A General Anti-Abuse Rule

Summary of Responses
11 December 2012
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Foreword

The vast majority of people and businesses in the UK do not try to avoid paying their tax. However, where that is not the case, this Government continues to take strong action to tackle avoidance wherever it is identified. The development of the UK’s first General Anti-Abuse Rule (GAAR) is a key part of that, and will provide a significant new tool to tackle abusive tax avoidance schemes and deter those who are tempted to engage in them.

The consultation on the development of the GAAR, which I launched on 12 June, has been comprehensive. HM Revenue and Customs received a significant number of written comments on the scope, design and implementation of the GAAR from a wide range of individuals, businesses and representative bodies, and also met directly with many of those groups and individuals to discuss their ideas.

The feedback has demonstrated widespread support for a GAAR which meets the twin goals of protecting our tax system from abuse while maintaining the attractiveness of the UK as a location for genuine business investment.

I am grateful to all those who took the time to respond to the consultation. Considerable thought has been given to the issues raised and many constructive suggestions made, and I believe the draft GAAR is better for this public input.

I hope there will be continuing public engagement through consultation on the draft Finance Bill legislation and GAAR guidance that are both published today.

The GAAR is a significant new development in the UK tax system, and is one of a number of steps that we are taking to ensure that our tax system delivers the right balance between being open for business, but not for avoidance.

David Gauke
Exchequer Secretary, December 2012
1. Introduction

Background

1.1 In December 2010 Graham Aaronson QC was asked by the Government to report on whether a general anti-avoidance rule would be beneficial for the UK tax system. Graham Aaronson’s report was published on 21 November 2011. He concluded that a broad spectrum general anti-avoidance rule would not be beneficial to the UK, and instead recommended the introduction of a rule which is targeted at abusive arrangements.

1.2 The Government announced at Budget 2012 that it accepted this recommendation and would consult with a view to bringing forward legislation in Finance Bill 2013 that was both effective at tackling artificial and abusive tax avoidance schemes and also practical for both taxpayers and HMRC.


1.4 HMRC received over 14,000 responses from a range of businesses, representative bodies, trade associations, professional bodies, firms and individuals. Of these, 169 were substantive responses replying to the specific questions raised in the consultation document. These responses are captured in this document. More detail on the responses is provided at Annex B.

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¹ General Anti-Abuse Rule Consultation Document, 12 June 2012: [GAAR consultation document](#)
Headline summary of the responses

- The majority of respondents support the introduction of a GAAR targeted at artificial and abusive tax avoidance. Specifically, respondents agreed with the Government’s view that a ‘broad spectrum’ general anti-avoidance rule would not be beneficial for the UK.

- Many respondents were concerned that the draft legislation had the potential to have wider application than the stated target.

- There was general agreement that good comprehensive guidance including practical examples was key to providing the greatest possible certainty about how the rule might operate in practice, particularly in the personal tax planning arena, including inheritance tax.

- There were mixed views on whether the GAAR should operate within the Self Assessment regime, with some commentators concerned that this will impose an additional burden on taxpayers in the absence of a clearance process. Other respondents felt that the GAAR should operate within existing frameworks as far as possible, minimising any additional processes which would in turn add to the compliance burden.

- There was broad support for the concept of an Advisory Panel to provide an effective taxpayer safeguard and approve the GAAR guidance. There were many useful suggestions on how to create a Panel commanding public support and enthusiasm for further detailed discussions as the proposals develop.

- There was 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 on the panel.

- A number of respondents considered that Inheritance Tax (IHT) should be excluded from the taxes covered by the GAAR because of the long-term planning that may be involved, and the indicators of abuse in the draft legislation might be inappropriate for IHT.
2. The target and scope of the GAAR

This chapter summarises the responses received during the consultation in relation to taxes to which GAAR applies and double taxation agreements:

2.1 Taxes to which the GAAR applies

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

2.1.1 The consultation document proposed that the GAAR should initially apply to:

   I. Income Tax;
   II. Corporation Tax (including taxes linked to Corporation Tax, such as the Bank Levy);
   III. Capital Gains Tax (CGT);
   IV. Petroleum Revenue Tax (PRT);
   V. Inheritance Tax (IHT);
   VI. Stamp Duty Land Tax (SDLT);
   VII. Annual residential property tax (ARPT) due to be introduced in 2013; and
   VIII. National Insurance Contributions (NICs).

