abuse, and so the GAAR cannot be applied to them. Accordingly, many cases of the sort which generated a great deal of media and Parliamentary debate in the months leading up to the enactment of the GAAR cannot be dealt with by the GAAR.
>
> **B5.3** However, where there are abusive arrangements which try to exploit particular provisions in a double tax treaty, or the way in which such provisions interact with other provisions of UK tax law, then the GAAR can be applied to counteract the abusive arrangements.[147]

HMRC also publish a series of examples to show when an arrangement might, applying the double reasonableness test, be treated as abusive or not in the context of the GAAR. This includes one example of an avoidance scheme, copied over the next three pages, that sought to exploit a DTA, a scheme that was the subject of a unsuccessful claim for judicial review ('Huitson') on the grounds that the legislation introduced to frustrate it was retrospective, as, as such, infringed human rights law.[148]

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146 HMRC *International Manual* para 152010 ret'd September 2020

147 HMRC, *GAAR guidance : Parts A, B and C*, September 2020 pp7-8

148 The case is discussed in, *Retrospective taxation*, Commons Briefing paper CBP4369, 27 August 2020 (section 3).

HMRC, *GAAR guidance: Part D – Examples*, September 2020

Huitson – DTAs

This example is intended to show a wholly artificial scheme that claimed to prevent people trading in the UK from being taxed in the UK by exploiting the terms of a Double Taxation Agreement in a way that could not have been intended by the UK and the other state.

D12.1 Background

D12.1.1 This relates to an avoidance scheme which, it is said, enabled UK residents, through certain provisions of the UK/Isle of Man ('IOM') DTA, to carry on a trade or profession in the UK at a very low effective tax rate.

D12.1.2 The UK resident contracted to provide his services through an IOM partnership where each of the partners was a trustee of an interest in possession ('IIP') trust of which the taxpayer was the settlor and life tenant.

D12.1.3 The scheme relied on the provision at Article 3(2) of the UK / IOM DTA which, it was claimed, exempted from UK tax the share of the partnership profits received in the UK in his capacity as a beneficiary under an IIP trust. No tax was paid in the IOM and the tax paid in the UK was at an effective rate of c.3.5%

D12.2 The arrangements

D12.2.1 A UK resident individual carries on a trade of IT consultant in the UK. The individual enters into a contract to provide his services to an IOM partnership consisting of 5 IOM companies which then contracts out his services to end users. Each IOM company is a trustee of an IIP trust of which a UK resident individual is the settlor and life tenant.

D12.2.2 The partnership therefore comprises five trustee companies of five separate IIP trusts in which five separate UK residents are the settlor and beneficiary of their own IIP trust. The end users make payments to the partnership in respect of services provided by the appropriate individual.

D12.2.3 The individual receives an annual fee of £15,000 from the partnership and additional funds from his trust as beneficiary which are equivalent to the partner's share of the profit of the IOM partnership. The annual fee is taxed in the UK at normal rates but the other funds received from the IOM trustee company are claimed to be exempt from UK tax and also attract no tax in the IOM.

D12.3 The relevant tax provisions

- the UK/IOM Double Taxation Agreement
- section 858, Income Tax (Trading and Other Income) Act ('ITTOIA') 2005

D12.4 The taxpayer's tax analysis

D12.4.1 It was claimed that where the UK individual received funds from IOM trustees in his capacity as beneficiary of the IOM trust, Article 3(2) of the UK/IOM DTA exempted those funds from UK tax because that Article provides that "the industrial or commercial profits of a Manx enterprise shall not be subject to United Kingdom tax".

***GAAR guidance: Part D – Examples*, September 2020** **Huitson-DTAs 2/3**

D12.4.2 The partners in the foreign partnership are trustees of IIP trusts of which UK taxpayers are the beneficiaries. It was claimed that s858 ITTOIA 2005, which refers to members of a firm, should not apply to the beneficiaries of the trust.

D12.5 What is the GAAR analysis under s207(2) of FA 2013

D12.5.1 Are the substantive results of the arrangements consistent with any principles on which the relevant tax provisions are based (whether express or implied) and the policy objectives of those provisions?

The express purpose of DTAs is to avoid double taxation and prevent fiscal evasion, not to facilitate double non-taxation. This is clear from the judgment of the High Court and the Court of Appeal in *R (on the application of Huitson) v Revenue and Customs Commissioners* [2010] EWHC 97 (Admin) and [2011] STC 1860, and the Court of Appeal in the case of *Bayfine UK v Revenue and Customs Commissioners* [2011] EWCA Civ 304. The GAAR will apply to abusive arrangements where UK tax advantages have been obtained through rights or benefits under a DTA.

The Organisation for Economic Co-operation and Development (OECD) commentary on Article 1 of the Model Tax Convention says at para 9.4: "States do not have to grant the benefits of a double tax convention where arrangements that constitute an abuse of the provisions of the convention have been entered into." Further the predecessor of s858 ITTOIA 2005 had been introduced following an earlier avoidance scheme that sought to allow a UK resident to avoid UK tax upon their UK earnings by the use of a foreign partnership and a DTA. The provision made clear that a DTA could not affect the UK's right to tax its own residents upon income earned in the UK.

D12.5.2 Do the means of achieving the substantive tax results involve one or more contrived or abnormal steps?

The taxpayer had previously carried on a trade in the UK and paid tax on his profits. He then carried on his trade in the same way but through an IOM intermediary, solely to avoid tax through the terms of the DTA as he understood them. The involvement of an overseas partnership and trust was contrived and abnormal in the context of a UK individual carrying on a trade in the UK and was described as wholly artificial by the High Court and Court of Appeal in the Huitson judicial review proceedings.

D12.5.3 Are the arrangements intended to exploit any shortcomings in the relevant tax provisions?

The scheme attempts to exploit the provisions of the IOM/UK DTA to claim that a very low effective rate of tax is paid by a UK resident on profits from a trade.

D12.5.4 Does the arrangement include any of the indicators of abusiveness within s207(4) of FA 2013?

The arrangements result in an amount of income for UK tax purposes (£15,000pa) which is significantly less than the amount for economic purposes (that is, £15,000 plus the amounts received from the IOM trustees). This could not have been the intention when the relevant provisions were negotiated and enacted.

GAAR guidance: Part D – Examples, September 2020 **Huitson-DTAs 3/3**

D12.5.5 Do the tax arrangements accord with established practice and has HMRC indicated its acceptance of that practice?

HMRC had never accepted that the arrangements gave rise to the claimed tax result. On the contrary HMRC had advised taxpayers that the arrangements did not succeed and advised them to pay tax on that basis. In the judicial review launched by one of the contractors, Mr Robert Huitson, the High Court judge found, as one of a number of incontrovertible propositions that, "At no time did HMRC accept the interpretation advanced by the claimant, or by other taxpayers who were in a comparable position. On the contrary, HMRC challenged that interpretation."

D12.6 Conclusion

D12.6.1 On the facts given the arrangement is abusive and one to which HMRC would seek to apply the GAAR.

