LEGAL RESEARCH PAPER SERIES
Paper No xx/2014 **August 2014**

Designing a General Anti-Abuse Rule: Striking a Balance

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This article argues that statutory general-anti avoidance or anti-abuse provisions (GAARs) are an essential part of a modern tax system, since specific legislation will not catch every abuse. Properly drafted GAARs with appropriate protections can give administrators and courts an important tool to use in cases of egregious abuse, but the use must be within a legitimate framework suitable for the jurisdiction in question. GAARs are not the appropriate mechanism for a fundamental rewriting of domestic or international tax law, but they are a valuable element of the statute book in the fight to combat artificial tax arrangements.

1. Introduction

The United Kingdom (UK) introduced a statutory general anti-abuse rule in 2013. It is a latecomer to this form of legislation. By contrast, several British Commonwealth countries have had general anti-avoidance rules for many years.[1] Some Asian countries, such as Hong Kong and Singapore, have long experience of GAARs, whilst others have recently introduced them or are considering doing so.[2] The current political and public climate around tax avoidance lends support to the introduction or strengthening of anti-avoidance provisions, but both critics and supporters can often claim too much for GAARs. They can be a useful tool in the armoury of a revenue authority, but by their very nature they cannot, and should not, be employed to deal with policy difficulties in tax law or failure to have thought through objectives adequately. If change is needed to the fundamental structure of national and international tax law, this requires a different form of action.[3]

It has been questioned whether GAARs are suitable for developing countries and the concern has been expressed that a sophisticated and mature tax authority is needed to administer a GAAR.[4] GAARs clearly raise issues about the level of discretion to be given to revenue authorities, and these issues are important whatever the level of development of the jurisdiction concerned. It is the case that GAARs must be designed to fit in with the legal background of the relevant jurisdiction. Rules of construction of the underlying substantive law, methods of statutory drafting and the approach of the courts are all highly relevant to the approach and wording of the GAAR. The resources available to the tax authorities must also be taken into account in design of the GAAR provisions, especially when considering the appropriate safeguards for taxpayers.

This article examines the reasons for introducing a statutory general anti-abuse rule in the UK and the explanation for its shape and design. Although the use of the word "abuse" rather than "avoidance" in the UK rule is deliberate and intended to show that the rule is more moderate than some general-anti-avoidance rules, the term "GAAR" is used in this article for both types of rule unless the context otherwise requires. Some of the reasons are particular to the UK, but most are widely shared. These characteristics common to all, or at least most, tax systems, point to the need for certain design features in all or most GAARs. They mean that experience can be shared to some extent, although this is not a case where one size can fit all and every system has to be seen in the light of its own economic and socio-legal background.

2. Are GAARs Really Necessary?

In an ideal world, GAARs would not be necessary. As Malcolm Gammie has argued, cogently, of the UK GAAR:

> The GAAR reflects the failure of current policy and legislation and in particular the failure to think more carefully about the nature of the tax base – what you want to tax – and to articulate it correctly with greater principle, clarity and purpose.[5]

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A version of this article was also presented at the fourth IMF–Japan High Level Tax Conference for Asian Countries which was held in Tokyo, Japan in 2013, and the author benefited from comments and from the other papers presented there, especially that of Kiyoshi Nakayama of the IMF.

1. Australia and New Zealand had GAARs in the nineteenth century (although their legislation has been heavily amended since then): *see* D. Pickup, *General Anti-avoidance Provisions: A Comparative Study* in *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (J. Freedman ed., Oxford University Centre for Business Taxation 2008).
2. China introduced a statutory GAAR in 2008. India plans to introduce a GAAR from 2016. *See also* K. Nakayama, *General Anti-Avoidance Rules in Asian Countries*, PowerPoint presentation at the fourth IMF–Japan High Level Tax Conference for Asian Countries held in Tokyo, Japan in 2013. Available at: http://www.ifa-jb.com/media/20130405-nakayama.pdf.
3. Such as the OECD Base Erosion and Profit Shifting Action Plan 2013 (available at: http://www.oecd.org/ctp/BEPSActionPlan.pdf) or something more radical.
4. C. Silvani, *GAARs in Developing Countries: IFA Research Paper*, available at: https://www.ifa.nl/Document/Research%20Papers/IFA%20Research%20Paper%20on%20GAARs%20in%20Developing%20Countries%20%28IFA%20Research%20Paper%29.pdf.
5. M. Gammie, *Moral Taxation, Immoral Avoidance – What Role for the Law?*, British Tax Review 4 (2013), p. 577.