2.1.2 The majority of respondents to the consultation agreed with the proposals. Just under one third of those responding to the specific question however considered that IHT should be excluded, with others expressing particular concerns about its inclusion. The main reasons given 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.

2.1.3 A small number of respondents pointed out that the SDLT legislation already includes section 75A of the Finance Act (FA) 2003 (SDLT specific anti-avoidance rules) and therefore they did not see the rationale for the application of GAAR to SDLT. The respondents queried whether section 75A of FA 2003 would be repealed if the GAAR were to apply to SDLT.
Proposals and next steps

2.1.4 The Government recognises that IHT has a number of differences when compared to the other direct taxes and has complex interactions with trust and estates legislation. However, the Government does not agree that these are reasons to exclude IHT from the GAAR as that would leave IHT potentially exposed to abusive avoidance schemes.

2.1.5 In order to address some of the detailed concerns, the Government proposes the following 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.

2.1.6 The Government does not intend to repeal section 75A of FA 2003 (SDLT anti-avoidance rules). Section 75A and other Targeted Anti Avoidance Rules (TAARs) apply to a wide range of avoidance including arrangements that would not be considered to be at the “abusive” end of the spectrum of tax avoidance, which is the intended target of the GAAR. Nonetheless, the GAAR may in due course obviate the need for some TAARs and enable others to be simpler.

2.1.7 Further information on the interaction between the GAAR and TAARs will be provided in the draft GAAR guidance that is published today.

2.2 Double Taxation Agreements

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

2.2.1 The consultation document considered that the proposed GAAR would be consistent with the Organisation for Economic Co-operation and Development (OECD) commentary on the Model Tax Convention and should apply to artificial and abusive arrangements where UK tax advantages have been obtained through rights or benefits under any double taxation agreement (DTA).

2.2.2 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. However, concerns were expressed that a precedent could be set by which international treaties could be overridden, which might be followed by other countries.
2.2.3 A small number of respondents considered that existing powers should already prevent such abuse and that where such powers do not exist it would be better to negotiate anti-abuse provisions to limit treaty benefits in the relevant DTAs.

2.2.4 Some respondents were also concerned that any ability of the GAAR to exert primacy over DTAs could affect inward investment to the UK through creating an uncertain tax landscape for investors.

2.2.5 Suggestions were made that this would be of less concern if:

- the scope of the GAAR was more clearly targeted at abusive arrangements;
- guidance illustrated the effect of the application of the GAAR in relation to other fiscal authorities;
- guidance clarifies how application of the GAAR meets the OECD’s “guiding principle” test; 
- priority rules in relation to the GAAR and DTA provisions were clarified.

**Proposals and next steps**

2.2.6 The Government recognises 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.

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2 The OECD declares that the “benefits of conventions should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions” (“guiding principle”).
3. The draft GAAR legislation

This chapter consists of two parts covering: 1) the main operative provisions of the draft GAAR and 2) key technical provisions included in the draft GAAR legislation.

3.1 Part one: main operative provisions

Clause 2(1) – tax arrangements

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

3.1.1 The consultation document considered that a narrower purpose test carries risk that it might be circumvented by abusive schemes. Therefore a “main purpose” coupled with the concept that arrangements must also be “abusive” provides sufficient balance between certainty to taxpayers and HMRC collecting the right amount of tax.

3.1.2 In addition, the consultation document considered that the definition of tax arrangements would automatically exclude from the GAAR arrangements that are entered into without tax intent. Therefore, the draft legislation would not require additional provision of this nature.

3.1.3 There was a mixed response to the above two points, with respondents divided in their views of the balance to be struck between the “main purpose” and “double reasonableness” tests.

3.1.4 There were two distinct views on the “main purpose” rule:

- a “sole”, “dominant” or “primary” purpose test would be preferable to a main purpose rule as providing greater assurance to taxpayers that “centre ground planning” would not be caught; and
- a “main purpose” test would be adequate so long as the key “double reasonableness” test in clause 2(2) was properly formulated.

3.1.5 Equally there were differing views on whether the legislation should have a specific exclusion for arrangements without tax intent, as proposed in the report from Graham Aaronson QC’s GAAR study group. Less than a quarter of respondents took the view that there should be such an exclusion, reasons including that it may make it easier for people to self-assess. Other respondents considered that, whilst a ‘no tax intent’ exclusion may be helpful for some taxpayers, there was no need for such an exclusion as long as it was clear that the GAAR is aimed at transactions that are abusive.
Proposals and next steps

3.1.6 The Government considers that the best way of ensuring that the GAAR applies only to its intended target is to refine the “double reasonableness” test. It considers that there is a risk that a sole or dominant purpose filter might exclude some of the arrangements which the GAAR is intended to counteract.

