DOSSIER ▪ Première partie – Pays anglo-saxons ou scandinaves

Tackling fiscal "abuse of law" in the UK: different routes to a single destination

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In the UK, tax avoidance is tackled through a judicial approach based on purposive interpretation (the so-called "Ramsay" approach) and through specific legislation as well as a legislative General Anti-abuse Rule (GAAR) that was introduced in 2013. The judicial approach is said to be a principle of statutory construction but at times may appear to be stretched beyond that in order to defeat what is seen as "aggressive avoidance". The statutory GAAR contains several safeguards for taxpayers and was widely accepted by the tax community when introduced, but some have expressed concerns about the uncertainty it may bring, whilst others would say that it is at least as certain as the judicial approach. With the aim of providing clarity, the GAAR is supported by extensive extra-statutory guidance. In addition there is a procedure under which GAAR cases are considered by a GAAR Panel of practitioners which must express an opinion on the reasonableness of the transaction within the context of the legislation, this opinion then being advisory for the courts should the case progress further. There have now been several GAAR opinions published but no GAAR case has yet reached the courts. In this situation the GAAR has a valuable impact in deterring some of the most egregious forms of tax avoidance and may eventually mean there is less need for the courts to stretch statutory interpretation of ordinary legislative provisions. A development of some concern, however, is the way in which penalties and other consequences have been attached to the GAAR subsequent to its initial introduction, making challenge in the courts difficult if not financially impossible in some cases. These wider consequences of the GAAR may go a step too far.

Au Royaume-Uni, l'évasion fiscale est combattue par une jurisprudence finaliste (dite « Ramsay »), en ce qu'elle considère l'avantage fiscal obtenu par le contribuable pour caractériser un abus. La matière est également régie par de nombreuses dispositions « spéciales », prévenant des abus particuliers, également par une norme générale anti-abus adoptée en 2013. La jurisprudence a certes inspiré ces textes, mais elle peut dépasser le cadre de ceux-ci afin de réprimer une évasion fiscale particulièrement agressive. La norme générale anti-abus de 2013 contient des garanties du contribuable. Elle a été bien accueillie par les fiscalistes, même si certains s'inquiètent du degré d'incertitude qu'elle comporte, tandis que d'autres soutiennent qu'elle n'apporte pas plus de sécurité juridique que la jurisprudence. Dans le but d'assurer une plus grande sécurité, la norme générale est accompagnée d'un guide qui recense les montages jugés abusifs. Il existe de plus un comité de l'abus de droit, composé de praticiens, lesquels se prononcent sur la régularité des montages au regard de la loi. Les avis ainsi rendus exercent bien sûr une influence sur le juge si l'affaire est par la suite portée devant les tribunaux. Si la norme générale a été abondamment commentée par la doctrine, elle n'a pas pour le moment fait l'objet d'une jurisprudence. Il n'est pas douteux cependant qu'elle a déjà permis de dissuader l'élaboration de montages particulièrement frauduleux. Peut-être également qu'elle dispensera le juge d'interpréter trop largement les règles spéciales anti-abus, dans le but de combattre l'évasion fiscale. Il demeure une inquiétude quant à l'application des pénalités (60 %), et autres conséquences de la reconnaissance d'un abus, qui pourraient conduire à des conséquences financières impossibles à supporter pour les contribuables. Peut-être, de ce point de vue, la norme générale est-elle allée trop loin.

1. Introduction

Unlike many of its European neighbours, the UK has no native concept of "abus de droit".[1] As a member of the EU, however, it has become subject to the abuse of law principle developed by the Court of Justice of the European Union.[2] Whether the UK departs fully from the EU or not, a question of some topicality at the time of writing, it is likely that many EU principles, including that of abuse of law, will continue to affect UK law for many years to come, given that they have been absorbed into UK case law. In the fiscal context, the principle of abuse of law manifests itself as the *Halifax principle*, developed in a number of cases originating in the UK as well as in those from other Member States.[3] It is evident in the UK in connection with VAT, but also emerges more widely in relation to non EU taxes in relation to the application of the four freedoms.[4]

