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Section 101 and Schedule 14: amendments relating to the operation of the GAAR

"Minor procedural changes" or a circumvention of crucial safeguards?

The Rt Hon Jesse Norman MP, Financial Secretary to the Treasury (Mr Norman), described clause 98 and Schedule 13 to the Finance Bill 2020 as making "minor procedural and technical changes" designed to "ensure that the policy operates as originally intended", and to "help to protect over £200 million in tax revenue by ensuring that the General Anti-Abuse Rule (GAAR) works effectively".[1] This note explains what these changes are and how they actually circumvent crucial safeguards to the operation of the GAAR. It questions the asserted financial impact and discusses evidence pointing to undesirable consequences.

Context

The GAAR was enacted in Part 5 of the Finance Act 2013 (FA 2013). It applies to "abusive" "tax arrangements" which the taxpayer asserts give rise to a tax advantage. Arrangements are "tax arrangements" if

> "having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements".[2]

And

> "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".[3]

[1] *Hansard*, HC, Finance Bill, Eighth Sitting, col 228 (16 June 2020).
[2] FA 2013 s.207(1).
[3] FA 2013 s.207(2).

In its original form, prescriptive procedural rules which included safeguards had to be adhered to by HMRC before the GAAR could operate.

The GAAR has unusual and draconian consequences where it applies. First, very high penalty rates apply as a result of rules enacted in the Finance Act 2016 (FA 2016), namely 60 per cent of the counteracted tax advantage.[4] Secondly, it may trigger the issue of an accelerated payment notice (APN) or partner payment notice (PPN) by HMRC under the rules enacted in 2014 for the purposes of removing the cash flow advantage for taxpayers of entering into a tax avoidance scheme.[5] These notices carry their own penalties for non-compliance in addition to the GAAR penalties and other penalties which may apply under self-assessment (see for example Schedule 55 to the Finance Act 2009 (FA 2009), penalties under the Taxes Management Act 1970 and penalties for non-compliance with information notices issued under Schedule 36 FA 2009). Thirdly, the rules enacted in Schedule 16 to the Finance (No.2) Act 2017 ("the enablers rules"), may apply.[6] These rules are intended to penalise, name and shame enablers of tax avoidance schemes, and the conditions are largely based on the GAAR. They operate in addition to the penalty regimes under the disclosure of tax avoidance schemes (DOTAS) rules first enacted in the Finance Act 2004,[7] and promoters of tax avoidance schemes rules (POTAS rules) enacted in the Finance Act 2014.[8]

Proposals to further broaden each of these sets of rules were announced on 21 July 2020.[9] There is a further still, and far worse, cause for concern on the part of tax advisers: in July 2020 Dame Margaret Hodge, Chairwoman of the Public Affairs Accounts Committee, recommended in a paper that there be a criminal offence without an element of dishonesty for tax advisers enabling tax avoidance schemes.[10] The test she proposes is also based on the GAAR.

It is as a result of the potentially very broad application and the draconian consequences of its application, that the GAAR carries its own unique safeguards. Much discussion took place as to whether these safeguards were adequate at the time the GAAR was enacted and the safeguards did not go as far as the GAAR Committee recommended. Moreover, they have been significantly eroded by FA 2016 in the creation of "provisional counteraction notices",[11] which could be issued by HMRC without any of the safeguards being adhered to but which had a narrower application than the notices introduced by the Finance Act 2020 (FA 2020). The two main safeguards enacted by FA 2013, were the Designated Officer requirement and the GAAR Advisory Panel requirement.[12] The former requirement is that only a "Designated Officer", namely an officer of HMRC designated for the purposes of the GAAR, as opposed to any officer of HMRC, would have the power to issue a counteraction notice under the GAAR. The latter requirement is that three members of an "independent" panel (appointed by HMRC) would give

[4] FA 2016 s.158(2) inserting FA 2013 s.212A(2).
[5] FA 2014 Pts 4 and 5.
[6] F(No.2) A 2017 Sch.16.
[7] FA 2004 ss.306–319.
[8] FA 2014 Pt 5 ss.234–283 and Schs 31–36.
[9] HMRC, *Tackling Promoters of Tax Avoidance: Consultation* (publication date: 21 July 2020; closing date for comments: 15 September 2020).
[10] Anti-Corruption & Responsible Tax (appg) and the Policy Unit King's College London, *Ineffective tax avoidance: targeting the enablers* (July 2020).
[11] FA 2016 s.156(1) inserting FA 2013 ss.209A–F.
[12] FA 2013 s.209 and Sch.43.

their opinions on whether or not the entering into or carrying out of the tax arrangements was a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances (including the circumstances described in section 207(2)(a) to (c) and (3) FA 2013). These procedures are contained in Schedule 43 FA 2013 and have since been supplemented by Schedules 43A and 43B.[13]

The key procedural rules to note in order to make sense of the changes are as follows.