Clause 2(2) – ‘abusiveness’ requirement

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

3.1.7 This was a key concern for nearly all respondents. A large majority of the respondents considered that the proposed “double reasonableness” test is subjective and that the draft legislation may go beyond the stated policy aim, its scope potentially extending across a broad spectrum.

3.1.8 Respondents felt that the test introduces a level of moral judgement and places great stress on the GAAR guidance. As a result there is scope for potential mission creep over time as the GAAR guidance evolves, and that this would place too much discretion in the hands of HMRC.

3.1.9 Some respondents considered that “reasonableness” could be better considered by reference to the characteristics of arrangements or means by which arrangements achieve their intended result, taking the view that the indicators at paragraph 2(4) of the draft tried to assess “reasonableness” by the results of the arrangements.

3.1.10 Many replies considered that the test was subjective and that this would lead to uncertainty. A small number of respondents preferred the positive formulation of the double reasonableness test contained in the report from Graham Aaronson QC’s GAAR study group, expressing the view that excluding arrangements that could reasonably be regarded as a reasonable exercise of choice gave greater certainty of outcome. Others considered that making the GAAR depend on the “double reasonableness” test was the wrong approach and made alternative proposals for defining abusive tax arrangements.

Proposals and next steps

3.1.11 The Government considers that the range of proposed safeguards in the draft legislation will ensure appropriate application of the GAAR. However it also proposes a number of changes to the draft “double reasonableness test” to ensure that the GAAR will operate as intended to target abusive arrangements. There are three main changes.
3.1.12 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.

3.1.13 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.

3.1.14 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.

3.1.15 The draft legislation has also been amended so that it no longer highlights transactions or agreements that include non-commercial terms as one of the indicators of abusiveness.

3.2 Part two: key technical provisions

Clause 4(1) and (2) – counteraction

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

3.2.1 The draft legislation provided that “arrangements are to be counteracted on a just and reasonable basis” and that “counteraction may be made in respect of the tax in question or any other tax to which the [GAAR] applies”.

3.2.2 The majority of respondents agreed that the counteraction provision as suggested in the draft legislation is appropriate. Some doubts were expressed that HMRC might seek to find the largest tax yield when counteracting, rather than the most likely scenario absent the actual arrangements that had taken place.

Comment

3.2.3 Any application of the GAAR would be subject to the particular facts of the case. Counteraction must take place on a just and reasonable basis, which should preclude HMRC from seeking the maximum possible yield without having regard to all the relevant circumstances. Any counteraction would also be subject to the existing appeal provisions.
Clause 4(3) and (4) – consequential adjustments

The consultation document proposed that when counteraction under the GAAR has occurred, consequential adjustments can be made on a just and reasonable basis. This included adjustments to the computation and assessment of tax for the same taxpayer or other persons for that period or other periods. The adjustments proposed could either be relieving or in certain circumstances increase or create a tax charge.

Many responses reflected concerns relating to consequential adjustments. The main points were:

- it was wrong that someone who was not party to the tax arrangements could potentially receive an unexpected tax bill as a result of a consequential adjustment;
- consequential adjustments should only be relieving in effect, particularly as the main GAAR counteraction provision would be available against any party to the arrangements;
- there were issues of taxpayer confidentiality in relation to the making of adjustments;
- there was a lack of clarity over what constitutes a “just and reasonable” outcome;
- taxpayers should be able to self-assess consequential adjustments;
- there should be a clear right of appeal and it should be made clear at what point the right of appeal could be invoked.

Proposals and next steps

The Government agrees that the consequential adjustment provision should only have a relieving effect. Consequential adjustments will need to be claimed by a taxpayer. Where a claim is made, HMRC must give effect to the claim if it is just and reasonable to do so.

Consequential claims under the revised legislation will only be admissible if HMRC has counteracted the tax advantage and that counteraction has become final.

Appeal rights will apply if HMRC considers that it should not give effect to all or part of a claim.

As with the main counteraction provision, whether an adjustment is “just and reasonable” will depend on the specific facts involved in a particular case. This
will be a question for the court or tribunal to determine where issues cannot be resolved by agreement.

**Commencement**

7. The Government would welcome views on the options set out regarding commencement, how transitional arrangements should be dealt with, and whether there should be different rules for different taxes where appropriate.