In this ideal world, where policy makers think carefully about what to tax and how to achieve their aims, tax legislation would be based on clear underlying principles and would be drafted in such a way as to give effect to those principles without ambiguity or room for dispute or manipulation. Courts would have a simple task when it came to interpretation of statutes to give effect to parliamentary intention. Indeed it would rarely be necessary to have resort to the courts because the meaning of the legislation would almost always be apparent.

This is an ideal that one can probably safely say no tax system has yet achieved. Some systems come closer to it than others. Civil law legislation may be more principles based and less complex and detailed than common law. UK tax legislation is particularly detailed and unwieldy.[6] But even civil law tax systems now commonly have some form of statute-based GAAR.[7]

In the real world, no legislation, however detailed, can cover every issue that might arise. In fact excessive detail often increases the opportunities for planning or avoidance.[8] It makes sense to have some kind of default provision and it is not surprising that increasing numbers of jurisdictions are adopting some kind of legislation of this nature. As this type of provision becomes more ubiquitous, broadly compliant taxpayers, including multinational businesses, become less concerned about the implications provided they are satisfied with the administrative arrangements and safeguards. The administration of the GAAR thus takes on a primary importance.

3. Addressing Some Myths about GAARs

A GAAR cannot rewrite the law where there is no clear objective because the essence of a GAAR is that it prevents abuse of the underlying legislation. A GAAR will not operate properly unless the underlying law is based on a clearly stated principle, because without such a principle or objective it is impossible to decide whether there has been abuse of the legislation.

For this reason, a GAAR should not be, and is not, an excuse for slapdash drafting. It cannot replace properly thought-through specific legislation and in fact it ought to encourage drafters and politicians to think more carefully about the formulation of such legislation. For this reason it might be hoped that GAARs would improve the underlying tax legislation but even if they do not, they should not make it worse.

A GAAR will not necessarily increase uncertainty. In part, whether it does so depends on how much certainty exists in the relevant jurisdiction without a GAAR. In most countries the rules of statutory construction allow some latitude for purposive interpretation. The UK is sometimes thought of as the land where form governs substance,[9] but in fact, as will be discussed further below, even in the UK purposive construction is now the norm. Once we move away from literal interpretation, the discretion rested in the courts means that a measure of uncertainty is present anyway. In the absence of a GAAR, the courts might be tempted to stretch the interpretation of the wording before them, whereas if there is a carefully formulated GAAR in place they will be more inclined to interpret the legislation more narrowly but then look to the GAAR for guidance as to whether it should be subjected to that anti-avoidance rule.[10] In this way, a GAAR could actually increase certainty.

GAARs might be seen as increasing the discretion of revenue authorities. Not every case will reach the courts and the use of GAARs as a threat could be problematic. For this reason many jurisdictions with GAARs have administrative arrangements which ensure that the GAAR can only be used with the sanction of a specialist group within the revenue authority or with the approval of a GAAR panel, which might even include members external to the revenue authorities. Some jurisdictions also use advance clearance procedures. The use of such panels and the problems with advance clearances will be discussed further below in connection with the UK system.

4. Why Did the UK Introduce a GAAR?

In order to understand the introduction of a GAAR by the UK in its 2013 Finance Act, some background is required.

During the 1980s, the UK courts appeared to be creating a judicial anti-avoidance doctrine or approach. This process was commenced by a series of cases, notably a decision of the UK's highest court at that time, the House of Lords, in the case of *W.T. Ramsay v. IRC*.[11] What was called "the new approach" was elaborated in subsequent case law, but this took various twists and turns. Initially, the case law evolved an apparent judicial rule. This appeared to be that where there was a preordained series of transactions with inserted steps with no commercial purpose other than the avoidance of tax and no practical likelihood that the events would not take place in the order ordained, the courts could view the scheme as a whole and tax on the basis of the overall result.[12]