Despite this general absence of a concept of abus de droit in UK law, in a fiscal context the UK has developed its own approaches to dealing with some of the activity that is undertaken to avoid taxes. Whilst the starting point may be different from that in other legal systems, this author will argue that the end point is very similar. For around forty years now the UK has been moving away from literal interpretation towards a purposive approach in tax cases. In addition the UK has many specific statutory anti-avoidance provisions together with, since 2013, a statutory General Anti-abuse Rule (GAAR). Were the UK to remain in the EU, the Government would not now feel the need to make any changes to legislation in order to implement Article 6 of the AntiTax Avoidance Directive (ATAD)[5]; it would argue that the UK GAAR covers the requirement adequately. The UK GAAR has been criticised by some for being too narrow[6] and by others for being too wide,[7] but in fact it is likely that the results of its application will be very similar to those of the application of GAARs worldwide. The UK GAAR can be seen as a parliamentary legitimation of an approach that has been developed by the courts in reaction to a perception of increasing volumes of highly artificial and contrived tax avoidance. The judicial decisions were introducing uncertainty into the law and the GAAR legislation was designed to contain that uncertainty within an administrative framework replete with taxpayer safeguards.[8] Whether the balance aimed at has been achieved is another question: arguably legislative and administrative developments since the introduction of the GAAR ~~itself~~ have upset the balance that the GAAR legislation sought to achieve. This direction of travel is a reaction to public and media pressure but it can be misdirected and is beginning to raise cause for concern.[9] The problem is not the concept of the GAAR itself, but the way in which it is being used as a basis for other measures.

2. Development of a judicial approach

There is a famous and often quoted comment in a 1936 case from the House of Lords, at that time the highest law court in the UK, the *Duke of Westminster's* case.[10]

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."

This has often been cited over the years to show that the UK takes a literal approach to interpretation in tax cases and that if a taxpayer can manage to get within the technical wording of the legislation he may achieve his objective of tax minimisation. Argu-

1. *Bayliss v Gregory* (1986) STC 22 per Vinelott J. p. 43 "The doctrine of abuse of right by a taxpayer which obtains in some continental countries has no place in our jurisprudence". For a definition of abuse of rights see WARD, D.A. *et al.*, "The Business Purpose Test and Abuse of Rights" [1985] *British Tax Review* 68. "The abuse of rights doctrine, where that has been applied, generally involves a recognition that although a taxpayer has a right to enter into any contract or undertake any transaction which is legal, he abuses that right if he exercises it solely to avoid or reduce taxes."
2. For a comprehensive review of this principle *see Prohibition of Abuse of Law: A New General Principle of EU Law?* Eds R. DE LA FERIA and S. VOGENAUER (Hart, Oxford , 2011).
3. *Halifax plc v C&E Comrs* Case C-255/02, [2006] Ch 387.
4. See, for example, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, Case C-196/04, [2006] ECR I-7995.
5. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, *OJ* L 193, 19.7.2016, p. 1-14.
6. R. MURPHY, **"Why we need a genuine general anti-avoidance principle to beat tax abuse" Blog, June 20, 2012**, available at: http://www.taxresearch.org.uk/Blog/2012/06/20/why-we-need-a-genuine-general-anti-avoidance-principle-to-beat-tax-abuse-2/ [Accessed 13 December 2018].
7. P. MASON, "No GAAR without GADR", *Tax Adviser Magazine*, June 2013, 28.
8. G. AARONSON, *GAAR Study* "A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system" Report by Graham Aaronson QC (11 November 2011), available at: https://webarchive.nationalarchives.gov.uk/20130605083650/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf [Accessed 13 December 2018].
9. The GAAR penalty has now been criticised by the Economic Affairs Committee of the House of Lords as draconian and restricting access to justice, para 103 HL Paper 242, The Powers of HMRC: Treating Taxpayers Fairly, 4th Report of Session 2017-19, 4th December 2018, available at: https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/242.pdf [Accessed 13 December 2018].
10. *IRC v Duke of Westminster* [1936] A.C. 1; 19 TC 490.