3.2.10 The consultation document proposed that the GAAR should apply fully to tax advantages arising from arrangements entered into on or after the proposed commencement date of 1 April 2013; and it should not apply to tax advantages arising from arrangements fully completed by that date.

3.2.11 The Government also welcomed comments in relation to what the appropriate rule should be for arrangements that had been put in place before 1 April 2013 but not completed by that date.

3.2.12 There was a wide range of views on when the GAAR should start to take effect. At the extremes, some respondents considered that the provisions should take effect for all tax advantages obtained after the Budget statement of the Government’s intention to introduce the GAAR in March 2012; whereas others considered that it should not come into force before 1 April 2014, or later, in order to allow people to become familiar with the legislation and reorganise their affairs where necessary.

3.2.13 The majority expressed concern that the GAAR should not have retrospective effect and should make due allowance for any longer-term planning which may already be in progress. They considered that any arrangements that had been started before the GAAR commencement date should be excluded from application of the GAAR.

3.2.14 There was also significant concern that GAAR guidance could not be agreed until the Advisory Panel had been appointed and that it would be difficult to assess where arrangements stood in relation to the GAAR until the GAAR guidance was finalised.

3.2.15 Some respondents suggested that separate transitional and commencement rules should be introduced for IHT in view of the very-long-term planning that is often involved.

3.2.16 There was also the suggestion that after a certain date all arrangements should potentially fall within the scope of the GAAR, no matter when they commenced.
Proposals and next steps

3.2.17 The Government’s key policy objective in introducing the GAAR is to discourage involvement in contrived and abusive tax arrangements by providing for effective counteraction.

3.2.18 In the light of the responses the Government proposes that the GAAR should take effect from the day on which Finance Act 2013 is passed. Only abusive arrangements that are entered into on or after that date will be within the scope of the GAAR.

3.2.19 The Government also proposes that an arrangement entered into after the commencement date, which was subject to an earlier pre-commencement step, would not be subject to the GAAR if the post-commencement arrangement is not abusive. Conversely, if the post-commencement arrangement is abusive, regardless of the pre-commencement step, then the GAAR may apply.
4. Proceedings before the court or tribunal

Burden of proof

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

4.1 The consultation document sought views on clause 5(1) of the draft legislation at Annex D, which proposed that it should be for HMRC to show that the key requirements for the GAAR to apply are met and that the counteraction is just and reasonable.

4.2 The vast majority of respondents on this point agreed that the burden of proof should entirely fall on HMRC. In addition a number of respondents also requested that GAAR guidance is provided on what is considered “just and reasonable”.

4.3 A small number of taxpayers also suggested that the court or tribunal should not be precluded from substituting its own view of the “just and reasonable” counteraction.

Comment

4.4 There is nothing in the proposed legislation that would prevent the court or tribunal from determining a different amount on appeal in the light of their findings.

Admissibility of evidence

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

4.5 The majority of respondents agreed with and supported the concept that particular weight should be given in the legislation to the GAAR guidance and the Advisory Panel opinion. However, in many cases this support was conditional on HMRC not being represented on the Advisory Panel.

4.6 There were concerns that the GAAR would give excessive power to HMRC or the courts to set aside the normal process of law merely because the outcome was considered to be “wrong”.

Proposals and next steps

4.7 The Government agrees that there should not be an HMRC representative on the Advisory Panel. This was announced on 7 November 2012.

4.8 The Government does not consider that the GAAR confers inappropriate powers. It is the Government’s intention that it should apply to the most contrived and
abusive tax arrangements where it could not reasonably be maintained that the claimed tax outcome was one that Parliament would have intended. Guidance drafted by HMRC and approved by the Panel must be in accordance with the Government’s policy objectives in bringing forward the GAAR legislation. Determination of any appeal is ultimately a decision for the court or tribunal. While the published GAAR guidance must be taken into account by the court or tribunal in reaching their decision, it is only one of the factors involved and does not in any way limit proper judicial process.
5. Administration

The consultation document sought comments on the proposal to operate the GAAR within existing Self Assessment regimes and tax administration procedures.

**Self Assessment**

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

5.1 The consultation document proposed that the GAAR should, as far as possible, operate within existing Self Assessment regimes (where the relevant tax operates in such a regime). For taxes not within Self Assessment (such as PRT and IHT), the Government proposed that the GAAR should operate within existing administrative rules for those taxes and apply counteraction accordingly.