6. Hence the creation by the current UK government of the Office of Tax Simplification. *See* 2010 press release at https://www.gov.uk/government/news/office-of-tax-simplification.
7. F. Zimmer, *Form and Substance in Tax Law*, General Report – Cahiers de Droit Fiscal International Vol. LXXXVIIa (2002), p. 19.
8. D. McBarnet & C. Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 Modern Law Review 6 (1991), p. 848.
9. *The Duke of Westminster*'s case ([1936] A.C. 1.) is frequently cited to support this view, although this may be something of an oversimplification of that case even as it stood originally and the rule in the *Duke of Westminster*'s case was modified in the UK even before the introduction of the GAAR as described below.
10. On this, *see* paragraph 1.7 (iii) of G. Aaronson, *GAAR Study: A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system* (London: November 2011), produced at the request of the UK government. Available at http://webarchive.nationalarchives.gov.uk/20130605083650/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf (Aaronson Report).
11. *W.T. Ramsay Ltd v. IRC* [1982] AC 300. For more complete surveys of this area and the relevant cases and arguments *see* J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, British Tax Review (2004), p. 332, and J. Freedman, *Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament*, 123 Law Quarterly Review (2007), p. 53. The new approach did not overrule the *Duke of Westminster*'s case discussed above, but it did limit its application. The account set out here is necessarily simplified due to space constraints and the focus of this article.
12. This judicial "rule" was fully set out in *Furniss v. Dawson* [1984] A.C. 474.

This position began to be strained, however. Taxpayers started to rely on the precise wording of the so-called judicial rule as if it were a legislative rule and argued that their schemes were not fully preordained or that the steps all had a commercial purpose. The taxpayers won some important cases[13] and the courts began to review their approach and assert that there was not, and never had been, a judicial rule. Rather, they were applying a form of statutory interpretation.[14]

Due to the uncertainty surrounding the case law at this stage, a proposal was put forward in 1998 to introduce a statutory GAAR, but this was rejected after some discussion.[15] Partly this was because no wording could be agreed that was as flexible and acceptable as the judicial language, and partly because it was considered by the representatives of taxpayers that an advance clearance procedure was essential, whereas the revenue authority did not consider it had the resources to provide such a service, nor did it wish to do so.

The continuing development of the case law after 1998 did nothing to remove the uncertainty around this area of law but did emphasize that there was no judicial anti-avoidance rule or principle, only a form of statutory construction.[16] This is an approach to construction where:

> The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.[17]

In some cases, the judiciary took this to be an invitation to apply a very purposive form of construction and to reach a result which arguably involved some straining of the wording.[18] In other cases, particularly where they found it hard to discern a clear purpose to which to give effect, the courts found in favour of the taxpayer.[19]

At the same time, there was considerable concern in the UK at the perceived number of highly complex artificial and often aggressive tax schemes being carried out. Whilst the UK has extensive advance disclosure provisions, the disclosed schemes still required legislation to combat them and retrospective legislation brings its own difficulties. Only a GAAR can deal with an aggressive scheme that has already taken place where the underlying legislation and any specific anti-avoidance provisions do not cover the position under normal rules of interpretation.

In 2011, the new coalition government in the UK agreed to set up a study group under the leadership of a leading tax barrister, Graham Aaronson QC, to investigate whether the UK should have a GAAR.[20] The government may have anticipated that, as in 1998, the business and professional communities would reject the idea, but in fact the Aaronson Report recommended a moderate, targeted anti-abuse rule. The use of the word "abuse" rather than the word "avoidance" was important to underline the moderate nature of the rule proposed, but the rule is nevertheless referred to in this article as a GAAR. The study group comprised a business representative, two academics, and three judges, led by Mr Aaronson QC himself.[21] The report notes that the study had business and professional backing because:

> Introducing such a targeted rule should contribute to providing a more level playing field for business: enterprises which conduct responsible tax planning would no longer have their competitiveness undermined by others which seek to reduce their tax burden by contrived and artificial schemes. Likewise tax professionals who are not willing to recommend or implement such schemes will not have their client base eroded by those who are prepared to do so.[22]