The Government's consultation on the GAAR asked respondents as to whether the GAAR should apply to tax treaties, noting concerns that if the GAAR disapplied the effect of DTAs, that would conflict with the UK's duty to abide by the terms of its agreement with other countries:

> [The Aaronson Report] recommended that the GAAR should apply to abusive arrangements where tax advantages have been obtained under "relevant" double taxation agreements ("DTAs").[149] 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".
>
> 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.
>
> 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.*
>
> 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,

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

> and there is no requirement to distinguish between different DTAs (i.e. "relevant" DTAs or otherwise).[150]

Annex C to the consultation discussed the issue at more length, quoting the OECD's commentary as indicating that general anti-abuse rules did not conflict with tax treaties, and taking the view that "the proposed GAAR is targeted at abusive schemes, and accordingly, it accords with international law."[151]

In its summary of responses to the consultation, HMRC noted that on this issue, "Half of all respondents expressed agreement with the question, some with the caveat that the application of the GAAR should be consistent with the terms of the specific DTA", although "concerns were expressed that a precedent could be set by which international treaties could be overridden, which might be followed by other countries." In response to this the Government stated that recognised the concerns expressed: "the GAAR must be applied in a manner consistent with our international treaty obligations which will be reflected in the draft GAAR guidance that is published today."[152]

The issue was also raised, briefly, in the House of Lords Economic Affairs Committee's report on the draft legislation for the GAAR to be included in the Finance Bill 2013:

> [One] more limited, but nevertheless important, issue [raised by witnesses] concerned whether the GAAR could override the application of double tax agreements (DTAs) since these are agreements between countries. The ICAEW explained the point in this way:
>
> *We are also concerned about whether the GAAR is lawful in relation to its application to the UK's tax treaties … The proposed GAAR will over-ride the UK's international obligations already written into its double tax treaties and could therefore be held to be unlawful.*
>
> *We accept that in relation to treaties with fellow OECD members this concern is probably addressed by specific OECD agreements, but this still leaves about 100 [treaties] with non-OECD countries where the GAAR may be unlawful as it stands."*

The Committee went on to note the views both of Graham Aaronson, and Judith Knott from HMRC:

> Mr Aaronson told us: "We … discussed this on the GAAR committee and our original draft was quite subtle. I think it said that it applies to double tax treaties so far as it can apply to double tax treaties, recognising that there is room for legal argument as to whether a bilateral treaty can be overridden by our domestic legislation. In practical terms, there should be no problem … Most double tax treaties are based on the OECD model, which is accompanied by the equivalent of guidance notes. They make it clear that the abusive use of a double taxation convention will be ineffective.

150 HMRC, *A General Anti-Abuse Rule (GAAR) - consultation document*, June 2012 p10
151 *op.cit.* pp43-4
152 HMRC, *A General Anti-Abuse Rule : summary of responses*, December 2012 pp7-8

> We asked officials whether there was an issue here. Ms Knott said: "we believe that the GAAR does not override our international obligations. We have a wide network of treaties and we apply them in line with the OECD model convention. Under the OECD guidelines, we are able to deny treaty benefits where they have been obtained by abusive transactions … In relation to non-OECD countries, even outside the OECD it is a general principle that people look at the OECD guidelines as a general international framework. We really do not see that there is an issue there." [153]

The Committee did not raise any concerns itself, and the issue came up briefly when the House debated, and approved, the provisions in the *Finance Bill 2013* for the new GAAR. Speaking for the Opposition Catherine McKinnell mentioned the ICAEW's concerns over the international legality of the GAAR; as part of his response on this occasion Treasury Minister David Gauke said, "The GAAR does not override UK tax treaties … It acts in much the same way as GAARs do for other countries that respect OECD and UN model tax treaties." [154]

The statutory provisions for the GAAR form ss206-215 & schedule 43 of the *Finance Act 2013*. Section 212 establishes the priority of the GAAR legislation: as HMRC's guidance explains, "S212 *FA 2013* provides that the GAAR takes priority over any other part of the legislation applying to the taxes covered by the GAAR. This is so even if the other legislation expressly states that it takes priority over anything else." [155] To this end, section 212(3) gives examples of such legislation, including the provisions under which DTAs are introduced.

To date this aspect of the GAAR appears to have been uncontroversial, but on 8 September 2020 the Secretary of State for Northern Ireland, Brandon Lewis, cited this provision as being precedent for UK domestic legislation violating international law. Mr Lewis was answering an urgent question on plans to include provision in the forthcoming UK Internal Market Bill to give Ministers powers to prevent the application of, and unilaterally reinterpret and disapply parts of the Northern Ireland Protocol.[156] On this occasion the Minister was responding to a question from Sir Robert Neill:

> **Sir Robert Neill :** The Secretary of State has said that he and the Government are committed to the rule of law. Does he recognise that adherence to the rule of law is not negotiable? Against that background, will he assure us that nothing that is proposed in this legislation does, or potentially might, breach international legal obligations or international legal arrangements that we have entered into? …
>
> **Brandon Lewis :** I would say to my hon. Friend that yes, this does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect,

153 *The draft Finance Bill 2013*, HL Paper 139, 13 March 2013 para 156-8
154 HC Deb 17 April 2013 c426, c446
155 HMRC, *GAAR guidance : Parts A, B and C*, September 2010 para C9.1
156 The NI Protocol, an integral part of the Withdrawal Agreement between the UK and the EU, sets out how goods will be traded between Northern Ireland and Great Britain (the rest of the UK) after the transition period ends. For the background on this see, *Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland*, CBP8720, 23 October 2019.

> required by article 4, in certain very tightly defined circumstances. There are clear precedents of this for the UK and, indeed, other countries needing to consider their international obligations as circumstances change.
>
> I say to hon. Members here, many of whom would have been in this House when we passed the Finance Act 2013, that that Act contains an example of treaty override. It contains provisions that expressly disapply international tax treaties to the extent that these conflict with the general anti-abuse rule.[157]

The Minister did not answer any further questions as to whether this was a fair analogy, although there was quite a lot of commentary to suggest it was not.[158]

George Osborne, who was then Chancellor, noted, "to avoid any confusion [the 2013 Finance Act] created a general anti-tax avoidance rule that could override double tax treaties, but all parties to these treaties accept such rules - and the OECD backs them."[159] David Gauke, the Treasury Minister who introduced the GAAR, argued, "OECD guidance at the time makes it clear that States could take action to stop abuses of tax treaties - which is what the 2013 Finance Act did. So no, not a precedent for breaking international law."[160]

Picking up Mr Osborne's comment, Judith Freedman, Oxford Professor of Tax Law, argued, "the OECD treaty commentary at that time explicitly accepted that general anti abuse rules in domestic tax law were not in conflict with tax treaties (Commentary on Art 1, para 9.2). The UK was carefully drafted to satisfy that requirement. I was on the study panel that proposed the legislation and we thought about this! We would never have proposed something that contravened international law. It is outrageous to use this as an example of something that does."[161]

Following this, on 10 September Lord Keen of Elie, the then Advocate-General for Scotland, took questions on this issue in the Lords. Notably when Lord Keen gave examples of, in his words, "tensions … between our domestic legal obligations and our position with regard to international law", he did not mention this legislation.[162]

The *United Kingdom Internal Market Bill* received a Second Reading in the Commons on 14 September, and although this issue was not a feature of the debates, it was mentioned by Sir Oliver Heald in his speech:

> I was surprised to see the Secretary of State for Northern Ireland justify this with the alleged precedent of the general anti-abuse rule set out in the Finance Act 2013.

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157 HC Deb 8 September 2020 cc508-9. For commentary on the Bill, which was published the following day, see, *United Kingdom Internal Market Bill 2019-21*, Commons Briefing paper CBP9003, 14 September 2020.

158 For example, "Government rationale for a precedent to break international law doesn't seem to add up", *Channel 4 News FactCheck*, 9 September 2020

159 George Osborne, Twitter, 8 September 2020

160 David Gauke, Twitter, 8 September 2020

161 Judith Freedman, Twitter, 8 September 2020

162 HL Deb 10 September 2020 c919

I was a Law Officer at the time and Dominic Grieve was Attorney General, and one thing I can say about Dominic Grieve is that he was very correct and extremely painstaking, and he made sure that Government legislation did not offend the rule of law. That Act did not breach Britain's treaty obligations. That was made clear by Ministers at the time and I cannot recall anyone arguing that it did.

It had the support of the OECD and the countries with which Britain had tax treaties. It was written after a review led by our leading tax QC Graham Aaronson to ensure that it was focused properly and was in line with our tax treaties. There was full consultation.

Since it was passed, it has not been attacked as being in breach of treaty obligations, and the wording of that Act simply confirms the agreed legal situation. In fact, if it is an example of anything, it is an example of reaching agreement and doing things properly.[163]

[163] HC Deb 14 September 2020 c72

6. Implementation of the GAAR

6.1 Introduction & penalties (2013-2016)

In his 2013 Budget the then Chancellor, George Osborne, announced the introduction of a new Employment Allowance: from April 2014 businesses, charities and community sports clubs would be entitled to claim up to £2,000 from their annual payment of secondary Class 1 National Insurance contributions (NICs).