5.2 There were mixed views on whether the GAAR should operate within the Self Assessment regime. Many respondents supported the idea of avoiding additional counteraction procedures where existing processes meant this was not necessary.

5.3 Over one third of the respondents, including large firms and some representative bodies, suggested that the GAAR should be operated via a direction or counteraction notice regime and not through Self Assessment. Reasons given for this included:

- use of existing processes would impose additional burdens on taxpayers during the first few years of the GAAR operation when there are concerns that there would not be much contextual information such as Tribunal decisions or Advisory Panel opinions;
- no clearance procedure will be available; and
- the GAAR may not be applied consistently under the Self Assessment regime.

5.4 A small number of respondents suggested that the GAAR should be incorporated within the Disclosure of Tax Avoidance Schemes regime (DOTAS), or that it should only apply where disclosure is required under the DOTAS regime, as HMRC and taxpayers would then automatically know that the GAAR might apply.

**Proposals and next steps**

5.5 The GAAR is specifically targeted at abusive tax arrangements. Therefore, limited numbers of taxpayers will have to consider the legislation in detail when self-assessing. To quote one of the respondents: “It would be highly unlikely for a taxpayer to stumble unwittingly into a transaction close to or over the GAAR borderline on abuse.”
5.6 The function of DOTAS (to detect and gather information regarding avoidance schemes) is different from the function of the GAAR (to deter and counteract abusive tax advantages). The GAAR is intended to complement and work alongside the DOTAS provisions as a separate component of the Government’s commitment to tackling tax avoidance. Whilst many abusive tax arrangements need to be disclosed under the DOTAS rules, the Government considers there are risks in constraining the GAAR to operate only in respect of disclosable schemes.

5.7 The Government therefore considers that the GAAR should be within Self Assessment regimes for those taxes where it applies as that will reduce the need for potentially difficult changes to legislation and procedures that might otherwise be needed.

**Other administrative issues**

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

5.8 Most respondents to this question (a significantly different group from those responding to question 10) considered that as far as possible the GAAR should operate within existing administration rules with some commenting that a new system would add confusion and increase costs for taxpayers.

5.9 Some respondents, whilst preferring the GAAR to be within the existing administration rules, took the view that adjustments may be needed in the future in the light of early experience in operating the GAAR. Therefore they requested that the GAAR should be managed centrally by a specialist unit and its operation and application should be subject to review.

**Proposals and next steps**

5.10 The Government considers that operation of the GAAR should remain as far as possible within existing administrative procedures which are familiar to taxpayers and advisers as this will help minimise additional costs and administrative procedures for both taxpayers and HMRC.

5.11 HMRC will establish robust internal administrative procedures for the GAAR to ensure that the GAAR is operated consistently and appropriately.
6. The Advisory Panel

Advisory Panel Process

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

6.1 The Advisory Panel process proposed in the consultation document fell into four stages:

- Stage 1: written notification to a taxpayer that a designated HMRC officer considers that the GAAR may apply (with reasons and proposed counteraction), and inviting a written response.
- Stage 2: written response from the taxpayer.
- Stage 3: if the taxpayer provides a written response, the designated HMRC officer must consider the response. If the officer is still of the view that the GAAR may apply, he or she must refer the matter to the Advisory Panel.
- Stage 4: the Advisory Panel will give its opinion to HMRC and to the taxpayer.

6.2 The consultation document sought views on any time limits that should be set for each stage.

6.3 Most respondents supported the idea of statutory time limits, with varied suggestions mainly in the range from 30 days to 90 days. Some responses recognised that stage 4 will depend on the availability and workload of the Advisory Panel.

6.4 There were comments that stage 1 of the Advisory Panel process (written notification that the GAAR applies) should be subject to the normal assessment and enquiry time limits.

Proposals and next steps

6.5 The Government proposes a 45-day time limit (beginning with the day on which the notice is given) for taxpayers to send written representations about the proposed counteraction to a designated HMRC officer (stage 2 above). The Government does not propose to set time limits for stages 3 and 4 above.

6.6 The Government recognises that taxpayers may have concerns that the whole Advisory Panel process is not time limited. It believes this is more appropriate for guidance than legislation and there are existing processes available for resolving delays in progressing cases. More detail about the expected timescales involved is set out in the draft GAAR guidance published today.