Schedule 43 FA 2013 sets out key procedural rules and safeguards. A notice of a proposed counteraction is issued under paragraph 3 of Schedule 43 FA 2013 ("a paragraph 3 notice"). A final GAAR counteraction notice can be issued under paragraph 12 of that Schedule if and when the correct procedures have been followed. A paragraph 3 notice can be issued where a designated HMRC officer considers that a tax advantage has arisen to a person from arrangements that are abusive and that it ought to be counteracted under section 209 FA 2013. The notice given to the taxpayer under this paragraph has to explain specific procedures relating to the GAAR application, which include the application of the main safeguard, the requirement of a GAAR Advisory Panel opinion. The procedures to be explained in the notice include that the taxpayer has 45 days within which to make representations in response to the notice, that if none are made then the officer must refer the matter to the GAAR Advisory Panel and if they are made that the officer must consider them, and if the officer is still of the view that the advantage should be counteracted, only then should the matter be referred to the GAAR Advisory Panel.

Final GAAR counteraction notices can also be issued under Schedule 43A and Schedule 43B FA 2013, in each case under paragraph 8 after different procedures have been met (these relate to notices of binding or pooling).

Section 209 FA 2013 is the section giving effect to adjustments made under a final GAAR counteraction notice. That is, a notice issued under one of Schedules 43, 43A or 43B FA 2013 where the safeguards and other procedural requirements have been complied with.

Changes enacted by the Finance Act 2020: protective GAAR notices

A new section 209AA FA 2013 provides that a written notice can be issued by HMRC, stating that an officer of HMRC considers "that a tax advantage might have arisen to the person from arrangements that are abusive", and on the assumption that it does, "it ought to be counteracted under section 209".[14] These notices replace the provisional counteraction notices which had been introduced by FA 2016.

Stopping there for a moment, it must first be noted that this type of notice can be issued by any officer of HMRC: it is not a requirement that such a notice be issued by a "Designated Officer", which is a requirement in order for a final counteraction notice to be issued under Schedule 43 FA 2013, as well as for a paragraph 3 notice. In this regard, it must also be noted that section 103(1) FA 2020 provides:

> "Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise)."

[13] FA 2013 Schs 43A and 43B inserted by FA 2016 s.157(2) and (3).
[14] FA 2020 Sch.14 para.3.

It may therefore be that HMRC will automate the issue of protective GAAR notices in the same way as they have done for other notices which the legislation states must be issued by an officer of HMRC (see for example *HMRC v Rogers, Shaw*).[15] That there is a decision to be taken or a discretion to be exercised is unlikely to affect whether HMRC automate the process. For example, daily penalties for late filing under paragraph 4 of Schedule 55 FA 2009 are issued automatically by a computer although there is a legislative condition for HMRC to decide that a penalty is payable.

Thus, it can readily be seen that the issue of a protective GAAR notice is not subject to the safeguards mentioned. Indeed, the only procedural right given to a person who receives a protective GAAR notice is the right to give a notice of appeal against the notice.[16] Where a person who receives a protective GAAR notice does not give a notice of appeal, or where they do give one but then either they withdraw it or they settle with HMRC, the protective notice has effect for all purposes (except the penalty provision in section 212A FA 2013) as though it had been given as a final GAAR notice (defined in section 209AC FA 2013), and as though all of the procedural requirements, including all the safeguards, had been complied with.[17]

In the writer's view this is much more than a "minor procedural change": protective GAAR notices circumvent the safeguards altogether.