This broad support from business and the professions has continued, although there has been some criticism from these groups of the detailed wording of the legislation and some of the administrative arrangements. Others make more fundamental criticisms, i.e. that we should not need a GAAR if we get the legislation right in the first place (as argued by Gammie above), or, that *any* GAAR that involves overriding the wording of the legislation creates uncertainty and that this GAAR relies too heavily on the official written guidance or, from the other direction, that this GAAR is too moderate and too easily defeated by taxpayers. In particular, some critics have argued that the GAAR is not useful because it will not prevent base erosion by some of the large multinational corporate groups, especially those which have recently been in the public eye as paying little or no tax in the UK such as Amazon and Google. This is true. The GAAR is not intended to tackle wider problems with the structure of international tax and it was always misleading to suggest that it would do so.

It does remain to be seen how useful the UK GAAR will be, but the process of producing a moderate, balanced GAAR has meant that, although it is still subject to criticism, it has been possible to enact it without any major upheaval or dramatic consequences to date.

5. The Essence of the UK GAAR – The Double Reasonableness Test of Abusiveness

At the core of any GAAR is the question of how to draw the line between behaviour that is to be classed as acceptable

13. For example, *Craven v. White*, House of Lords [1989] A.C. 398.
14. For example, *IRC v. McGuckian* [1997] STC 908, and, *MacNiven v. Westmoreland* [2001] UKHL 6.
15. The history can be traced in Tax Law Review Committee (TLRC) *Tax Avoidance* (London: IFS 1997): available at http://www.ifs.org.uk/projects/18/83; Inland Revenue, *A General Anti-Avoidance Rule for Direct Taxes* (London: Inland Revenue 1998), available at http://www.hmrc.gov.uk/consult/consult_1.htm and TLRC, *Response to Inland Revenue* (London: IFS 1999), available at http://www.ifs.org.uk/projects/18/83.
16. The leading case on this is *BMBF v. Mawson* [2005] 1 AC 684.
17. This formulation, taken from the Hong Kong case, *Collector of Stamp Revenue v. Arrowtown Assets Ltd* [2003] HKCFA 46, has now been accepted by the UK courts as summarizing the position reached in the UK case law as it has evolved from the *Ramsay* case onwards.
18. For example, *Tower MCashback LLP1 v. HMRC* [2011] UKSC 19.
19. *Mayes v. HMRC* [2011] EWCA Civ 407.
20. *Supra* n. 10.
21. The full list of members was 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 the 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. *Supra* n. 10, para. 1.7(ii).

mitigation and that which is to be struck down as abusive. The UK GAAR[23] applies only to tax arrangements entered into on or after the day on which the Finance Act 2013 was passed. Thus the UK GAAR has no retrospective effect which is an important feature in terms of the rule of law, but one which means that there is little likelihood of litigation on the provisions in the near future. Some of the problems encountered in introducing a GAAR in India were avoided in the UK by ensuring that there was advance warning and consultation.[24]

The UK legislation is relatively short and is based on a draft by Graham Aaronson QC, advised by the study group, but with amendments made following public consultation between the government's acceptance of the proposal and the introduction of the final legislation.[25]

The legislation applies only to tax arrangements that are "abusive". There is a wide definition of "tax arrangements". Arrangements are "tax arrangements" if, having regard to all the circumstances it would be "reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements".

This test of purpose used by the UK has been rejected as too wide in India, where an "impermissible avoidance arrangement" under the forthcoming GAAR will require that the *main purpose* is to obtain a tax benefit.[26] The concern in the UK is that it is too easy to set up a commercial purpose in a tax case and argue that therefore that tax advantage is not the main purpose, whereas it is much harder to show that a tax advantage is not *one of the main purposes*.

The Hong Kong GAAR uses the narrower "sole or dominant" purpose test and has seen several successes for the revenue authority despite this.[27] The wide nature of the UK test is considered to be balanced by the fact that it is also necessary to show that the arrangements are "abusive". At this point, the UK legislation uses a completely unique "double reasonableness" test 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 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.