6.7 The Government also proposes that where a taxpayer does not make written representations under stage 2 the matter must still be referred by a designated
HMRC officer to the Advisory Panel for consideration. This means that no counteraction by HMRC can occur under the GAAR unless an opinion has been given by the Advisory Panel.

6.8 The Government intends that counteraction should fall within existing assessment provisions. In consequence, stage 1 of the process will need to be initiated within the normal time limits for assessment and enquiry.

**Other matters relating to the Advisory Panel**

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

6.9 Most respondents welcomed the introduction of the Advisory Panel as a taxpayer safeguard. There was support for the view that it should be a non-judicial body that would consider a case before it progresses to a court or tribunal.

6.10 A significant majority expressed strong objections to HMRC being represented on the Advisory Panel. Others merely commented that there should not be an HMRC majority.

6.11 Some responses suggested the Advisory Panel should consist of retired Tribunal judges, experienced tax advisers, or senior in-house employees with relevant practical and commercial experience. A small number of respondents expressed concerns over potential difficulties in appointing subject matter experts in niche areas to the Advisory Panel since such experts were likely to be conflicted.

6.12 Almost all respondents welcomed the idea of the key principles from the Advisory Panel’s deliberations being made public and incorporated in the GAAR guidance. A large number of respondents requested that the full opinions be anonymised and published.

6.13 Most supported the proposition that opinions issued by the Advisory Panel should not be binding on HMRC or the taxpayer.

6.14 A number of firms and representatives expressed concerns over possible neutral opinions being given, suggesting that if a neutral opinion is issued there should be clear reasoning for it, or that it should be taken as acceptance that the arrangements were not abusive.

6.15 A number of respondents were concerned that the taxpayer and HMRC should have a balanced opportunity to explain their case to the Advisory Panel. In particular that the taxpayer should be able to respond to comments advanced by HMRC at stage 3, and that the Advisory Panel should have information powers.
Proposals and next steps

6.16 In response to these concerns, the Government announced on 7 November 2012 that there would be no HMRC representative on the Advisory Panel.

6.17 In addition:

- The Government proposes to include an additional right for the taxpayer to make representations to the Advisory Panel after a matter has been referred to the Advisory Panel regardless of whether the taxpayer has already responded at stage 2 above.

- The Advisory Panel should be able to ask for further information from either HMRC or the taxpayer that it considers necessary to form an opinion. Formal powers are considered inappropriate because the Panel is not a judicial or investigative body, and the use of such powers could increase the amount of time needed to reach an opinion.

6.18 The Government does not propose that the Advisory Panel should publish detailed opinions due to the risk of breaching confidentiality. The Advisory Panel process is a pre-judicial stage of determining tax liability. However it does propose that the Advisory Panel should publish a summary of anonymised key principles emerging from cases that are referred to it. HMRC will continue to examine issues around taxpayer confidentiality that may affect how this proposal is implemented.

6.19 The draft of the GAAR legislation published today sets out the proposed form of the question that the Advisory Panel should consider. This is not a final view and the Government is still considering this point further.
7. Guidance


7.1 The consultation document sought views on the proposed authoritative guidance and the timing of the guidance. Specifically, the Government proposed that the guidance must be taken into account by the court or tribunal when considering any issue in connection with the GAAR.

7.2 Responses were mixed. While a small number of respondents suggested that the GAAR guidance should be wholly drafted and owned by the Advisory Panel, the majority either agreed that the guidance should be drafted by HMRC (subject to the Advisory Panel’s approval) or expressed no view on the proposed procedure.

7.3 A small number suggested that the GAAR guidance could be introduced as a statutory instrument. Others noted the difficulties in regularly updating the guidance if it were included within a statutory framework.

7.4 Many respondents asked for the final, approved GAAR guidance to be issued before commencement of the GAAR. Many respondents asked for draft GAAR guidance to be published and consulted on before being finalised.

7.5 There were many requests for the GAAR guidance to be both detailed and comprehensive in particular that it should:

- include examples that would be caught by the GAAR and those that would not;
- include theoretical application of the GAAR to decided cases;
- show what HMRC would view as established practice;
- reflect the commerciality of transactions.

7.6 Respondents also thought that the provision of a checklist or flowchart that would lead the taxpayer through the legislation, and specifically through the “double reasonableness” test and indicators, would be helpful.

7.7 Respondents suggested that the GAAR guidance should be updated once or twice a year and include any relevant examples or key principles that had emerged since the last update.