The only requirements specific to this notice are those stated in section 209AA subsections (2) to (4) FA 2013[18]: under subsection (2), "the protective GAAR notice must be given within the ordinary assessing time limit applicable to the proposed adjustments", so unless there is an open enquiry the time limit is likely to be four years, six years or 12 years.[19] Under subsection (3) this is limited where

> "(a) a tax enquiry is in progress into a return made by the person, and (b) the return relates to the tax in respect of which the specified adjustments under the protective GAAR notice are made".[20]

In that case the protective GAAR notice must instead be given no later than the time when the enquiry is completed. Under subsection (4)

> "the protective GAAR notice must (a) specify the arrangements and the tax advantage, and (b) specify the adjustments that, on the assumption that the advantage does arise from tax arrangements that are abusive, the officer proposes ought to be made".[21]

Once a protective GAAR notice has been issued by HMRC, the adjustments have effect as though they were made under section 209 FA 2013. However, section 209 FA 2013 is amended by a substituted subsection (6) so that where the taxpayer does give a notice of appeal against a protective notice (or is otherwise outside the terms of section 209AA(8) FA 2013), then the adjustments are in effect suspended unless and until HMRC issue a final GAAR counteraction

[15] *HMRC v Rogers, Shaw* [2019] UKUT 406 (TCC); [2020] STC 220.
[16] FA 2013 s.209AA(6) as inserted by FA 2020 Sch.14 para.3.
[17] FA 2013 s.209AA(8) as inserted by FA 2020 Sch.14 para.3.
[18] FA 2013 s.209AA(2)–(4) as inserted by FA 2020 Sch.14 para.3.
[19] TMA 1970 ss.34, 36 and 36A.
[20] FA 2013 s.209AA(3) as inserted by FA 2020 Sch.14 para.3.
[21] FA 2013 s.209AA(4) as inserted by FA 2020 Sch.14 para.3.

notice. This does not, though, prevent the adjustments in the protective notice meeting the time limit requirements in new section 209(6)(b).[22]

The appeal made by the giving of a notice of appeal under section 209AA(6) FA 2013 is stayed for a period of either: 1. 12 months from the day on which the protective GAAR notice is given; or 2. if a final GAAR counteraction notice is given before that time, then until the day on which final GAAR counteraction notice is given.[23]

Where there is no appeal, protective GAAR notices do not take effect so as to bring the taxpayer within the GAAR penalty regime: section 212A FA 2013 is expressly excluded from the deeming effects which follow on from a taxpayer failing to appeal against a protective notice.[24] But, as regards penalties, a tax adviser meeting the definition of an enabler in paragraph 7 of the enablers rules[25] could have cause for concern if a taxpayer fails to give a notice of appeal against a protective GAAR notice. In the event that a protective GAAR notice were to take effect in the same way as a final GAAR counteraction notice, it is likely to have an impact on the application of the enablers rules. These rules penalise the facilitators of abusive tax arrangements which have been defeated (not necessarily by the GAAR), by imposing penalties on them equal to the fee charged for their services. A penalty is payable by each enabler of abusive tax arrangements, where a person enters into abusive tax arrangements and incurs a defeat in respect of the arrangements. For this purpose abusive tax arrangements are defined in the same way as for the GAAR.

Changes are made to the effects of a paragraph 3 notice by new section 209AB FA 2013, which also circumvents crucial safeguards. Section 209AB applies where a paragraph 3 notice has been issued (or a notice under Schedule 43A FA 2013), mirroring section 209AA(8) FA 2013 as discussed above. This applies where a protective GAAR notice (or provisional counteraction notice issued prior to the commencement of FA 2020) has not been given in relation to the relevant adjustments.

It is puzzling, to say the least, that on top of the procedural requirements specified in paragraph 3 of Schedule 43 FA 2013, in particular the brief period allowed for the taxpayer to make representations, there is now a requirement for the taxpayer to give a notice of appeal against a paragraph 3 notice, and if the taxpayer does not do so, then, instead of a referral to the GAAR Advisory Panel being made without the taxpayer's representations, the notice will take effect as though it was given as a final GAAR counteraction notice and all of the procedural requirements had been complied with. It seems to the writer to defeat the very purpose of the paragraph 3 notice, which is to set in motion the process of referral to the GAAR Advisory Panel, being the key safeguard for the application of the GAAR.

It is important to see these changes for what they are: they are not minor procedural changes but an increase in HMRC's already vast and draconian powers in relation to tax avoidance and a circumvention of the safeguards of the GAAR.

Finally, the writer must question whether further avoidance measures are necessary to reduce the tax gap, or even desirable. There is ample evidence to suggest they are not. For example,

[22] FA 2013 s.209AA(9)(b) as inserted by FA 2020 Sch.14 para.3.
[23] FA 2013 s.209AA(7) as inserted by FA 2020 Sch.14 para.3.
[24] FA 2013 s.209AA(8) as inserted by FA 2020 Sch.14 para.3.
[25] F(No.2)A 2017 Sch.16, above fn.6.

HMRC's Research Report 581 into the role of tax advisers (carried out in 2017 and published in April 2020) (the Research Report)[26] makes three very pertinent findings.