This reads in a somewhat cumbersome way, it must be admitted, but after considerable discussion it was found to be the best way to achieve a test combining safeguards with the requisite degree of objectivity. Various formulations were considered, including those referring directly to the intention of parliament, but these often seemed to add nothing to existing law, since looking for the intention of parliament is exactly what the courts do under ordinary principles of purposive interpretation of legislation. The GAAR needed to do something more than that, but to do it in a way that would not give the revenue authorities and the courts undue discretion. The double reasonableness test ensures that the judgement is not one of pure statutory interpretation. The test looks at a range of additional factors but it is always rooted in reasonableness and includes guidance on the considerations to be taken into account, including the principles and objectives of the underlying legislative provisions and any shortcomings in them.

Reasonableness may be considered to be a vague test, but it is one that the UK courts, at least, are well used to considering. If there are no discernible principles and objectives behind the legislation, express or implied, then it will be much more difficult to apply the GAAR. Hence, legislators need to take that on board when preparing new legislation and the GAAR should be a valuable prompt to encourage that to happen.

The UK GAAR then goes on to list non-exhaustive examples of possible indicators of abusiveness as follows:

> (4) Each of the following is an example of something which might indicate that tax arrangements are 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, 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,
> but in each case only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.

Thus economic substance may be relevant, but not if the underlying legislative provision in question was not seeking to tax based on economic substance, so this is not a simple substance over form rule.

Potentially very significantly, in a novel approach for the UK, the practice of the revenue authority and established practice are stated in the legislation to be further potential indicators that particular tax arrangements were not abusive.

6. Further Issues Encountered in Designing the UK GAAR

Many of the issues encountered in designing the UK GAAR will be familiar to readers from other jurisdictions. Other jurisdictions may have different answers to some of the questions in view of the underlying tax law, approaches to statutory construction in the courts of the country concerned and resources available. It is not possible simply to transpose one system onto another successfully, due to

23. In sections 206-15 of the Finance Act 2013. The full wording can be found at http://www.legislation.gov.uk/ukpga/2013/29/part/5/enacted.
24. *See* Shome et al., Expert Committee *Final Report on GAAR in Income-tax Act, 1961* (Delhi: 2012).
25. For details of the consultation and the consultation papers, *see* http://www.hmrc.gov.uk/avoidance/gaar.htm.
26. *Supra* n. 24, p. 24. *Also see* P. Mehotra & K. Pandey, *General Anti-Avoidance Rule in India*, presentation for the fourth IMF–Japan High Level Tax Conference for Asian Countries held in Tokyo, Japan in 2013.
27. Section 61A of the Inland Revenue Ordinance, Cap. 112 (Hong Kong).

these considerations, but there will be similar questions arising in each jurisdiction.

6.1. Approach to statutory interpretation or overriding principle?

In view of the history described above, it was clear that the UK GAAR needed to create an overriding principle rather than being an aid to statutory construction. Since the case law had already established that purposive interpretation should apply in tax cases, anything less than an overriding principle would have been of little assistance. The Aaronson Report makes it clear that the UK GAAR is more than a rule of construction, or interpretation, of statutory language. The GAAR comes into action only if:

> the arrangement would, on conventional purposive interpretation, succeed in achieving the advantageous tax result which it set out to obtain. The GAAR then provides an overriding statutory principle to which other tax legislation is subject.[28]

Given that the case law on statutory construction still has to be applied as a prior exercise before moving on to the GAAR, it might be thought that all the problems of uncertainty of the case law mentioned above therefore remain. This is true to some extent, but the hope is that gradually the courts will retrench from their more stretched interpretations of the underlying law, given that the GAAR exists to deal with the most egregious schemes. Whether this will actually be the case remains to be seen, as the courts are still dealing with pre-GAAR cases at present. The GAAR does draw useful boundaries for the judiciary in relation to what parliament considers to be acceptable, and in this way its existence will come to be relevant more generally.

Likewise, there are issues around the relationship between the GAAR and specific anti-avoidance provisions. Clearly the specific anti-avoidance legislation will be applied first. If it operates then that will answer the question. If the specific provision is not effective, then, if it delineates some deliberate boundaries around what is and is not caught we can expect that to be determinative of the matter, due to the emphasis put upon the objectives of the provisions as described above, but any attempt to subvert that specific legislation itself should be caught.