Proposals and next steps

7.8 A first draft of the GAAR guidance published for consultation today reflects many of the above helpful comments. The guidance includes examples across a range of taxes, as requested.
8. Tax Impact Assessments

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

8.1 The Government recognises the importance of gaining a thorough understanding of the effects that the proposals could have and therefore invited comments on the Taxes Impact Assessment (TIA) included in the consultation document.

8.2 The key concern raised by respondents was that the draft legislation from the consultation document was widely drawn and could potentially catch commercial transactions. This would increase the compliance burden and the costs incurred in considering whether the GAAR is in point.

Comment

8.3 The Government considers that application of the GAAR will only need to be considered where taxpayers have entered into arrangements which may be abusive. In consequence there will be no impact where ordinary commercial or planning arrangements are concerned. The proposals made in the light of responses to Question 4 of the Consultation Document are intended to make clear the type of arrangements that are targeted by the proposed legislation.
9. Summary of proposals and next steps

9.1 The Government considers that the best way of ensuring that the GAAR applies only to its intended targets is to refine the “double reasonableness” test. It proposes to:

- clarify the circumstances to be taken into account in determining whether arrangements are abusive;
- make clear that the specific indicators that an arrangement might be abusive are not relevant if it is apparent that the relevant tax rules were intended to secure that outcome;
- provide a specific indication that arrangements are not abusive if they are in accord with established practice and HMRC has indicated its acceptance of that practice.

9.2 In the light of the responses the Government proposes that the GAAR should take effect from the day on which Finance Act 2013 is passed. Only arrangements entered into on or after that date can be within the scope of the GAAR.

9.3 In order to provide GAAR guidance from the date of commencement, the Government has announced that it will appoint an interim group to develop and approve the initial guidance in time for the introduction of the legislation into Parliament. The Government also announced that HMRC will not be represented on the Advisory Panel.

9.4 The Government intends that counteraction should fall within existing assessment provisions. In consequence, stage 1 of the process will need to be initiated within the normal time limits for assessment and enquiry.

9.5 It also proposes:
- an additional right for the taxpayer to make further comments to the Advisory Panel following HMRC representations made at stage 3;
- the Advisory Panel should be able to ask for further information from either HMRC or the taxpayer that it considers necessary to form an opinion.

9.6 Revised draft legislation and draft GAAR guidance are published for consultation by HMRC today.
Annex A: List of stakeholders consulted

HMRC does not normally identify the names of any individuals who contribute to a consultation. Where there has been any uncertainty over whether a consultation response represented personal views or those of an organisation we have assumed that it was made in a personal capacity and so the stakeholder will not be separately identified below. Please note that whether a response is deemed to be made by an individual or organisation will only have a bearing on whether the name of the stakeholder is published below.

Association of Chartered Certified Accountants
Ackland Webb
Association for Financial Markets in Europe
Aiglon Consulting
Allen & Overy LLP
Anderson Barrowcliff LLP
Ashurst LLP
Association of Accounting Technicians
Association of British Insurers
Association of Corporate Treasurers
Association of Taxation Technicians
Aviva PLC
AVN Picktree
AVN Venus Tax
Baker & McKenzie LLP
Baker Tilly
BDO LLP
Berwin Leighton Paisner LLP
Boodle Hatfield LLP
British Property Federation
British Chambers of Commerce
British Land Company PLC
Business Oxygen Ltd
Business Services Association
British Venture Capital Association
Cassons
CBI
CCH
Chartered Institute of Taxation
City of London Law Society
Cleaver Black
Country Land and Business Association
Cunningtons
David Gill and Co
David Kirk and Co
Davis Polk
Dean Statham LLP
Deloitte LLP
Dufton Kellner Ltd
EDF Tax Ltd
Egan Roberts Ltd
Elman Wall Ltd
Ernst & Young LLP
Executor and Trustee Company Limited
Exceed (UK) Ltd
Field Fisher Waterhouse LLP
Finance and Leasing Association
Frank Hirth plc
Freshfields Bruckhaus Deringer LLP
The Fry Group
G4S plc
Greater London Authority
GPC Financial Management Ltd
Grant Thornton UK LLP
Greater Manchester Chamber of Commerce
H R Harris & Partners
Harcourt Capital
Hixsons Ltd
International Bureau of Fiscal Documentation
Institute of Chartered Accountants for England and Wales
Institute of Chartered Accountants of Scotland
Institute for Fiscal Studies
Institute of Directors
J Sainsbury PLC
John Allen & Co
Kingfisher PLC
KPMG LLP
Kumar Strategic Consultants Ltd
Law Society
Law Society of Scotland
Legal & General Group Plc
Linklaters LLP
Lomas and Company Accountants Limited
London Chamber of Commerce and Industry
London Society of Chartered Accountants
Lyness Accountancy
Macfarlanes LLP
Macilvin Moore Reveres LLP
Marlow Proactive
Maurice Turnor Gardner LLP
McCleary & Co Ltd
Mint Accounting
Mishcon de Reya
Moore Stephens
Murray Associates Accountants Limited
National Grid plc
New Quadrant Partners LLP
Norton Rose LLP
Annex B: Consultation process and statistics