ably this was never a true interpretation of the case[11] and, if it ever was, it has certainly not been so for many years. Since the 1980's, the so- called "*Ramsay* principle", established in the case of that name,[12] has required a purposive approach to be adopted. There have been some twists and turns in the case law, since initially the courts attempted to provide a formula setting out the circumstances in which they would ignore inserted steps. In the case of *Furniss v Dawson*,[13] Lord Brightman stated that

> "First, there must be a pre-ordained series of transactions or, if one likes, one simple composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end… Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of liability to tax not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The Court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied".

This was then further elaborated by Lord Oliver in a case called *Craven v White*[14] to require that, not only must the series of transactions be preordained in order to produce a given result and the transaction have no other purpose than tax mitigation, but also that there was, when the steps were introduced, no practical likelihood that the preplanned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and that the preordained events did in fact take place.

It can be seen that this very prescriptive judicial approach to defining the circumstances in which the *Ramsay* principle could be applied was an attempt to introduce precision and certainty into an uncertain world, but the result was to give great succour to those setting up artificial avoidance schemes. Taxpayers could argue that the result was not pre-ordained if the final steps were not entirely planned, or if a change was made to the arrangements part way through the transactions. In this way, providing a formula simply resulted in more attempts by taxpayers to game the system.

Eventually the courts began to reassert the principle as one of statutory construction.[15] They made it clear that the *Ramsay* case did not introduce a new doctrine operating within the special field of revenue statutes but rescued tax law from an "island of literal interpretation".[16]

Since then, the Ramsay principle has developed into what is a fairly wide approach and there are cases where the UK Supreme Court has gone further than some expected in this regard.[17] When a judgment begins by stating that "In our society, a great deal of intellectual effort is devoted to tax avoidance" and then makes reference to "the most sophisticated attempts of the Houdini taxpayer to escape from the manacles of tax"[18] the influence of current public opinion on judicial decision making is not hard to detect.

The principle to be applied is now said to be that

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."[19]

This is sometimes known as the "*Arrowtown* test" after the name of the Hong Kong case in which it was set out. The judge in that case was merely attempting to understand the state of the UK case law, but his summary has been widely adopted in the UK case law.

As can be seen, this leaves considerable room for broad interpretation.

On the other hand, as a general rule of statutory interpretation in the UK, the courts are not permitted to look at material outside the statute, such as parliamentary debates or preparatory background papers, to assist in interpretation of legislation. They must find the meaning in the wording of the statute but ~~in~~ the context of the statute as a whole. Only in very limited circumstances may a statement of a

11. J. Freedman, "General Anti-Avoidance Rules (GAARs) – A Key Element of Tax Systems in the Post-BEPS Tax World? The UK GAAR", in M. Lang *et al.*, *GAARS – A Key Element of Tax Systems in the Post-BEPS World*, (IBFD, Amsterdam 2016).
12. *W.T. Ramsay Ltd v. IRC* [1982] AC 300.
13. *Furniss v. Dawson* [1984] A.C. 474.
14. *Craven (Inspector of Taxes) v White (Stephen) (HL)* [1989] A.C. 398; [l988] TC 476.
15. *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6; [2003] 1 AC 311 (HL).
16. *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* 76 TC 446 (HC, CA and HL).
17. For example in *Tower MCashback LLP 1 v HMRC* [2011] UKSC 19; [2011] AC 457 and *UBS AG v HMRC* and *DB Group Services (UK) Ltd v HMRC* [2016] UKSC 13.
18. Lord Reed in *UBS* , above fn. 17, para. 1.
19. This formulation, taken from the Hong Kong case, *Collector of Stamp Revenue v. Arrowtown Assets Ltd* [2003] HKCFA ~~52~~, has now been accepted by the UK courts as summarising the position reached in the UK case law as it has evolved from the *Ramsay* case onwards.