Primary legislation to implement the new allowance was published in October 2013. The Bill also contained a number of miscellaneous measures relating to the scope of NICs *including* the application of GAAR to National Insurance contributions.[164]

When these clauses were debated in Committee, Treasury Minister David Gauke acknowledged concerns that "because the GAAR is tightly focused it will give a green light to all other forms of tax avoidance":

> Those who think that should take note of the range of actions we have taken in recent Budgets and Finance Bills. We have, for example, taken firm action to clamp down on stamp duty land tax avoidance, introduced the new annual tax on enveloped dwellings, and continued to close loopholes as quickly as possible after they emerge.
>
> In the summer, we published a consultation called "Raising the stakes on tax avoidance" in which we sought views on proposals for a new set of obligations for promoters of high-risk tax avoidance schemes. HMRC does an excellent job defeating tax avoidance schemes in the courts and ensuring that people know that many of these schemes simply do not work, but we know that there is more to do. That was why the consultation also encouraged users of avoidance schemes to settle their tax affairs after similar cases had lost in court or tribunal.
>
> The GAAR is an important step to increase the pressure on the tax avoidance industry, but it is not the only step and we will continue to take action against all forms of tax avoidance.[165]

On this occasion Shabana Mahmood MP confirmed that in the Opposition's view, extending the scope of GAAR was "uncontroversial" although the scale of GAAR "is so small that it will not do enough to close the tax gap." Ms Mahmood went on to argue "there are no penalties for using a scheme to which the rule might be applied, so there is little or no disincentive for anyone who seeks to avoid tax." In response to this point, Mr Gauke said:

> This is a complex area, because if there are penalties under the general anti-abuse rule, should there not be penalties under targeted anti-avoidance rules and so on? I do not think there can be a glib answer, and any changes are likely to be quite fundamental to how our tax system works. It is important that the GAAR can be bedded in and that there is a period in which taxpayers and advisors can get to grips with it. We have not ruled

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[164] *Budget 2013*, HC 1033, March 2013 p64 (Table 2.1 – item 25) . For more details of the Bill's scrutiny see Library Research paper 13/60, 1 November 2013 & Commons Briefing paper CBP6761, 26 February 2014.

[165] Public Bill Committee, *Fourth sitting*, 21 November 2013 c74

> out future action to strengthen the deterrent impact of the rule by attaching penalties, if necessary. We will keep that matter under review.[166]

There were no test cases for the GAAR in the months following passage of this legislation,[167] though, as noted by Jolyon Maugham, who gave the annual Hardman Lecture at the ICAEW in November 2014, this was not particularly surprising:

> Has [the GAAR] gone away? A question I get asked a lot. Well, it was introduced on 17 July 2013. Transactions prior to that date were grandfathered. So think about the self-assessment cycle. When would you expect a transaction post 17 July 2013 to be reported? How long would you expect HMRC to take to enquire into that transaction? How long would you expect HMRC to take before it launches its first ever test case for this brave new world? So, it's just much too early to call it a damp squib.

Mr Maugham went on to discuss the case for extending the GAAR, or for having penalties for taxpayers who were found to have infringed it:

> And it's also too early, I think, to be asking the question whether the GAAR should be extended. At a conceptual level the debate is this: the advantage of a GAAR is that it might offer a broad spectrum antibiotic against tax avoidance. The disadvantage is that it erodes the legal certainty that people need to transact and to invest. If you look through the GAAR provisions in detail – and I have had cause to do that – you can see time and again the draftsman choosing to prefer legal certainty over breadth of coverage. The GAAR is narrowly – and to my mind rather precisely – drawn.
>
> I think that's the right balance to strike: you take careful and measured steps if you wish not to scare off investment. If investors take fright it will be very difficult to tempt them back. And I think you need clarity about what it is that you've already done before you do any more.
>
> All of that having been said, I do think there is a good case for a GAAR-specific penalties regime. Having fenced off a relatively small part of fiscal territory, I do think there is an argument for electrifying the fence by imposing a penalty on those who stray into that territory. Very often, the most artificial of transactions have very limited economic costs associated with them. Sometimes no more than professional fees.
>
> If you believe, as I do, that the GAAR territory is tolerably closely drawn, then you can easily get yourself comfortable with the idea of giving people very good reason to stay outside it.[168]

In November 2014 the then Shadow Chancellor, Ed Balls, announced that a Labour Government would introduce a system of penalty payments to underpin the GAAR, "with fines of up to 100 per cent of the value of the tax which was avoided."[169] Subsequently in the

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166 *op.cit.* cc75-6, c77. In his initial study, Graham Aaronson had ruled out a penalty system as, "such provisions would be seen as presenting an irresistible temptation to HMRC to wield the GAAR as a weapon rather than to use it, as intended, as a shield." (*GAAR Study*, November 2011 para 5.48).

167 PQ21249, 14 January 2016

168 Jolyon Maugham, Barrister, Devereux Chambers, *"Tax avoidance – game over?", ICAEW Hardman Lecture*, ICAEW Tax Faculty, 12 November 2014

169 Labour Party press notice, *Labour to bring in tough new penalties to tackle and deter tax avoidance*, 14 November 2014

Autumn Statement the next month the Government announced that it would "consult on whether and how to introduce penalties for tax compliance cases where the GAAR applies."[170]

In January 2015 HMRC launched a consultation – *Strengthening the sanctions for tax avoidance* – asking for views on this proposal; this included an assessment of the possible impact of GAAR penalties, but did not give an estimate for the amount that might be raised: "If implemented, a GAAR penalty would likely have an Exchequer Impact. The amounts concerned would depend on the eventual design of any penalty."[171]

The consultation paper summarised the case for introducing a specific GAAR penalty or for the application of existing tax penalty rules:

> Existing tax penalty rules can already apply to tax arrangements which come within the GAAR. These rules are set out in Schedule 24 to the *Finance Act 2007*, and can apply where a taxpayer has failed to take reasonable care in completing their tax return or has deliberately submitted an incorrect tax return. Those tests apply equally to tax returns submitted by taxpayers who have used an abusive tax avoidance scheme which is counteracted under the GAAR …
>
> The main rationale for introducing a specific GAAR penalty is that the GAAR tackles the most abusive tax avoidance schemes. Counteraction under the GAAR is already a potential trigger for other anti-avoidance measures, including the Accelerated Payments legislation. The GAAR can therefore already deny a cashflow advantage to the avoider, but the Government is concerned that an avoider who has taken an unreasonable, abusive position can be no worse off than if they had taken a reasonable position. The Government believes that introducing a financial sanction specific to cases to which the GAAR applies might be an appropriate means of strengthening the deterrent effect for potential users of abusive schemes.
>
> Some commentators argue that HMRC should more actively apply the existing penalty legislation in Schedule 24 to the *Finance Act 2007*. It could be argued that attempting to gain a tax advantage through the use of an abusive tax avoidance scheme constitutes the type of behaviour that can give rise to a penalty for an incorrect return being filed. For example, there is an arguable case that a taxpayer becoming involved in an abusive scheme demonstrates 'deliberate' behaviour in making their tax return on this basis. However, each case is judged on its own merits and in practice it may sometimes be difficult to levy a penalty where the avoider obtained professional advice, even where this advice is found to have been incorrect.
>
> For those cases to which Schedule 24 applies, one option might therefore be to build upon the existing rules …. These already have different levels of penalties for inaccuracies depending on whether the inaccuracies involve domestic or offshore matters …. It could be possible to increase the percentage level of Schedule

170 *Autumn Statement*, Cm 8961, December 2014 para 2.159. see also, "An electrified fence", *Waiting for Godot blog* (Jolyon Maugham), 6 December 2014

171 *Strengthening Sanctions for Tax Avoidance*, 30 January 2015 p16. The paper also set out proposals for tougher measures to deter taxpayers who persistently used avoidance schemes that failed – so-called 'serial avoiders' – introduced in 2017 (see, HMRC, *Information about the Serial Tax Avoidance Regime*, January 2018).