6.2. Objective or subjective test?

The tests in the UK GAARs are all objective. The Aaronson Report initially suggested that if there was no subjective intent to achieve an advantageous tax result, the GAAR would not have effect. This was rejected by the government and it was agreed by Mr Aaronson and most commentators that there were sufficient safeguards in the legislation without this. Subjective tests in tax law are generally problematic. Proof becomes a very difficult matter given the complexity of tax law and the fact that many taxpayers are completely reliant on their advisers in any event. It is best to have an objective test and provide safeguards in other ways.

28. *Supra* n. 10, para. 5.4.

6.3. Burden of proof

More generally, burden of proof is frequently an issue when GAARs are discussed and there seem to be very mixed approaches in different jurisdictions. No doubt this is to some extent the result of different procedures in tax cases more generally and so it is not an issue where there will be general lessons to be learned across jurisdictions, but it is certainly an issue which requires careful consideration as part of GAAR design.[29] In the UK the burden of proof is squarely on the UK revenue authority to show that the tax arrangements are abusive. This is considered to be an important safeguard against overactive use of the GAAR.

6.4. The counterfactual

One issue in the minds of the Aaronson study group was that of the counterfactual to the transaction undertaken. An alternative transaction to that which is to be defeated by the GAAR is needed in order to know what tax to impose, but at the time the Aaronson study group was considering the issue, difficulties were being experienced in Australia because the Australian GAAR legislation was very prescriptive about what the counterfactual should be.[30] In response to this and other experience elsewhere, therefore, the Aaronson Report proposed, and the UK government accepted, that the rules governing counteraction of any transaction caught by the UK GAAR should be very open. The requirement is to make adjustments that are just and reasonable. There is procedural protection for the taxpayer in that a notice must set out the counteraction that a specialist officer of the revenue authority considers should be taken.

The GAAR Guidance issued to accompany the UK GAAR (which has more status than normal extra statutory guidance notes as discussed below) states that the alternative transaction chosen should not necessarily be the one which would result in the highest tax charge.[31] In the case of a dispute with the revenue authority, the precise form of the counteraction would be a justiciable issue.

Whilst the lack of detail in the legislation on this may be of concern to some commentators, the Aaronson study group did not think this posed any difficulties. The UK approach is based on experience in Hong Kong, where the Assistant Commissioner may assess the liability to tax of the relevant person in such manner as she "considers appropriate to counteract the tax benefit which would otherwise

29. Ernst & Young report, *GAAR Rising* (February 2003), available at http://www.ey.com/Publication/vwLUAssets/GAA_rising/$FILE/GAAR_rising_1%20Feb_2013.pdf, states that there is no global consistency on burden of proof. Countries where the burden of proof is on the taxpayer are reported to include China, Singapore and Korea (Rep.), whilst the proposed Indian GAAR will place the burden on the tax authority as in the UK.

30. G.S. Cooper, *Predicting the Past – The Problem of Finding a Counterfactual in Part IVA*, 40 Australian Tax Review (2011), p. 185. The Australians have since amended their GAAR to get over the particular difficulty being experienced – *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill* 2013.

31. Her Majesty's Revenue and Customs (HMRC) *GAAR Guidance* (Approved by the Advisory Panel with effect from 15 April 2013), para. B13.3. Available at http://www.hmrc.gov.uk/avoidance/gaar-part-abc.pdf.

be obtained".[32] As Lord Hoffmann remarked in a leading Hong Kong case, that makes the Hong Kong GAAR a powerful and flexible weapon.[33] Provided the procedural safeguards are effective, and with the question ultimately being one for the courts if necessary, this should strike a better balance than a very prescriptive rule.

6.5. Relationship with tax treaties

Several jurisdictions have experienced uncertainly around the relationship between their GAARs and tax treaties.[34] The GAAR, as an ordinary part of domestic law, is generally capable of applying in cases where a tax treaty is in place. The Commentary to the OECD Model Tax Convention, as amended in 2003, states that as a general rule there is no conflict between GAARs and tax treaties.[35] The tax treaty is simply applied, taking into account any adjustments made under the domestic GAAR.