Minister in Parliament be taken into account.[20] Thus purposive interpretation, though broadened by the *Ramsay* principle as expounded in *Arrowtown*, is still more limited in the UK in some respects than it is in most civil law jurisdictions.

The lack of certainty resulting from these judicial rules was one reason for the proposal for a statutory GAAR by Graham Aaronson QC, who had set up a study group to examine this issue in 2011 at the request of the Government.[21]

3. Statutory interventions – SAARS and TAARS

SAARS

As in most other jurisdictions, the UK has extensive specific anti-avoidance rules (SAARs) and has done so for many years. UK tax legislation is much more detailed than that found in civil law countries and this is in part due to the more literal interpretation approach taken in earlier years. The absence of a general principle of abuse of law contributed to this. Although this has now changed, the UK's legal culture is one of expecting everything to be spelled out. This is true across the board and not only in a tax context. Thus, for example, whilst an EU Directive may be more or less "copied out" in some jurisdictions, in the UK there has been a tendency to add detail or "over-implement" that can lead to exceeding the requirements of the Directive ("gold-plating") and other problems.[22]

The large number of SAARs in the UK tax legislation could be argued to be a reason not to need a GAAR, but tax avoidance schemes can be designed to make use of a SAAR. SAARs are tightly drafted and, if a tax adviser can find a way to make such legislation work for the taxpayer it can look very strong in his or her favour. This can lead to a cat and mouse game of "creative compliance"[23]; that is the use of the detailed legislation to show formal compliance whilst actually minimising taxation. The UK's statutory GAAR is, therefore, in part a reaction to the failure of SAARs to put an end to artificial tax avoidance schemes. In theory it might be thought that the advent of a statutory GAAR would reduce the need for SAARs, but this has not proved to be the case so far. It is difficult to change legal culture and the UK Government and, Her Majesty's Revenue and Customs (HMRC), being risk averse, have so far preferred a "belt and braces" approach of both SAARs and the GAAR. In some areas the SAAR will form part of the original design of a charging provision or of the tax system as a whole, such as the Controlled Foreign Company Rules. At other times there will be amending legislation of an addition to meet a known tax scheme or activity that relies on a loophole or defect in the initial legislation.

Extensive use of SAARs may undermine one of the potential advantages of having a GAAR Having an overriding principle on the statute book ought to make it possible to draft simpler legislation, but it seems unlikely to do away with the need for SAARs altogether, especially those that are part of the structure of the tax system. A GAAR can only ever help give effect to the purpose of the underlying legislation- it cannot substitute for that framework legislation which is the source of the intention of the provisions. The relationship between SAARs and a statutory GAAR is one we shall return to when discussing the UK GAAR in more detail.

TAARs

Not content with SAARs, the UK tax policy makers have frequently included a type of legislation known as a targeted anti-avoidance rule. This differs from a specific rule because it is couched in very wide language and uses a purpose test. It can be thought of as a kind of mini-GAAR in one area, or a very wide kind of SAAR.

An example is section 16A of the Taxation of Chargeable Gains Act 1992.[24] This reads as follows:

> 16A Restrictions on allowable losses

20. The case of *Pepper v Hart* [1993] A.C. 593 permits limited recourse to non-statutory material in the form of ministerial statements in restricted circumstances and when legislation is ambiguous. See the Rt. Hon. Lord Steyn, "*Pepper v Hart*: a Re-examination" (2001) 21 *O.J.L.S.* 59; A. Kavanagh, "*Pepper v Hart* and Matters of Constitutional Principle" (2005) 121 *L.Q.R.* 98; S. Vogenauer, "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25 *O.J.L.S.* 629.

21. Aaronson, fn 8 above. This study group was made up of John Bartlett (Group Head of Tax, BP plc) , Sir Launcelot Henderson (Judge of the Chancery Division of the High Court of Justice), The Rt. Hon. Lord Hoffmann (formerly Lord of Appeal, Non-Permanent Judge of the Court of Final Appeal of Hong Kong) , Howard Nolan (formerly Tax Partner at Slaughter & May, part time Judge of the First-Tier Tribunal (Tax Chamber)), John Tiley QC (Hon) (Emeritus Professor of the Law of Taxation, Cambridge University), and Judith Freedman, Professor of Tax Law at Oxford University and author of this article. The resulting Aaronson Report was that of Mr Aaronson alone. The analysis was supported by the group except that the judges were required to maintain strict neutrality as to whether a GAAR should be introduced or not.