> 24 penalties in cases where inaccuracies in the return arise in respect of arrangements to which the GAAR applies ...
>
> However, it would not necessarily be possible in all cases to demonstrate that Schedule 24 to the *Finance Act 2007* applies. For this reason the Government considers that it is appropriate to consider alternative financial sanctions to penalise taxpayers participating in arrangements to which the GAAR applies. Alternative options to strengthen the deterrent effect of the GAAR might include:
>
> - Introducing a new penalty for cases where the GAAR applies;
> - Introducing a surcharge for cases where the GAAR applies.[172]

The Chancellor presented his last Budget of the Parliament on 18 March 2015, and in the Budget report the Government confirmed that it would go ahead with this change in a future Finance Bill.[173] Following consultation over the summer,[174] the Conservative Government confirmed in December 2015 that it would introduce a penalty of 60% of the tax due which will be charged in all cases successfully tackled by the GAAR:

> Legislation will be introduced in Finance Bill 2016 to introduce a new penalty for the GAAR. This will be triggered when a taxpayer submits to HM Revenue and Customs (HMRC) a return, claim or document that includes arrangements which are later found to come within the scope of the GAAR.
>
> The penalty will become chargeable at the point that HMRC successfully counteracts abusive tax arrangements under section 209 of Finance Act 2013. That is, where there is no appeal against the counteraction or, if there is, the appeal is not successful.
>
> The existing penalty rules in Schedule 24 to the Finance Act 2007 will continue to apply in GAAR cases as they do to any other case. However, in situations where a combination of a GAAR penalty and a Schedule 24 penalty in respect of the amount of tax counteracted by the GAAR exceeds the amount of that counteracted tax, the total penalty will be restricted to 100% of that tax, or for offshore matters up to the highest penalty available under Schedule 24.
>
> HMRC will provide notice that a taxpayer may be within the scope of the GAAR, and the taxpayer will be given the opportunity to correct their tax position up until the point that their arrangements are referred to the GAAR Advisory Panel. In doing so, the taxpayer will not be liable to a GAAR Penalty.
>
> The GAAR procedure will be amended such that a GAAR Advisory Panel opinion will enable counteraction of the same arrangements by other users. The GAAR procedure will also be amended to enable a "protective" assessment of tax, to align the GAAR procedure with the overarching enquiry framework.[175]

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172 *op.cit.* pp11-2. see also, "The Q&A: the proposals to strengthen sanctions for tax avoidance", *Tax Journal*, 13 February 2015.
173 *Budget 2015*, HC 1093, March 2015 para 2.205
174 *Summer Budget 2015*, HC 264, July 2015 para 2.175.
175 HMRC, *Penalties for the General Anti-Abuse Rule - tax information & impact note*, 9 December 2015

It was estimated this measure would raise £25m by 2018/19.[176] Respondents had had mixed views about this initiative, but were generally positive about the safeguards that the Government proposed for the penalty regime:

> Responses to the consultation were mixed. Some respondents queried whether any further anti-avoidance legislation was needed at all with regard to the GAAR, saying that there had been no time to evaluate the effectiveness of the suite of anti-avoidance measures introduced in Finance Act 2014. Many expressed the view that there had not been sufficient time to evaluate the impact of the GAAR and queried the need to introduce a penalty at this stage. However, responses to the consultation largely confirmed that proposed safeguards are appropriate and agreed with the development of these measures.[177]

Draft legislation for a GAAR penalty and small changes to the GAAR procedure was published at the time, and in the 2016 Budget the Government confirmed that these provisions would be included in the *Finance Bill 2016* without any significant amendments.[178] When these provisions were debated at the Committee stage of the Bill, the Opposition tabled a new clause to require a review of the GAAR's operation, as well as an amendment to set the GAAR penalty at 100% of the tax due. Treasury Minister David Gauke set out the Government's case for opposing both:

> New clause 4 asks the Government to conduct a review of the GAAR in a year's time. The GAAR advisory panel is already required to publish anonymised reports of the cases it considers. It is difficult to see how this new clause could provide a better insight into GAAR cases than this.
>
> Amendment 4 proposes that a penalty of 100% is introduced for the GAAR. While under HMRC's existing penalty rules a penalty of 70% to 100% will usually be charged in cases of fraud, it is right for the GAAR penalty to sit just below this. Under the new measure, tax avoiders can be charged penalties under the existing penalty rules and the GAAR penalty up to a maximum of 100%. As such, the amendment does little more than what we are already suggesting, and I therefore urge the House to reject it.[179]

In a PQ at the time the Minister noted that it was still too early to expect the GAAR to have been applied:

> **Asked by Rob Marris :** To ask Mr Chancellor of the Exchequer, how many tax avoidance cases the General Anti-Abuse Rule Advisory Panel made decisions on in (a) 2013, (b) 2014, (c) 2015 and (d) 2016 to date.

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176 *Budget 2016*, HC 901, March 2016 p87 (Table 2.2 – item n)

177 *Strengthening Sanctions for Tax Avoidance – A Consultation on Detailed Proposals: Summary of Responses*, 9 December 2015 para 3.2

178 HMT, *Overview of tax legislation & rates*, March 2016 p24; *Budget 2016*, HC901, March 2016 para 2.206. Provision is made by ss156-8 of *FA2016*.

179 HC Deb 28 June 2016 c156. The debate focused on the related, if separate, issue of corporate tax avoidance, and neither of these proposed amendments were put to the vote.

> **Answered by: Mr David Gauke :** The General Anti-Abuse Rule (GAAR) was introduced in July 2013, and only applies to abusive tax arrangements entered into from this date.
>
> This means that it will first apply to income tax returns for the tax year ending 5 April 2014, which must have been filed with HM Revenue and Customs (HMRC) by 31 January 2015.
>
> For cases to be tackled by the GAAR, HMRC must first enquire into tax returns once they are received, and gather all relevant facts. It is therefore still early in the process of litigation action for cases to be tackled by the GAAR.
>
> The GAAR Advisory Panel is an external body separate to HMRC. Their independent role means that they do not report the number of meetings held to HMRC.[180]

In answer to a PQ in February 2018, Treasury Minister Mel Stride suggested that it would likely be some time before any GAAR penalties were imposed:

> **Asked by Tulip Siddiq** : To ask Mr Chancellor of the Exchequer, on tax avoidance, how many penalties were imposed under the General Anti-Abuse Rule regarding (a) income tax and (b) corporation tax in each in (i) 2016 and (ii) 2017.
>
> **Answered by: Mel Stride** : The General Anti-Abuse Rule (GAAR) penalty applies to tax arrangements entered into on or after 15 September 2016. Before a GAAR penalty can be charged, HMRC must first enquire into tax returns once they are received and gather all relevant facts. For example, for income tax, arrangements to which a GAAR penalty may apply can first feature in tax returns in the year ended 5 April 2017, which must be filed with HMRC by 31 January 2018.
>
> Whilst no penalties have been charged to date, HMRC is actively using the GAAR and in all cases referred to the GAAR Advisory Panel to date, the panel have agreed with HMRC, and been of the opinion that the cases should be pursued for GAAR counteraction. GAAR Panel decisions are published online at: https://www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar.[181]

Of course over this period there have been other initiatives to tackle aggressive tax avoidance – arguably most importantly the introduction of ‘Follower Notices’ & ‘Accelerated Payment Notices’ in 2014[182] – and HMRC has continued to challenge individual avoidance schemes in the courts, with a high rate of success.[183] In March 2016 the Supreme Court considered two schemes to avoid tax on bankers’ bonuses,[184] and, as barrister Jolyon Maugham argued at the time, the language of the Court’s ruling is some indication how the culture had changed:

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180 PQ37131, 23 May 2016

181 PQ125464, 7 February 2018. In April 2019 the Minister confirmed no penalties had been charged to date (PQ237714, 1 April 2019).