The first finding is that HMRC's actions have been successful in shutting down incentives to operate in the tax avoidance marketplace.[27] This is supported by HMRC's latest report on the tax gap, showing that for the tax year 2018–2019 the unpaid tax attributable to tax avoidance is 0.02 per cent of the total tax revenue (£1.7 billion) and it has been on the decline for the past few years.[28] In the writer's view this neatly evidences the conclusion in the Research Report that by 2017 tax avoidance had been stamped out of the "above ground" market.[29] By contrast, the tax gap attributable to other matters was:

- evasion: £4.6 billion;
- failure to take reasonable care: £5.5 billion;
- legal interpretation: £4.9 billion;
- criminal attacks: £4.5 billion;
- non-payment: £4.1 billion;
- error: £3.1 billion; and
- the hidden economy: £2.6 billion.[30]

Mr Norman considered that the FA 2020 changes to the GAAR would help to protect over £200 million in tax revenue but it is not clear what the source of this information is. He recommended that clause 12 of Finance Bill 2020, in the name of the Scottish National Party, be rejected. Clause 12 if adopted, would have required a review of the impact of these changes within six months. He stated:

> "HMRC already publishes the 'Measuring the tax gap' report annually which shows how the tax gap has changed year on year….HMRC also publishes an annual report and accounts that provide specific information on the impacts of the GAAR, including the number of GAAR opinion notices issued."[31]

That is incorrect: yes, the Annual Report and Accounts for 2018–2019 do mention the number of GAAR opinion notices issued by the GAAR Advisory Panel (that number is four) and the resulting number of counteraction notices to customers (2,300), but they do *not* state the value of the tax revenue. Nor do the tax gap reports state the financial impact of the GAAR. Indeed the estimated exchequer impact from 2020–2021 onwards of the measures announced on 21 July 2020 (referred to at the start of this note) is zero for all years.

The second finding of the Research Report is that the stamping out of tax avoidance in the market was not down to the GAAR. The Research Report states, and this writer agrees, that the main reason given by the individuals questioned was the enactment in 2014 of the APN and PPN

[26] HMRC and Kantar Public, *Understanding the evolving role of tax advisers and agents in the avoidance marketplace: Research Report 581* (carried out March 2017; published 2020).
[27] HMRC, Research Report, above fn.26, 2.
[28] HMRC, *Measuring tax gaps 2020 edition: Tax gap estimates for 2018 to 2019* (An Official Statistics release, 9 July 2020), 6.
[29] HMRC, Research Report, above fn.26, 28.
[30] HMRC, *Measuring tax gaps 2020 edition*, above fn.28, 13.
[31] *Hansard*, HC, Finance Bill, Eighth Sitting, col 227 (16 June 2020).

rules mentioned above. The Research Report notes that the APNs and PPNs removed the cash flow incentive for taxpayers to enter into schemes,[32] which is indeed the purpose of these notices. Before 2014, although tax advisers were well aware of the hostile attitude of the courts to tax avoidance, this did not deter them from promoting tax avoidance schemes. This is because, even if it was likely that HMRC would litigate the scheme and also likely that the tribunal would hold that the scheme did not work, until that happened—and it could be many years before it did—the scheme would have given the taxpayer the cash flow advantage of not having to pay the tax which would otherwise have been payable. For example, the transactions in the *Rangers* case took place in 2001, but the tax did not become payable until 2015 when the Inner House of the Court of Session held that the scheme failed.[33] Additional reasons for the stamping out of tax avoidance schemes, in the writer's view, are the DOTAS, POTAS and enablers rules mentioned above.

The third finding of the Research Report is that the changes already made prior to FA 2020 had "created the risk of alienating some within the agent community".[34] The Report notes that tax advisers felt that HMRC have been overactive in policing the market, and have failed to communicate with the market in the way that they used to, including specifically in relation to their use of new legislative powers. It was noted for example that there are no meetings with Inspectors anymore. Furthermore, there are no clearance procedures in place to obtain a formal view from HMRC in relation to most transactions. Clearance may be obtained from HMRC as to the tax treatment of a transaction prior to it being carried out, but only where there is uncertainty as to the interpretation of new legislation or where there is a specific statutory clearance procedure. Clearance will not be given that the GAAR does not apply. According to the Research Report, tax advisers who do not advise on tax avoidance schemes, felt that they had been aligned with tax avoidance scheme promoters as a result of the uncertainty in the law created by the courts' approach to construing tax legislation in *UBS AG and another v HMRC* in the Supreme Court in 2016,[35] and the changing attitude towards what constitutes tax avoidance.[36] It must be recalled that this was HMRC's appeal to the Supreme Court and that the tax advantage arising from the arrangements had been upheld by a strong Court of Appeal and a strong Upper Tribunal (UT) (although it is fair to say that the arguments HMRC ran in the Supreme Court differed from those run in the courts below). Indeed, the writer noted whilst reviewing HMRC's Annual Report and Accounts 2018–19 that HMRC had won 100 per cent of their tax avoidance cases in the Supreme Court, whilst the figures for HMRC's success rates for tax avoidance cases in all of the courts below are significantly lower.[37] But someone on a higher pay grade than the writer may dare to wonder why that is the case. The uncertainty of treatment by HMRC is further compounded by evidence of HMRC's tendency in recent times to fail to apply their own published guidance. For