22. V. Miller, *EU Legislation: Government action on "gold-plating"*, House of Commons Library, SN/1A/5943, 19 April. 2011, available at: http://researchbriefings.files.parliament.uk/documents/SN05943/SN05943.pdf [Accessed 13 December, 2018].

23. D. McBarnet and C. Whelan, "The Elusive Sprit of the Law: Formalism and the Struggle for Legal Control" (1991) 54 *Modern Law Review* 848.

24. Inserted by the Finance Act 2007 s.27(3).

> (1) For the purposes of this Act, "allowable loss" does not include a loss accruing to a person if –
> (a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and
> (b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.

The terms used are then defined. As can be seen, this provision is very wide in its effect and includes a main purpose, or one of the main purposes, test. There is extensive guidance from HMRC that in effect cuts down the effect of this provision[25] (although the guidance can be relied upon by the taxpayer only in very limited circumstances and does not actually amend the law).[26]

The UK has well over 300 TAARs and they also show no sign of diminishing as a result of the introduction of the statutory GAAR. New ones continue to be introduced. They have become a useful tool for HMRC, with far fewer safeguards than the statutory GAAR. For that reason it may now be difficult to persuade the authorities to give them up, especially in the current environment where tax avoidance is perceived to be such an evil that politicians are prepared to legislate against it with little encouragement from the revenue authorities.

4. The UK statutory GAAR

It was against a background of the judicial *Ramsay* principle that the decision was made to introduce a statutory GAAR in the UK in the Finance Act 2013. This had been resisted by previous UK governments and, indeed, HMRC, who felt they would be under pressure to introduce a system of advance clearances were a GAAR to exist. This they did not want to do. Taxpayers were concerned about rule of law issues around uncertainly and giving too much discretion to HMRC.[27]

However in 2011 the political situation was such that the Coalition Government felt it necessary to take some action and so they set up a Study Group chaired by a leading tax barrister, Graham Aronson QC.[28] Following the deliberations of that group (which included the present author).[29]

Aronson proposed the introduction of what he described as a moderate, targeted anti-abuse rule. The use of the word "abuse" rather than the word "avoidance" was important to convince the tax practitioner community that this was in some way narrower than a normal GAAR. Aaronson's report stated that

> "I have concluded that introducing a broad spectrum general anti-avoidance rule would not be beneficial for the UK tax system."

He then went on to propose a number of safeguards to address the concerns of some critics in the profession and taxpayer community. Aaronson was then able to argue that because of these provisions an advance clearance system was not needed. This directly addressed the previous concerns of HMRC. This was clever and careful positioning, which proved to be successful in the sense that the proposal was consulted upon and widely accepted by the business and tax communities. There was a view that it might increase certainty by encouraging the courts not to stretch their interpretations of legislation to quite the extent they had been doing, since they would be able to use the GAAR to tackle artificial avoidance instead, and that it would reduce the activities of those promoting egregious tax avoidance schemes by acting as a deterrent. There were concerns expressed that the provision was too wide or too narrow,[30] but public pressure was building for some action and this was seen as a way forward by the Government, and one that the taxpayer community and profession would accept.

The provision came into force in July 2013.[31] It applies only to tax arrangements entered into on or after the day on which the Finance Act 2013 (FA 2013) was passed. Thus the UK GAAR has no retrospective effect, which is an important feature in terms of the rule of law.