182 For more details see, *Tax avoidance and tax evasion*, Commons Briefing paper CBP7948, 7 April 2021 (section 4).

183 HMRC has published details of the outcome of avoidance cases over the last four years: *Tax avoidance litigation decisions*, November 2020

184 *UBS* and *Deutsche Bank* [2016] UKSC 13

> [The GAAR has] now been on the statute books for almost three years and a judge has yet to have the chance to use it. So the judicial activism continues.
>
> Both Deutsche Bank and UBS had enjoyed success in the lower courts. Judges had not been able to find in the language of the legislation an intention that the bonuses should be taxed as HMRC contended.
>
> But you didn't need to read further than the first paragraph of the Supreme Court decision to know that this time would be different. When judges start the conversation with talk of the "sophisticated attempts of the Houdini taxpayer to escape from the manacles of tax" it's rarely as a precursor to offering the tax freedom our would-be Houdini desires. It found that the result contended for by the banks would be "positively contrary to rationality, bearing in mind the general aims of income tax statutes" and dismissed their arguments.[185]

Writing in the *Tax Journal* in September 2016, Heather Self, partner at Pinsent Masons, reviewed both this and a subsequent judgement by the Court of Appeal,[186] concluding "at all levels, from the FTT to the Supreme Court, judges appear to be more and more confident in striking down schemes, particularly where the tax result does not appear to be in line with economic reality." Ms Self went on to raise the question whether, in the light of this trend, the GAAR would ever been relied upon in a tax avoidance case: "many recent decisions have been given ten years or more after the transactions to which they relate: we may have to wait until the mid-2020s before the true impact of the GAAR can be measured. My view is that it will be less than many expected when introduced in 2013."[187]

In the late 1990s the Labour Government first consulted on the case for introducing a general anti-avoidance rule before deciding against the idea. As an alternative the Government announced its willingness to use retrospective legislation to frustrate the most aggressive avoidance schemes – the so-called 'Primarolo Statement' made by Treasury Minister Dawn Primarolo in December 2004.[188] During this earlier debate over the merits of a GAAR, Edward Troup, then in private practice, subsequently Permanent Secretary at HMRC, argued against the idea in an opinion piece in the *Financial Times*. Mr Troup suggested that tax avoidance was not "paying less tax than you 'should'" but "paying less tax than Parliament would have wanted" and a GAAR was not an answer to this problem:

> [A GAAR] … would, of necessity, have to give the revenue authorities the discretion to invoke, or not to invoke, its operation. The taxpayer would be laid at the mercy of the bureaucrat … The determination of what parliament might have intended would be

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185 "The future of tax avoidance", *Waiting for Godot blog*, 16 March 2016

186 *Chappell v HMRC* [2016] EWCA Civ 809. See also, HMRC press notice, *HMRC protects more than £900 million through 10th win against NT Advisors*, 26 September 2016.

187 "Comment: do we still need a GAAR?", *Tax Journal*, 2 September 2016

188 For more details see, *Retrospective taxation*, Commons Briefing paper CBP4369, 27 August 2020.

> shifted further from the hands of the courts, and from parliament itself, and further into the hands of the executive.[189]

In June 2016 Mr Troup gave evidence to the Treasury Select Committee, and on this occasion the then Chair of the Committee, Andrew Tyrie, mentioned Mr Troup's critique and asked how his views had changed; in response, Mr Troup said the following:

> The language is probably more colourful than I would use in my more staid days as a civil servant now, but [the article] … made the point, which I completely stand by, that the challenge of tax collection is to recognise that it is effectively using legal means to raise money for the state that is necessary to fund public services … The article was criticising not the concept of a general anti-avoidance rule but the proposal put forward in 1998 by a previous Government.
>
> **Chair:** Which is now in better shape.
>
> **Edward Troup:** It is now in much better shape and, sitting on this side of the table, the criticisms I made of the formulation there have been dealt with, because it is not in our discretion as HMRC, as to whether we like something or not, to determine the application of a rule. It is set out, as clearly as is possible with a general rule, by the word of statute, with protection through an independent panel who will, effectively, give a view before the rule can be applied.[190]

6.2 First opinions from GAAR Panel (2017-2019)

In July 2017 the GAAR Panel issued its first opinion, concurring with HMRC that an avoidance scheme exploiting an Employee Benefit Trust and a payment of gold bullion was not a "reasonable course of action" in relation to the relevant legislation (the 'disguised remuneration' rules, introduced in 2011 and consolidated in part 7A of the *Income Tax (Earnings & Pensions) Act 2003*).[191]

Writing in the *Tax Journal* a few weeks later, Heather Self (Pinsent Masons), suggested that the timing of this was not surprising:

> The GAAR was introduced in 2013 and only applies to transactions implemented on or after 17 July 2013. Since a transaction undertaken in 2013/14 would have been included in a return filed by 31 January 2015, and HMRC would then have had a further year to open an enquiry, it is only be expected that it has taken until 2017 for the GAAR Panel to start to issue rulings.[192]

In this context it is worth noting that the GAAR Panel issued three further opinions – on 9, 10 & 17 November; the first two relating to employee rewards using gold bullion, the third on the extraction of cash

[189] "Why the chancellor is missing the point", 15 July 1999. For more on this exchange see, *Tax avoidance: a General Anti-Avoidance Rule – background history (1990-2010)*, CBP2956, 16 January 2020.

[190] Treasury Committee, *Oral evidence: HMRC Executive Chair and Chief Executive*, HC232, 8 June 2016 Q8

[191] HMRC, *GAAR Advisory Panel opinion: employee rewards using gold bullion*, 17 August 2017. For background on the introduction of this avoidance legislation see, *The 2019 Loan Charge*, Commons Briefing paper CBP8811, 17 March 2021.

[192] "The GAAR Panel's first ruling: a reasonable decision?", *Tax Journal*, 8 September 2017

or equivalent through trust interests – and all three finding that the relevant scheme was not a "reasonable course of action."[193]

In her piece on the first of these rulings, Ms Self went on to note that the operation of the scheme showed some striking similarities to the types of scheme seen over twenty years ago that first led to debates as to the need for a GAAR …

> Many years ago, schemes involving payment in gold bullion or platinum sponge were commonly used in an attempt to avoid NICs charges. One by one, the schemes were shut down, and in December 2004 the Paymaster General, Dawn Primarol, said that if necessary, the government would introduce retrospective legislaiton to shut down future schemes …
>
> What is perhaps surprising is not that the GAAR Panel ruled against [this particular scheme], but that such schemes were still being sold as late as 2015. Although the GAAR Panel ruling is anonymised, the facts look remarkably similar to those set out in the case of *Doran Bros (London) Ltd v HMRC* [2017] UKFTT 0829.

… and the benefits that the GAAR now offered in HMRC's continuing efforts to counter this type of tax planning:

> HMRC was well aware of the scheme, and had indicated (in its avoidance Spotlight 30, published on 6 May 2016) that it did not consider it would succeed [if challenged in the courts] … A key benefit of the GAAR Panel process is that it can give a clear 'keep off the grass' warning much faster than a case can reach final decision in the courts.
>
> HMRC recently published its list of avoidance decisions for 2016/17[194], and it is notable that almost all of the case involve transactions which took place over ten years ago. Using the GAAR route is likely to enable HMRC to close down 'mass-marketed' schemes more quickly, and at lower cost, than taking them through the courts.[195]

In a second opinion, published in April 2019, the Panel considered a 'disguised remuneration' scheme, promoted in 2014 as a means for a company to make a £1.5m cash payment to a director using bonds and gilt options so as to avoid tax on this transfer. In this case, the promoter had disclosed the existence of the scheme to HMRC through DOTAS, and in the taxpayer's appeal, it was argued that in registering the scheme HMRC had, in effect, given tacit approval to this as reasonable tax planning. The Panel rejected this reasoning:

> In the representations made on behalf of the taxpayers it has been argued that in correspondence with Participant A [the scheme provider] concerning the requirement for disclosure under … DOTAS HMRC accepted that there was no tax advantage and that this could reasonably be understood by a reasonable taxpayer as HMRC having indicated their agreement with the tax planning …
>
> We have … thought about whether the DOTAS disclosure and subsequent correspondence could give reasonable grounds for

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193 GAAR Advisory Panel opinion of 9 November 2017; GAR Advisory Panel opinion of 10 November 2017; GAAR Advisory Panel opinion of 17 November 2017; 11 December 2017.

