1 Introduction

1.1 This consultation follows the responses to a consultation in early 2015 on measures for serial avoiders, serial promoters, and how to introduce specific penalties where the General Anti-Abuse Rule (GAAR) applies. It details proposals on how each of the measures would work and asks for comments on those details.

1.2 For serial avoiders, this detail includes the entry criteria; additional reporting requirements; a surcharge; restricting access to certain reliefs; and when it would be appropriate to publish the names of serial avoiders.

1.3 For the GAAR Penalty, this detail includes the circumstances in which a penalty will be charged; the penalty rate chargeable; and safeguards to ensure proportionality. The consultation also sets out some further areas for consideration under the GAAR.

1.4 For Promoters of Tax Avoidance Schemes (POTAS), this detail includes the new threshold criteria definitions, including the number of schemes to be considered over a specified period of time.

2 Executive summary

2.1 The Chartered Institute of Taxation (CIOT) agrees that the Government, and HM Revenue and Customs (HMRC) should be taking action to stop abusive tax avoidance. However, we are not convinced that further legislation is justified or necessary at present, either in relation to ‘serial avoiders’, ‘serial promoters’ or the GAAR.
2.2 We believe that current legislation is more than adequate to achieve the Government’s objectives, and that those objectives would be better achieved by prompt, accurate and proportionate action by HMRC to apply current law.

2.3 Before more legislation is introduced to tackle what the Government sees as unacceptable tax avoidance, we would like to see firm evidence, ideally in a formal post-implementation review, that the POTAS legislation introduced in Finance Act 2014 as well as the accelerated payment notice (APN) and follower notice (FN) regimes are not working as intended. In addition, changes to the Disclosure of Tax Avoidance Scheme (DOTAS) rules introduced in Finance Act 2015, which are intended to tighten up the reporting of schemes, are still in the process of being introduced, and should be given time to take effect before further legislation is enacted.

2.4 The consultation document does not explain which taxes the serial avoider and promoter proposals are aimed at. This needs to be clarified.

2.5 In addition, in our view, it is premature to introduce a specific GAAR penalty. The GAAR was introduced by Finance Act 2013 with effect from 17 July 2013 and so has only been in place for just over two years. As far as we are aware, to date no cases have been considered by the GAAR panel and no opinions issued. A key concern about a specific GAAR penalty is the uncertainty around what will be caught. The vast majority of professional advisers will take care to ensure they do not provide advice that would be caught by the GAAR, but the lack of cases to date means that there is uncertainty as to where the line is drawn and what ‘reasonably regarded as a reasonable course of action’ will mean in practice.

2.6 We note in this context that, on balance, the Aaronson report\(^1\) concluded that penalties were inappropriate.

2.7 As a consequence, we oppose the introduction of a GAAR penalty at this point. Nothing we say in any of our comments should be interpreted as supporting the proposal. Our comments are intended to improve the administration of the proposals and help reduce the costs to taxpayers and advisers who may be affected.

3 Q1. Do you agree with a regime based on this model? If not, please outline the reasons for your view.

3.1 We agree that the model adopted is appropriate, subject to our broader comments above. The design of the proposals, involving schemes entered into before the ‘warning period’ not counting as a scheme to be considered for a surcharge or additional sanctions broadly reflects our suggested approach in our response to the first consultation.

---

\(^1\) GAAR Study – report by Graham Aaronson QC 11 November 2011

At paragraphs 5.47 & 5.48 ‘Including [a penalty] in a UK GAAR would certainly increase its deterrent effect, and may be regarded by a significant proportion of taxpayers as no more than just retribution for schemes designed to avoid paying a fair share of tax. However, I consider that including such provisions would be seen as presenting an irresistible temptation to HMRC to wield the GAAR as a weapon rather than to use it, as intended, as a shield. For this reason I do not consider that it would be appropriate to include any provisions for applying special rates of interest or penalties to tax recovered by use of the GAAR’.

4 Q2. What do you consider would be a suitable length for a warning period?
4.1 A warning period of 5 years seems reasonable.

5 Q3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used help discourage further avoidance?
5.1 In general, we think it is desirable to keep administration as simple and effective as possible. Unless an annual certification process can be included within existing annual reporting arrangements, such as the annual tax return, it will be necessary to introduce specific legislation to set up a separate new reporting framework just for serial avoiders.

5.2 Taxpayers who entered into schemes many years ago (but who have already changed their behaviour) will fall into the annual certification regime if the scheme they entered into is defeated after the legislation takes effect. Given that it can take many years (sometime over ten years) for a scheme to reach court, the proposals could impose a significant compliance burden on a group of taxpayers who would otherwise be of limited interest to HMRC. We would recommend that consideration is given to how the additional reporting burden on these taxpayers could be mitigated.

5.3 Consideration will also need to be given to the capacity in which a person would be submitting an annual certificate. We presume that this would be straightforward where the person has used a scheme in their personal capacity, but it becomes less clear for arrangements that may have involved partnerships, companies or trusts (or a combination of them) with a combination of liabilities.