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25. HMRC Internal Manual , Capital Gains Manual, CG-APP9, *Capital Gains Tax: avoidance through the creation and use of capital losses*, March 2016 as updated, available at: https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg-app9 [Accessed 13 December 2018].
26. It can be relied upon only by a taxpayer who can show reliance under the doctrine of legitimate expectations.
27. For a fuller discussion of the history see Tax Law Review Committee (TLRC) *Tax Avoidance* (IFS, 1997): available at: http://www.ifs.org.uk/comms/comm64.pdf [Accessed 13 December 2018]; Inland Revenue, *A General Anti-Avoidance Rule for Direct Taxes* (London: Inland Revenue, 1998); TLRC, *A General Anti-avoidance Rule for Direct Taxes: Response to Inland Revenue's Consultative Document* (IFS, 1999) available at: http://www.ifs.org.uk/comms/comm77.pdf [Accessed 13 December 2018]; Freedman, above fn. 11 and A. Burchner, J. Cape and M. Hodkin, "The UK GAAR" in IFA, *Anti-avoidance measures of general nature and scope – GAAR and other rules*, (2018) International Fiscal Association Cahier, Volume 103a, den Haag, Sdu.
28. See fn. 8 above.
29. See fn. 21 above. The current author had been arguing for a GAAR for some time – see J. Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle" [2004] *British Tax Review* 332.
30. See fns 6 and 7 above.
31. In Finance Act 2013 (FA 2013) sections 206-15. The full wording can be found at http://www.legislation.gov.uk/ukpga/201/29/part/5/enacted [Accessed 13 December 2018].

The UK GAAR applies to direct taxes but not to VAT, which has been left to be covered by the *Halifax* jurisprudence. Whether this will continue if and when the UK ceases to be subject to EU law is not known for sure, but under current proposals EU law as decided until the date of exit of the UK from the EU will continue to apply for the time being.

Key Features of the Legislation

a) General-anti abuse rule, not anti-avoidance

Part 5 of FA 2013 "has effect for the purpose of counteracting tax advantages arising from tax arrangements that are abusive."[32]

Counteractions are made by adjustments that are "just and reasonable".[33]

The use of the word abuse was utilised to denote that this was narrower than a normal anti-avoidance rule and would apply only to the most egregious forms of tax avoidance. In the author's view, this was largely a way of convincing the tax community that this would ~~not~~ be an acceptable piece of legislation and it makes little difference in practice, but it does explain that the mischief targeted is abuse of legislation rather than wider forms of behaviour that some commentators would like to prevent, but which cannot be dealt with by a GAAR. This is true of all GAARs – they cannot without more deal with the type of international tax structuring that was intended to be addressed by the OECD's Base Erosion and Profit Shifting project (BEPS). Only a change in the underlying substantive law can tackle these problems. But public opinion in the UK at the time was such that some commentators supposed that a wide GAAR could prevent base erosion and profit shifting. Fortunately the initials of both an anti-abuse rule and an anti-avoidance rule are the same in each case so the provision remains a GAAR.

b) Main purpose or one of the main purposes

Section 207 FA 2013 defines "tax arrangements" as follows

> (1) Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

This is an objective test, due to the words "it would be reasonable to conclude". The reference to "main purpose, or one of the main purposes" contrasts with the "sole" or "essential" purpose test found in the EU case law on abuse of law. The rejection by the French constitutional council of a main purpose test for France in December 2013[34] shows that this test is controversial in some jurisdictions and the appearance of this test in Article 6 of ATAD[35] may be problematic in those countries. It is, however, a standard UK formulation, as seen in the discussion of TAARs above. It has long been considered that a sole purpose or even one main purpose is too easy a test for taxpayers to manipulate. Taxpayers and their advisers can almost always construct some kind of commercial purpose. Thus the "main purpose or one of the main purposes test" is used. However this is saved from framing the test too widely because of the subsequent limitations, in particular the double reasonableness test, described below.