194 HMRC, *Tax avoidance litigation decisions 2016 to 2017*, August 2017

195 "The GAAR Panel's first ruling", *Tax Journal*, 8 September 2017. For more recent comment see, "The final nail", *Taxation*, 28 October 2019.

> assuming that HMRC accepted, or at least did not disapprove of the proposed tax planning.
>
> We note that the DOTAS notification by the scheme provider (Participant A) does not mention the possibility that the planning might be entered into in connection with, or in replacement of, a bonus taxable as employment income or a credit to a director's loan account …
>
> Nothing in the correspondence supplied to us indicates that HMRC was subsequently provided with an explanation sufficient to enable HMRC to appreciate how the planning was to be used or that the fundamental purpose of the arrangements was to arrange for there to be a non-taxable credit to a director's loan account whilst enabling the company in question to claim a corporation tax deduction. This crucial element was omitted from the DOTAS disclosure and all subsequent correspondence. Instead, the planning was presented as involving no relevant tax advantage.
>
> We also note that the Tax Advisor expressly warned the Individual and the Company that "HMRC will view the arrangements as tax avoidance and attempt to argue that no corporation tax deduction is available and that the payment received by [the Individual] is taxable remuneration."
>
> We do not see in the DOTAS correspondence an "acceptance" by HMRC of the tax planning as established practice as envisaged by section 207 (5) FA 2013. We cannot even see how the correspondence could reasonably have been considered to support a view that HMRC might not disapprove of the tax planning and we note that the Tax Advisor did not draw that conclusion.[196]

In a further interesting development, in March 2018 HMRC published details of a successful appeal to the Advertising Standards Authority where the promoter of an avoidance scheme had made a series of misleading claims to taxpayers, and had also mislead 'by omission' in failing to mention the GAAR:

> HM Revenue and Customs (HMRC) complained to the ASA about misleading advertising by a tax avoidance scheme promoter, CDP Tax & Wealth Limited, which trades as Fiducia Wealth and Tax (Fiducia). The ASA agreed with HMRC and ruled that the claims made by Fiducia are misleading and must be withdrawn.
>
> **How this scheme is claimed to work**
>
> The scheme advertised by Fiducia claims to use government approved statutory rules that are within the tax legislation and reduce SDLT bills on residential property purchases by 60%. In practice, no SDLT is paid on the purchase and Fiducia keeps the balance of 40% as its fee.
>
> HMRC's understanding of the scheme is that:
>
> - certain types of land transactions are exempt from SDLT
> - one of these exemptions prevents mortgage providers incurring SDLT when they take a 'security interest' in a property as security for a mortgage

[196] HMRC, *GAAR Advisory Panel opinion of 11 April 2019*, 20 May 2019 para 15.2. 15.5-9

> - Fiducia is selling a scheme which seeks to misuse this exemption through a complex series of transactions, so that no SDLT is paid
>
> These types of arrangements fall under the meaning of 'avoidance' and go against the intentions of Parliament. Claims that such schemes are not disclosable under disclosure of tax avoidance schemes (DOTAS) are only correct if they don't fall within one of the DOTAS hallmarks. The Solicitors Regulation Authority has warned solicitors against involvement in SDLT avoidance.
>
> **The ASA Ruling**
>
> The ASA ruled that claims made by Fiducia are misleading and must be withdrawn. The ASA has also ruled that the Fiducia website "misleads by omission" by failing to mention the many government tools and policies aimed at counteracting the avoidance they're promoting. This includes the General Anti-Abuse Rule (GAAR). For transactions that took place after 16 July 2013, HMRC will consider whether the GAAR may apply … The Fiducia website also fails to highlight that the SDLT scheme offered is a form of tax avoidance which HMRC is likely to challenge.
>
> **What this means for promoters**
>
> The ASA ruling sets an example so other avoidance promoters can't make the same claims about similar arrangements. Fiducia and other promoters of similar planning arrangements must now remove these claims from their advertising or risk facing ASA sanctions for failing to comply with its rulings.[197]

With the GAAR Panel in operation there has been less comment on the GAAR in the House, although there has been confirmation in answers to PQs that all of the cases HMRC has submitted to the Panel – 13 up to May 2019[198] - have resulted in a Panel Opinion in HMRC's favour. In its 2018/19 Annual Report, HMRC noted that over that year the Panel had provided opinions in four cases, concluding in each case that entering into and carrying out the arrangements was not a reasonable course of action, and that as a result HMRC had "issued GAAR opinion notices to over 2,300 customers who have used these arrangements."[199]

In May 2019 HMRC gave details of a new 'disguised remuneration' avoidance scheme, apparently marketed as a wealth management strategy, which used loans or fiduciary receipts, in its 'Spotlight' publication. It advised taxpayers using this, or similar schemes, to settle, noting that it was considering whether GAAR might apply.[200] The Panel issued an opinion in April the next year,[201] and, as HMRC explained in a follow-up 'Spotlight' article, concurred with HMRC's view:

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197 HMRC, *Stamp Duty Land Tax avoidance: misleading advertising (Spotlight 43)*, 21 March 2018

198 PQ249975, 8 May 2019. The Panel has issued 5 Opinions since then.

199 *HMRC Annual Report & Accounts 2018/19*, HC 2394, July 2019 p113

200 HMRC, *Remuneration trust: tax avoidance using loans or fiduciary receipts (Spotlight 51)*, 10 May 2019

201 *GAAR Advisory Panel opinion of 7 April 2020: Rewards in the form of loans for employees including contributions to a trust*, 28 August 2020

> The Panel agreed with HMRC's view that entering into and carrying out these arrangements was not a reasonable course of action.
>
> The Panel stated that: 'In our view, the arrangements as a whole are contrived and abnormal and appear to us to serve no purpose other than to avoid tax. There has been a naked attempt to break the connection between the loans to the individual and their activities as a director of the company which have generated the economic value'
>
> The Panel also stated that: 'We cannot believe that Parliament intended loans to a person from a trust made out of funds deriving from economic value earned by that person's activities as a director to escape Part 7A'.
>
> To find out more information about the rules that apply to an income tax charge to employment income provided through third party arrangements such as remuneration trusts, read Part 7A of the *Income Tax (Earnings and Pensions) Act (ITEPA) 2003*.
>
> The GAAR Panel also said that they had already given opinions on some similar cases previously, where a director or shareholder sought to avoid tax on amounts received from their company.
>
> The Panel agreed with HMRC in all these cases that the arrangements were not a reasonable course of action or in line with employment income tax rules.[202]

More recently in February 2021 HMRC published the Panel's opinion on the 'artificial repayment of a loan or advance to a participator', which held, as before, the use of such arrangements was not a reasonable course of action.[203]

The same month the *Tax Journal* published an interview with tax practitioner Maryanna Sharrock (Stephenson Harwood), and when asked what recent tax case had caught her attention, Ms Sharrock made a striking observation on the continuing relevance of the GAAR to the world of tax avoidance:

> **Has a recent tax case caught your eye?**
>
> There isn't one specific case, but I can never pass by a case on tax avoidance whether it is disguised remuneration, stamp duty land tax or other planning. I am privileged to sit on the GAAR panel, and this has made me very aware of the extensive activity that still takes place in this area.[204]

6.3 Criticism of GAAR penalties – House of Lords Finance Bill Committee (2018-2019)

In December 2018 the Lords Economic Affairs Finance Bill Sub-Committee published a report on HMRC's powers, as part of its wider inquiry on the Finance Bill. The Committee raised concerns about "the

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202 HMRC, *Disguised remuneration: tax avoidance by owner managed companies using remuneration trusts (Spotlight 56)*, 1 September 2020. As noted above, the Panel dealt with the application of part 7A *ITEPA 2003* in its first ruling.