[32] HMRC, Research Report, above fn.26, 27.
[33] The decision of the Upper Tribunal was reversed by the Court of Session (Inner House): *Murray Group Holdings Ltd v HMRC* [2015] CSIH 77; [2016] STC 468. The decision of the Court of Session was upheld by the Supreme Court: *RFC 2012 plc (In Liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45; [2017] 1 WLR 2767; [2017] STC 1556.
[34] HMRC, Research Report, above fn.26, 2.
[35] *UBS AG and another v HMRC* [2016] UKSC 13; [2016] 1 WLR 1005; [2016] STC 934.
[36] HMRC, Research Report, above fn.26, 1.
[37] HMRC Annual Report and Accounts 2018–19 (for the year ended 31 March 2019), 110, Figure 22.

example, the changes to the Manuals in relation to speciality debt situs.[38] This is so even where there is no alleged tax avoidance, for example in *HMRC v Sippchoice Ltd*, in which the UT noted that HMRC had not followed their own Manuals.[39] Whilst the GAAR Guidance does have to be taken into account under the GAAR rules, there is no legislative requirement for it to be followed, and most situations are unlikely to be included in the GAAR Guidance in any event. It therefore provides limited comfort to taxpayers or their advisers on how the arrangements or transaction(s) will later be perceived by HMRC, the GAAR Advisory Panel or the tribunals and courts. So it seems to the writer that the changes made by FA 2020 and others currently being mooted, will only make the third finding in the Research Report even more of an issue.

Conclusion

In this writer's view the changes made to the GAAR by FA 2020 are not minor procedural changes; they go far beyond that and circumvent crucial safeguards to the GAAR which were designed to protect the taxpayer from the GAAR's potentially very wide application and draconian consequences. These changes give HMRC unsupervised discretion to apply the GAAR and put the burden on the taxpayer to appeal against the new types of notice which have been introduced. As a consequence, the GAAR can apply where a computer automatically issues a notice and there is a failure by the taxpayer to appeal it, which failure may even be an administrative one, or a misunderstanding by the taxpayer as to the procedures applicable and a lack of means to obtain representation. There does not seem to the writer to be a justification for these changes (or indeed the future changes proposed in July 2020). HMRC's reports demonstrate that tax avoidance has been all but stamped out by virtue of existing powers. Those powers, and the uncertainty in their application, had already left tax advisers feeling alienated.

Finally, these effects are contrary to the aims of the GAAR when it was recommended in 2011 by the committee led by Graham Aaronson QC, which concluded that introducing a narrowly-focused GAAR would "contribute to providing a more level playing field for business", "reduce legal uncertainty around tax avoidance schemes", "help build trust between taxpayers and HMRC" and "offer opportunities to simplify the tax system".[40] It seems to the writer that

[38] HMRC, Internal Manual, *Inheritance Tax Manual* (published 20 March 2016; updated 9 October 2020), IHTM27079, "Foreign property: specialty debts: bonds and debentures under seal": "HMRC has revised its previous approach to the Inheritance Tax (IHT) treatment of such debts, which was that where the debt is situated depends on where the relevant document is to be found."

[39] *HMRC v Sippchoice Ltd* [2020] UKUT 149 (TCC); [2020] 4 WLR 80.

[40] G. Aaronson, *GAAR Study: A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system* (the Aaronson Report) (11 November 2011); HM Treasury and The Rt Hon David Gauke, press release, *Independent Study on General Anti Avoidance Rule* (21 November 2011).

the extensive powers given to HMRC since 2011 have achieved the very opposite of each of these aims.

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General anti-abuse rule; Protective GAAR notices; Tax administration

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