Tax advantage is defined as including (a) relief or increased relief from tax; (b) repayment or increased repayment of tax; (c) avoidance or reduction of a charge to tax or an assessment to tax; (d) avoidance of a possible assessment to tax; (e) deferral of a payment of tax or advancement of a repayment of tax, and (f) avoidance of an obligation to deduct or account for tax.[36]

c) Double reasonableness test

Tax arrangements are said to be "abusive" if they are

> "arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances including –
> (a) whether the substantive results of the arrangements are consistent with any principles on which those provisions are based (whether express or implied) and the policy objectives of those provisions,
> (b) whether the means of achieving those results involves one or more contrived or abnormal steps, and
> (c) whether the arrangements are intended to exploit any shortcomings in those provisions".[37]

32. FA 2013 section 206(1).
33. FA 2013 section 209.
34. Constitutional Council, 29 December 2013, 2013-685 DC, cited in A. Calloud , French Branch Report , IFA Cahier 103a, 2018.
35. Council Directive (EU) 2016/1164 July 2016, above fn. 5.
36. FA 13 section 208.
37. FA 2013 section 207(2).

This is the central "double reasonableness" test. It assesses the transactions in question against a norm of what reasonable people would consider reasonable in the circumstances. There are special rules of evidence as to what can be considered in evaluating this, which go beyond the normal restrictive UK evidence rules, as discussed below. Conceptually this is once again a familiar way of imposing an objective standard in UK law, although the double nature of the test is unusual and somewhat clumsy sounding. Nevertheless it achieves the desired result of providing a very strong safeguard for a taxpayer. The use of a GAAR Panel made up of experts to assess this double reasonableness test should further safeguard the taxpayer, although this will be discussed below.

The list of circumstances in the legislation is not intended to be exhaustive but looks to the policy objectives of the provisions, the familiar notion of contrived or abnormal steps and also, a rather more novel concept, it looks to whether there were any shortcomings in the provisions.

d) What is abusive?

FA 2013 provides an non-exhaustive list of examples of abusive arrangements

> "(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,
> (b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes and
> (c) the arrangements result in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid…"[38]

In each case this is only abusive if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted. Another important taxpayer protection is that if the tax arrangements accord with established practice, and HMRC had, at the time the arrangements were entered into, indicated its acceptance of that practice, this is taken to be an example of something which might indicate that the arrangements are *not* abusive.

1) e) Evidence

Section 211 of the FA 2013 places the onus on HMRC to show a court that there are tax arrangements that are abusive, and that the adjustments made to counteract the tax advantages arising from the arrangements are just and reasonable.[39]

In determining this, a court *must* take into account HMRC's guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel at the time the tax arrangements were entered into, and any opinion of the GAAR Advisory Panel about the arrangements.

The court *may* take into account

(a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into, and

(b) evidence of established practice at that time.

This might not seem remarkable to those from a civil law system, which permits use of background materials in any event. It is, however, very unusual in UK terms as explained above.[40] This alone may give the UK GAAR a value that it would not possess in other jurisdictions. In particular, the GAAR Guidance[41] set out to improve clarity gains some considerable force although it is still not legislation and the court, whilst it must take it into account, could, technically, disagree with it. This Guidance now runs to hundreds of pages and different views could be expressed on whether that level of detail always increases certainty, but practitioners do pay it a considerable amount of attention.

f) The Panel

It can be seen that the GAAR Panel has assumed great importance. Initially intended by the Aaronson proposals to be a sounding board, rather like the Australian GAAR Panel, a place for a "regulatory conversation"[42], and to include an HMRC representative for this purpose, the Panel has now taken on a very formal role in preparing Guidance and expressing an opinion in every GAAR case prior to it going to court. To date there have been nine published opinions, each in favour of HMRC.[43] In many of these cases the decisions reached could probably

38. FA 2013 section 207(4).

39. FA 2013 section 211 (1) (a) and (b).

40. See fn. 20 above and text thereto.

41. HMRC Tax avoidance: general anti-abuse rule guidance – latest version, available at: https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules [Accessed 13 December, 2018].