203 HMRC, *GAAR Advisory Panel opinion of 16 December 2020: artificial repayment of a loan or advance to a participator*, 4 February 2021

204 "One minute with … Maryanna Sharrock", *Tax Journal*, 26 February 2021

Government's "approach and rhetoric towards tax avoidance", arguing that clearer distinctions should be made between "deliberate and contrived tax avoidance by sophisticated, high-income individuals, and uninformed or naive decisions by unrepresented taxpayers."[205]

Further to this the Committee was concerned about the development of HMRC's powers since 2012. While the Committee noted that many of these new powers had been "introduced following criticism from Parliament and the media of HMRC's approach to tax avoidance and tax evasion", it noted concerns "about the gradual accretion of powers over the last few years without any apparent oversight," with specific reference to the GAAR, as well as to Follower Notices (FNs) and Accelerated Payment Notices (APNs).[206]

As noted above, FNs and APNs were introduced in 2014. Briefly, FNs are used by HMRC to ask a taxpayer to settle their tax affairs. They are issued by HMRC when a taxpayer's involvement in a tax avoidance scheme with the same or similar arrangements to one challenged successfully by HMRC has been identified. If a taxpayer does not settle their affairs, they may be liable to pay a penalty. An APN is a requirement to pay an amount on account of tax or NICs. HMRC issues APNs to taxpayers involved in avoidance schemes disclosed under the Disclosure of Tax Avoidance Schemes (DOTAS) rules, or counter-acted under the GAAR. They can also be issued to taxpayers who have received a Follower Notice in relation to the scheme.[207]

The Committee argued that the system of FNs and APNs was flawed, and, notably, that HMRC's powers to impose penalties both in relation to associated both with FNs and the GAAR were "disproportionate":

> Witnesses were concerned that penalties for continuing appeals against underlying tax liabilities could undermine access to justice for taxpayers. Taxpayers continuing appeals after receiving a follower notice can face penalties of up to 50 per cent of the tax if they are unsuccessful …
>
> Malcolm Gammie QC told us that a similar situation exists with the General Anti-Abuse Rule: "…if you wish to appeal beyond a certain point in the General Anti-Abuse Rule process, you are at risk of a 60 per cent penalty … I am not quite sure that I know any taxpayer who would take that risk with that type of arrangement." …
>
> Penalties associated with General Anti-Abuse Rule and Follower Notices are draconian and restrict access to justice. We recognise that they were introduced to inhibit taxpayers from delaying settlement by appealing, but at their present level they are disproportionate and cannot be justified.
>
> Taxpayers who challenge HMRC's view of the law and pursue litigation after a Follower Notice or General Anti-Abuse Rule ruling

205 Following the creation of HMRC in 2005 from the merger of the Inland Revenue with HM Customs & Excise, the new revenue authority's powers were the subject of the 'Powers Review', a programme of consultation and legislation change which ran until 2012.

206 *The Powers of HMRC: treating taxpayers fairly*, HL Paper 242, 4 December 2018 paras 26 See also, "HMRC censured for 'aggressive' pursuit over tax avoidance", *Financial Times*, 4 December 2018.

207 *op.cit.* para 18, fn 15

> should not be penalised if they are ultimately unsuccessful. We recommend that these penalties are abolished.[208]

The Government published a response to the report on 22 January 2019, defending the system of FNs and APNs, and, in this case, rejecting the recommendation that FN and GAAR penalties be scrapped:

> Both these regimes are designed to address protracted delays in finalising avoidance cases and give the taxpayer opportunities to settle their disputes without the application of penalties. Penalties can be appealed to an independent tribunal.[209]

The Committee's report was debated on 29 April 2019, and on this occasion, as part of his speech, Lord Judge highlighted the application of the GAAR, and the Government's response on the issue of penalties:

> I wish to take one aspect of these various matters: the general anti-abuse rule. What does that define? Using that language presupposes that a scheme intended to reduce tax liability by reliance on litigation constitutes an abuse. The description "abuse" assumes that the scheme is unlawful or that, if not unlawful, it should be treated as though it is even if it is not. Since when has it constituted an abuse for a citizen, rich or poor, to seek to rely on law laid down annually by Parliament? It is a strange concept.
>
> If where the legislation is uncertain, a case is litigated, the court may decide that the scheme is lawful and, if it does, no penalty can be imposed on the taxpayer for going to court. It would be an extraordinary proposition if it could. However, what that successful taxpayer risked in going to court was not only the costs of losing the litigation, which is fair enough, but the imposition of a huge financial penalty—not tax, not back tax, not unpaid tax, not interest on tax, but just a straight penalty.
>
> That is precisely what is meant by the Government's response on page 9 that this regime—I paraphrase—provides the taxpayer with an opportunity to settle the dispute without the application of penalties. That is a subtle threat, seemingly bedecked, as an inducement that, "It will be in your interests to do as we tell you".[210]

A few weeks after the debate on 16 July Jesse Norman, Financial Secretary to the Treasury, gave evidence to the Committee,[211] and on this occasion said that the Government would look again at the issue of FN penalties. In turn, following a consultation exercise,[212] the 2021 Budget announced amendments to these charges.[213] However, in his comments to the Committee, the Minister did not address their concerns about GAAR penalties, and no proposals for reforming these have been made.

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208 *op.cit.* paras 103-4
209 HMRC, *The Powers of HMRC: treating taxpayers fairly – Government response*, 22 January 2019 pp8-9
210 HL Deb 29 April 2019 cc799-800
211 Select Committee on Economic Affairs, *Oral evidence: The Financial Secretary to the Treasury*, 16 July 2019. The Minister mentioned a number of changes to meet concerns regarding HMRC powers, that he confirmed a few days later in a Written Statement (HCWS1785, 21 July 2019).
212 Follower Notices and Penalties - Written Statement HCWS661, 16 December 2020
213 *Budget 2021*, HC !226, March 2021 para 2.100

6.4 Further amendments to the GAAR (2018-2021)

At the time of the 2018 Budget the Government stated that it would introduce legislation to make a number of minor technical and procedural amendments to the GAAR to ensure that it operates effectively.[214] Draft provisions to this effect were published in July 2019, along with other measures to be included in the next Finance Bill.[215] In this case, details of the amendments to be made to the GAAR were given in a tax information note from which the following is taken:

> The current process for pursuing abusive tax arrangements under the GAAR, gives HMRC a fixed 12 month window to gather information and consider whether to continue a GAAR challenge.
>
> However, some taxpayers and advisers have deliberately refused to co-operate with HMRC during that window and have withheld information, to prevent HMRC from making a decision as to whether enquiries should be pursued under the GAAR or not.
>
> A new GAAR notification (protective GAAR notice) will provide for HMRC to carry on its investigations beyond 12 months and mirrors the way normal tax enquiry notices work.
>
> Taxpayers will have the right to appeal a GAAR adjustment 12 months after the protective GAAR notice is issued (reflecting the existing 12 month window during which appeals cannot be progressed whilst HMRC carries out its enquiries).
>
> These changes will remove much of the incentive for the minority of taxpayers who would otherwise choose not to cooperate with requests for information, whilst ensuring appropriate safeguards such as appeal rights and oversight of the independent GAAR advisory panel are in place for those who are complying with the rules.[216]

The introduction of this legislation was delayed, with the postponement of the Budget due to the timing of the 2019 General Election and the Conservative Party's election victory.

The Chancellor Rishi Sunak presented the Budget on 11 March 2020, and the *Finance Bill 2019-21* was published the following week, including provision for these technical and procedural amendments to the GAAR. The legislation was unchanged from the draft version published in July 2019,[217] and was agreed, unamended, without a division, at the Committee stage of the Bill.[218] On this occasion the Financial Secretary to the Treasury, Jesse Norman, summarised the purpose of these amendments as follows:

> The clause will strengthen procedural changes made to the GAAR previously in 2016 which tackle mass-marketed tax avoidance

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214 HMT/HMRC, *Overview of Tax Legislation & Rates*, October 2018 para 2.53

215 Written Statement HCWS1713, 11 July 2018; HM Treasury press notice, *Finance Bill 2019-20: government publishes draft legislation*, 11 July 2019

216 HMRC, *Technical and procedural amendments to the General Anti-Abuse Rule*, 11 July 2019. HMRC did not anticipate this measure having an Exchequer impact.

217 HMT, *Overview of Tax Legislation & Rates*, March 2020 p22 (Table 1: Unchanged Measures)

218 Initially this was clause 98 & Schedule 13 of the *Finance Bill 2019-21*; following passage of the legislation it forms s101 & Schedule 14 of *FA2020*.