The UK GAAR contains provisions to make clear that the GAAR can apply even where there is a tax treaty. The GAAR Guidance explains that where there are abusive arrangements which try to exploit particular provisions in a tax treaty, or the way in which such provisions interact with other provisions of UK tax law, the GAAR can be applied to counteract the abusive arrangements.[36]

It should be noted, however, that this does not mean that the domestic GAAR can override tax treaties. As the Commentary to the OECD Model Tax Convention points out, specific relieving provisions must still be observed and GAARs cannot undermine these. Thus, as the GAAR Guidance underlines, the mere fact that arrangements benefit from express rules on attribution of profits or allocation of taxing rights does not mean that the arrangements amount to abuse, and so the GAAR cannot be applied to them. It might be thought that this is so obvious as to need no reference in the GAAR Guidance, but the reference is a response to some commentators in the UK who appeared to suggest that a GAAR could be a solution to the issues around the taxation of base erosion and profit shifting which were beginning to attract attention at the time the Aaronson study group was considering this issue. The GAAR Guidance makes it clear that this is not intended to be, and indeed never could be, the role of a GAAR.

The relationship between the Indian GAAR and tax treaties has been the matter of considerable concern in India and attracted adverse comment from overseas investors. As a result, the Shome Committee, set up to review the Indian GAAR as a result of this criticism, recommended that where the treaty itself has anti-avoidance provisions, such provisions should not be substituted by GAAR provisions under the treaty override provisions.[37] In other cases, however, the domestic GAAR may apply even where there is a treaty.

7. Providing an Appropriate Administrative Framework

Last but not least in the task of creating an appropriate balance for the UK GAAR are the administrative arrangements and rules of evidence.

7.1. Designated officers

Under the UK GAAR, only a designated HMRC officer may give the taxpayer notice that the revenue authority intends to serve notice on the taxpayer to that effect. This keeps tight control over this tool and also ensures that a specialist staff can be trained to operate the GAAR, limiting the resource otherwise needed to train the work force. This also keeps central oversight of the circumstances in which the GAAR might be used.

7.2. Advance rulings or clearances

As explained above, it had been thought in earlier discussions on the GAAR in the UK that an advance rulings procedure would be an essential part of the introduction of such a provision. This was considered to be problematic for a variety of reasons. First there was the question of resource and cost. Even if taxpayers were required to pay for clearances, there would still be a need to devote highly trained and skilled revenue staff to the clearance procedure and HMRC felt it had better ways of using this scarce resource. This is an argument that would undoubtedly be recognized by revenue authorities in developing countries around the world, as well as others.

Quite apart from the resource issue, clearances can be problematic in that they cause delay. Once they exist as a possibility, there is a tendency for taxpayers to apply for them whether they are needed or not as an insurance policy.

The Aaronson Report argued that there was no need for clearances where the GAAR being introduced was a targeted one that did not apply to "the centre ground of responsible tax planning". This was accepted by the UK government in implementing the proposed GAAR. It should be noted that in the UK the largest businesses have HMRC "Customer Relationship Managers" who would be able to discuss proposed transactions with them, and indeed would expect to do so as part of the cooperative compliance approach. This could be valuable in reducing any remaining uncertainty surrounding the GAAR in the commercial sphere, but at the same time there could be a concern that it might be unfair that large businesses have this facility available to them when others do not, so it is important that there are also other arrangements in place to give guidance.

7.3. The GAAR Advisory Panel

Several countries have panels of some kind to oversee the use of their GAARs. They vary substantially in operation, objectives and make-up. For example, the Australian Panel

32. Section 61A(2)(b) of the Inland Revenue Ordinance, Cap. 112 (Hong Kong).
33. *Commissioner of Inland Revenue v. Tai Hing Cotton Mill (Development) Limited* (FACV 2/2007).
34. For example, Canada had to amend its GAAR following uncertainty on this point.
35. Commentary on Article 1 of OECD Model Tax Convention, para. 22 as amended.
36. *Supra* n. 31, para. B5.3.
37. *Supra* n. 24, para. 3.16.

was set up to create an expert group to assist the tax office with decision making about the application of the Australian GAAR and to ensure consistency. It has external advisers, but is essentially an internal mechanism.[38] Likewise, the Indian GAAR Panel will have a member of the Indian Central Board of Direct Taxes as a member. The Aaronson study group intended that the UK GAAR Advisory Panel (the Panel) should play a similar role to that of the Australian one, but during the consultation period in the UK there was a shift towards a panel that was more independent of the revenue authority, so that the UK version has no representative of HMRC as a member. This shift seems to have been based on a misunderstanding about the intended role of the Panel as a forum for discussion about the line between abusive and non-abusive tax mitigation. The Panel is now independent to an extent, but the Chair is still appointed by the tax authority, leaving the status of the Panel unclear now, and open to criticism.[39] The attempt to make the Panel more independent, without making it fully so, may well lead to confusion and calls for further change. In the author's view, it would have been preferable had it retained the role originally intended for it by the Aaronson study group.