HMRC received over 14,000 responses to the consultation document published by the Exchequer Secretary, David Gauke, on 12 June. These came from a wide range of businesses, representative bodies, trade associations, professional bodies, firms and individuals.

In addition to receiving written responses, HMRC held a number of meetings to discuss the proposals with businesses, representative bodies and professional firms.

A total of 169 responses were received that engaged with the specific questions raised in the consultation document.

The remainder of the responses were expressed in broadly similar terms. They came from people supporting campaigns which, while agreeing that there should be a GAAR, seek a rule with wider coverage. The overwhelming majority took the view that the Government proposals were much too narrowly focussed.

The Government considers that a wide-spectrum rule would risk compromising the certainty that is vital to provide the confidence to do business in the UK, and that the GAAR should be carefully targeted to achieve the correct balance between deterring and counteracting abusive arrangements and the risk of creating uncertainty for taxpayers.
<table>
<thead>
<tr>
<th>Question</th>
<th>No of responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Do you agree that the GAAR should be limited to these taxes and duties initially? Are there any particular issues relating to how the GAAR would function in relation to the taxes (including NICs) that are proposed to be included?</td>
<td>73</td>
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<tr>
<td>2. Do you agree that the GAAR should be capable of counteracting UK tax advantages obtained under double taxation agreements?</td>
<td>57</td>
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<td>3. Do you agree that (1) the proposed “main purpose” rule serves as a useful filter, when coupled with the concept that arrangements must also be “abusive” and (2) a specific exclusion for arrangements without tax intent is not required?</td>
<td>90</td>
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<tr>
<td>4. Do you agree that the proposed “double reasonableness” test operates as intended to counteract only artificial and abusive schemes (such as those described in Annex B)?</td>
<td>157</td>
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<tr>
<td>5. Do you agree that the counteraction provision in the draft GAAR is appropriate?</td>
<td>58</td>
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<tr>
<td>6. The Government is continuing to develop its analysis regarding the appeals processes in relation to counteraction and consequential adjustments under the GAAR, and welcomes views which may inform detailed proposals to be published later in the year.</td>
<td>48</td>
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<td>7. The Government would welcome views on the options set out regarding commencement, how transitional arrangements should be dealt with, and whether there should be different rules for different taxes where appropriate.</td>
<td>96</td>
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<td>8. The Government welcomes views on clause 5(1) of the Draft GAAR.</td>
<td>40</td>
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<td>9. Do you agree that it is appropriate for particular weight to be given in the legislation to the GAAR guidance and the opinion(s) of the Advisory Panel on the arrangements?</td>
<td>61</td>
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<tr>
<td>10. The Government welcomes comments on whether particular issues arise in relation to Self Assessment (where the relevant taxes operate within a Self Assessment regime) or within the existing administrative rules for those taxes that do not operate within a Self Assessment regime.</td>
<td>92</td>
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<tr>
<td>11. The Government invites comments on the general proposal that the GAAR should as far as possible operate within existing administration rules for the taxes involved; and on what adaptations may be necessary to existing administrative rules to ensure that the GAAR operates with as little as possible additional administration cost and burden for taxpayers, advisers and HMRC. Is there a case for having a new type of assessment given the cross-regime range of the GAAR?</td>
<td>47</td>
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<td>12. The Government invites comments on whether time limits should be set for each of stages two, three and four and if so what those time limits should be.</td>
<td>50</td>
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<td>13. The Government welcomes comments on the proposals relating to the Advisory Panel.</td>
<td>124</td>
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<td>14. The Government would welcome views on the proposals for producing and updating the guidance</td>
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<tr>
<td>15. HMRC would welcome comments or evidence that can improve the TIA assessment of impacts, costs and yield of the GAAR proposals.</td>
<td>54</td>
</tr>
</tbody>
</table>