> schemes. The changes in 2016 introduced provisional counter-action notices, which allowed HMRC a 12-month window to gather information and consider whether to continue a GAAR challenge or pursue a different approach.
>
> Some taxpayers and advisers, I am sorry to say, have deliberately refused to co-operate with HMRC during that window, deliberately withholding information to prevent HMRC from making an informed decision. In effect, those people are seeking to run down the clock and it is right the Government take action to prevent this. At the moment, HMRC has no recourse against such people. Once that window closes, no further GAAR action is possible and HMRC is unable to pursue any alternative non-GAAR approaches.
>
> The clause replaces the provisional counter-action notices introduced in 2016 with a simpler protective GAAR notice. This will enable HMRC to carry on its investigations beyond 12 months and it mirrors the way normal tax inquiry notices work. The amendments will also confirm that where HMRC decides not to pursue the GAAR, cases can still be pursued using a technical non-GAAR argument. That has always been the intention of the legislation.[219]

Speaking for the Opposition Wes Streeting said, "We are not going to quibble about [this clause] … and the tidy up it is doing, but I am disappointed by the lack of ambition":

> Ministers should be trying to give the general anti-abuse rule more bite. For example, they could extend the general anti-abuse penalty rules to apply a 100% penalty for any tax avoidance scheme that fails the GAAR or, more likely, fails for some other reason, but would have failed the GAAR as well.[220]

In response the Minister noted, "the GAAR can lead to a fine of 60% of the counteracted advantage. It can be pretty substantial, and it has genuine teeth."[221]

The 2020 Budget report also set out a number of provisions to tackle promoters of tax avoidance schemes to be included in the next Finance Bill, in 2020-21, *including* "additional changes to the General Anti-Abuse Rule (GAAR) so it can be used as intended to tackle avoidance using partnership structures."[222]

Draft provisions to be included in the next Finance Bill were published on 'L-day' on 21 July,[223] and at this time HMRC launched a consultation on measures to tackle avoidance scheme promoters, which gave some details of the change to be made to the GAAR:

> The GAAR was introduced in 2013 and provides HMRC with the ability to challenge 'abusive' tax arrangements where those arrangements are designed to achieve a tax outcome clearly outside the intention of the legislation. Abusive tax arrangements are arrangements entered into or carried out which cannot reasonably be regarded as a reasonable course of action in

219 Public Bill Committee (Finance Bill), *Eighth Sitting*, 16 June 2020 c228
220 *op.cit.* c230, c229
221 *op.cit.* c232
222 *Budget 2020*, HC 121, March 2020 para 2.256; HMT, *Overview of tax legislation & rates*, March 2020 para 2.46.
223 Written Statement HCWS400, 21 July 2020

> relation to the relevant tax provisions, having regard to all the circumstances
>
> The GAAR legislation only applies to the person who received the tax advantage. This causes difficulties when considering a partnership case. Usually HMRC enquiries will be made into the partnership return. The final profit/loss figure would be agreed with the partnership and individual partners would then be informed of the relevant adjustments required to their personal tax returns. However, the GAAR lacks a clear mechanism to enable HMRC to issue separate GAAR notices to partnerships or to individual partners in such a way that each partner can be made responsible for their share of any partnership liability. …
>
> **Proposed revisions**
>
> The proposals would provide an express mechanism in the GAAR legislative framework to allow HMRC to deploy the GAAR at partnership level, with counteraction taking place via the partnership statement and then carried through to each relevant partner.
>
> The proposals would mean that GAAR notices could be issued to the representative partner in a partnership, mirroring the way partnership enquiries are conducted under the Income Tax Self-Assessment regime. [224]

HMRC's impact assessment stated that this package of changes, including the amendment to the GARR, was "not expected to have an Exchequer Impact", although "it supports the Exchequer in its commitment to protect revenue."[225]

The Chancellor, Rishi Sunak, presented the Budget on 3 March 2021. The Budget report confirmed that the forthcoming Finance Bill would include provisions, previously consulted on, to tackle promoters, including amendments to the GAAR.[226] HMRC published a summary of the responses it had had to the consultation – and in this case noted that "respondents supported the proposed changes to the legislation, agreeing that the changes would clarify how the GAAR applies to partnerships, and that the procedural safeguards in the regime were appropriate", and that "the government will proceed on the basis outlined in the consultation."[227]

Provision for this change is included in the *Finance (No.2) Bill 2019-21* (specifically clause 120 & Schedule 31).

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224 HMRC, *New proposals for tackling promoters and enablers of tax avoidance schemes*, 21 July 2020. See also, HMRC, *Tackling Promoters of Tax Avoidance: Consultation*, 21 July 2020 (para 7.1-19).

225 *ibid.*

226 HMT, *Overview of Tax Legislation & Rates*, March 2021 para 1.61. As noted, it is not anticipated that this, and the related changes to the promoter rules, will have a significant Exchequer impact.

227 HMRC, *Tackling Promoters of Tax Avoidance: Summary of responses*, 3 March 2021 para 1.37-8. This also notes some minor technical amendments to be made to the GARR at this time to "remove any ambiguity in the legislation" (para 7.13).

6.5 Concluding observations

In its discussion of anti-avoidance legislation *Tiley & Collison*, a standard text on the law, distinguish between the 'sniper approach' – "the traditional pattern of UK legislation" – and the 'shotgun approach' of some form of GAAR. The authors note that the difference in the second of these "lies in its conscious rejection of certainty." However, for those rejecting the case for a GAAR, "one has to accept all the consequences" of a sniper approach:

> If the argument is based on the Rule of Law, the concept of certainty and the rejection of official discretion, then one must also reject any discretion in the Revenue to soften the application of a particular rule in hard circumstances. All too often critics of the Revenue really want the best of both worlds, a Revenue bound hand and foot by red tape in its efforts to get taxes but with unfettered power to waive tax due.[228]

In their discussion of the GAAR, a second standard text, *Revenue Law*, note a number of other countries have introduced general anti-avoidance provisions – Canada, Australia, Hong Kong, New Zealand, South Africa and India - "but with only varying degrees of success":

> The current Australian provision, which focused on the concept of a tax avoidance 'scheme', replaced the previous legislation which was so widely worded that the courts tended to restrict its operation so that it became a weak weapon in the hands of the revenue authorities.
>
> However, its replacement relies heavily on judicial discretion with the result that there is a great deal of uncertainty surrounding the provision…
>
> As far as Canada is concerned, despite the fact that … the highest courts have upheld the application of the relevant GAAR … [a number of cases since 2009] suggest that, in seeking to apply it, the higher Canadian courts are facing exactly the same difficulties with respect to the proper approach to the interpretation of tax statutes s the UK courts did when developing the so-called judicial anti-avoidance doctrine.

The authors go on to point that, with the exception of India, which relatively recently introduced a GAAR, "none of these other jurisdictions … has seen a decline in the complexity of legislation, reducing and simplifying existing complex anti-avoidance legislation, being one of the factors Aaronson had pointed to as being a distinct benefit of the proposed GAAR."[229]

In her assessment of the GAAR published in 2019, Judith Freedman, Oxford Professor of Tax Law, suggested that the UK GARR was "not perfect" as "it would have been better than the underling tax system been simpler and clearer so that no GAAR was necessary."

In addition, it had been "regrettable that the UK legislation has continued to accrue new targeted anti-avoidance rules (TAARs) and

[228] *Tiley & Collison UK Tax Guide* 2018/19 ed para 8.2-3, para 8.6

[229] Anne Fairpo & David Salter, *Revenue Law: Principles and Practice*, 37th ed. 2019 para 3.82

other avoidance provisions … contrary to the expressed hopes in the Aaronson study":

> However, the United Kingdom is not alone. No jurisdiction has yet managed to create a system that does not require anti-abuse rules, either legislative or judicial. At a domestic and international level, GAARs have become a necessary weapon in the armoury against tax avoidance.[230]

[230] Judith Freedman, "The UK General Anti-Avoidance Rule: Transplants and Lessons", *Bulletin for International Taxation*, June/July 2019 p338

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