42. See further J. Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle", [2004] *British Tax Review* 332.

43. HMRC, *Tax avoidance: General Anti-Abuse Rule – GAAR Advisory Panel opinions,* available at: https://www.gov.uk/government/

have been reached in the same way without a GAAR but HMRC has obtained useful validation to give the GAAR teeth and to give warnings to those entering into schemes.[44]

The Panel is appointed by HMRC and there is official denial that it is quasi judicial, since it only gives an opinion on the papers and does not hear the whole~~,~~ case. Nevertheless the increasing powers it has been given, as described below, make it very hard to argue that it is not quasi-judicial and the author would expect its decisions to be subject to judicial review were that to become an issue. The way in which members of the Panel are appointed may also come to be an issue in due course.

g) Relationship between SAARS, TARS and GAARs and DTCs

The way in which the GAAR is structured shows that any specific piece of legislation must be applied before the GAAR becomes relevant. Nevertheless if the other conditions of the GAAR are satisfied the taxpayer cannot rely on shortcomings or other aspects of the underlying legislation to defeat the policy objectives of the provisions. There is an express priority rule in the UK GAAR legislation making it clear that this also apples to double taxation agreements,[45] so that the BEPS Action 6 main purposes provision is not problematic for the UK.[46]

5. Recent Developments and Conclusions

There are some issues and uncertainties around the GAAR, but they appear to be manageable. The dire predictions of the GAAR's greatest critics have not come true, taxpayers continue to be able to manage their tax affairs in most cases and other legislation has overtaken the GAAR as the most problematic in terms of uncertainty, for example the UK's Diverted Profits Tax. The deterrent effect of having a statutory GAAR has real value, though there is little evidence that the UK Government is holding back on introducing new specific provisions because of the existence of the GAAR as some had hoped would be the result of the legislation, so simplification seems unlikely in this area.

However there are some developments emerging that are worrying. The difficulty of defining tax avoidance has made the introduction of penalties and disincentives for avoidance very difficult. The fact that the GAAR defines a certain kind of avoidance has meant that HMRC and the Government have seized on the GAAR as a hook upon which to hang other legislation designed to reduce the most aggressive forms of avoidance. This includes accelerated payment notices (APNs) introduced in 2014 that require payment of tax on account where a taxpayer has been involved in a type of scheme that has, inter alia, been counteracted under the GAAR. In practice this makes it extremely difficult for a taxpayer to contest such a finding on the basis, for example, that the facts of his case are different, because he will have had to pay all the tax upfront and will then risk heavy penalties applicable if his transaction is found to be abusive. There are other similar examples of the GAAR definition being utilised as a basis for special treatment of taxpayers. This may sounds reasonable- if someone enters into abusive transactions they should expect to be penalised and the penalty is a deterrent.

But this results in some difficulties. First of all, behaviour that is caught by the GAAR might be less aggressive than behaviour caught by specific anti-avoidance measures. It is not clear why a transaction caught by the GAAR, after all specific provisions have failed, should be more heavily penalised than someone doing something more obviously contrary to the legislation. It is also a basic principle of the rule of law that a person should have a right to litigate their case if they consider they have an argument and the combination of APNs and the heavy, 60%, GAAR penalty introduced in the Finance Act 2016 makes this close to impossible and can be seen as depriving the taxpayer of access to the courts.[47]

None of these provisions were envisaged by the original Aaronson Report. Sadly they may actually inhibit the use and development of the GAAR as the courts may eventually react against the measures, as we have seen the Economic Affairs Committee of the House of Lords begin to do. Combatting behaviour that sets out to abuse the law is vital in a tax system that is to be efficient and fair, but if the scales tip too far the provisions may become counter productive and start to undermine tax morale and thus tax collection. The UK has not reached that point yet, but the warning signs cannot be ignored.

collections/tax-avoidance-general-anti-abuse-rule-gaar [Accessed 13 December 2018].

44. H. Self, "The GAAR panel's first ruling: a reasonable decision?" *Tax Journal* 8 September, 2017 13.

45. FA 2013 section 212.

46. OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris).

47. As pointed out by Malcolm Gammie and others in evidence to the House of Lords and accepted by the House of Lords Committee in their report of 4th December 2018 , fn 9 above.