The role of the Panel is primarily to consider whether the entering into and carrying out of the tax arrangements in question was a reasonable course of action as defined in the GAAR legislation.[40] All GAAR cases must be put to the Panel if they are to proceed. This process is stated by the GAAR Guidance not to be judicial in nature,[41] though there could be a drift towards a more judicial status. In addition the Panel has the task of advising on the GAAR Guidance and keeping it up to date. It may be some time before the role of the Panel is comprehensively worked out, but potentially it has an important part to play in ensuring that there is good oversight of the implementation of the GAAR and a measure of control over the application of the GAAR by HMRC.

7.4. Guidance and evidence

Usually in the UK extra statutory guidance is not binding on the revenue authority (other than in cases of judicial review where a legitimate expectation has been created). A novelty of the GAAR legislation is that it refers expressly to the GAAR Guidance. A court considering the GAAR *must* take into account the GAAR Guidance, as approved by the Panel at the time the arrangements were entered into, as well as the opinion of the Panel about the arrangements. The court *may* take into account ministerial, HMRC and other material in the public domain at the time the arrangements were entered into and also evidence of established practice at that time.

This goes substantially beyond the evidence that is normally permissible in the UK courts and is necessary to enable the court to consider the policy objectives it is required to take into account. It would not be possible to go beyond normal statutory interpretation without the additional material. For the UK this is a potentially radical change from normal rules of evidence, although it remains to be seen how much practical impact this will have.

The more general lesson from this is that a GAAR needs to be supported by good policy making and legislative practices, since without these it will be difficult to apply a provision that seeks out the underlying policy of the legislation.

8. Conclusion

A successful GAAR needs to balance the prevention of manipulation of legislation with protection of the right of taxpayers to plan their affairs with sufficient certainty and a workable legal framework for their transactions. Much can be achieved by creating an appropriate administrative framework. Enormous sophistication of the entire workforce of the tax authority is not necessary, so long as a small group of specialists can be set up to apply the GAAR. Provided they are drafted appropriately, GAARs should be a suitable tool for developing countries and indeed would be a valuable addition for revenue authorities in such countries, as in others.

If a moderate GAAR is used that aims only at the more extreme types of case and a panel of experts is appointed to help with drawing the necessary lines and creating suitable guidance for taxpayers, there need be no more uncertainty in a tax system with a GAAR than there is in most systems without one. A GAAR may prevent the courts from feeling obliged to take matters into their own hands and reach decisions which stretch the meaning of legislation. Unlike judicial decisions, a legislative provision can clearly go beyond statutory construction and can apply principles set out by the legislature.

Jurisdictions will need to relate any GAAR they introduce to their underlying law and a GAAR will work best where there are also stated principles behind the legislation. In this way GAARs should encourage and not deter good legislative drafting.

GAARs are not the correct tools for fundamental tax reform but a moderate general anti-abuse rule should be part of any modern tax system that is unless and until we have devised a perfect and crystal clear tax system than cannot be abused. Given that, it is likely that GAARs will have a role to play for some time to come.

38. T. Pagone, The Australian GAAR Panel, Lecture delivered at the Oxford University Centre for Business Taxation Conference, London (10 February 2012) available at http://www.austlii.edu.au/au/journals/VicJSchol/2012/2.pdf.
39. The author has discussed this further at J. Freedman, *Creating new UK institutions for tax governance and policy making: progress or confusion*, British Tax Review (2013), p. 373.
40. Schedule 43 Finance Act 2013.
41. HMRC'S *GAAR Guidance* (not subject to Advisory Panel approval), PART E–GAAR procedure. Available at: http://www.hmrc.gov.uk/avoidance/gaar-parte-procedure.pdf, para. 4.2.9.