6 Q4. Which of these approaches would best meet the five penalty principles?
6.1 The proposed surcharge does address the concerns we raised when we responded to the first consultation that a surcharge should not be imposed on the failure of any scheme that was entered into before this legislation comes into effect. Imposing a surcharge on a taxpayer for actions they took in the past would have introduced a significant element of retrospection.

6.2 We would prefer a surcharge that was simple and easy to understand and administer, so on those grounds the first of the two suggested approaches seems more appropriate than the second. However, we doubt that a low level of charge would act as an effective deterrent. We also think that it ought to be possible for penalties to be reduced to a considerable extent for co-operation and disclosure by the taxpayer.

7 Q5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?
7.1 See 6.2 above.
8 Q6. What other key features should form part of the surcharge to ensure it meets the five principles?

8.1 No comments.

9 Q7. How should a reasonable excuse safeguard be structured to be fair to the taxpayer without undermining the effectiveness of the surcharge? Would excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, achieve this aim?

9.1 There are a very broad range of circumstances under which advice will be sought and given in respect of arrangements caught by the rules. It is very hard to be prescriptive about the nature of such advice. As a consequence, we believe that it should be left to the Tax Tribunals to judge whether a reasonable excuse exists or not based on current law.

10 Q8. If appealing against the surcharge on the grounds of having taken reasonable care, do you agree that putting the onus of proof on the taxpayer to demonstrate reasonable care would remove any incentive to engage in delaying tactics?

10.1 We do not agree that the onus of proof should be put on the taxpayer to demonstrate reasonable care. This would be a significant change. Legislation to enforce compliance with information requests already exists. The Romie Tager Upper Tribunal decision involving a very large penalty (£1.2m) charged under Finance Act 2008 Schedule 36 paragraph 50 illustrates the significant powers already available to HMRC to deal with failure to comply with information notices.

10.2 In any event we have not seen any substantive evidence that delays in responding to information requests, or giving incomplete information in response to requests, normally prevent HMRC establishing that the taxpayer did not take reasonable care. We think that a slow or incomplete response to the question 'What evidence do you have to support the view that you took reasonable care?' would normally lead HMRC to conclude that the taxpayer did not take reasonable care and to determine a penalty on that basis.

11 Q9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?

11.1 We note that HMRC are increasingly consulting on introducing ‘naming’ provisions (see the current consultations ‘Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion’ where it is proposed that ‘enablers’ are named and ‘Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders’

---

2 [2015] UKUT 0040 (TCC)
where it is proposed that offshore evaders who make a prompted disclosure and 'directing individuals' are named).

11.2 We do not know if the legislation already in place on naming deliberate defaulters and those found guilty of National Minimum Wage non-compliance has been effective or not. We recall that when naming was first proposed it was felt that it would be a very powerful tool, but anecdotal evidence suggests that it has not had the impact hoped for. It would be useful if HMRC commissioned some research on this, before it introduced further naming provisions. We think that there is a definite risk that naming too many people, particularly for fairly small amounts, is likely to be ineffective, and even counter-productive.

11.3 Participants in avoidance schemes that end up in the Tribunal will often be publicly named once litigation has commenced in any event, and the names of high-profile individuals or celebrities who have allegedly used avoidance schemes have recently tended to appear in the press anyway. We would have thought that this sort of negative publicity is already acting as a significant deterrent to future involvement in high risk schemes.

11.4 As a matter of broad principle, we think that HMRC should approach publishing names with caution.

12 Q10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?

12.1 No further comments.

13 Q11. Which of these options would provide the best approach to restricting access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme?

13.1 We have a specific concern about the proposal as a matter of principle. Reliefs are an inherent part of the tax system available to any person who meets the qualifying criteria. Restricting reliefs in the manner proposed contravenes this basic principle. Two of the reliefs involved in some of the schemes before the Tribunals are tax relief for interest expense and tax deductions for capital allowances. These are fundamental business expenses and should not be restricted in normal cases. We doubt that it would be possible ever to define reliefs in such a narrow way that it would be fair or proportionate to restrict access to them.

14 Q12. If you favour restricting the power to restrict reliefs to certain categories, how should those categories be defined?

14.1 We do not support the proposal as a matter of principle.

15 Q13. Would focussing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?
15.1 Although we understand that it is necessary to identify schemes which fall within the regime, the approach suggested here reflects a broader concern that we have expressed previously that HMRC now view the DOTAS regime as a signifier that taxpayers are engaged in unacceptable conduct, rather than an information gathering mechanism. If HMRC are to repurpose the regime in this way, we believe there is a need to revisit the hallmark system.

15.2 We believe that DOTAS should be a fundamentally cooperative regime between HMRC and advisers, and there should be mutual interest in having a workable system. For the most part DOTAS has operated by consent since it was first introduced. Whilst DOTAS will always impose some kind of burden on advisers who are required to make sometimes difficult judgement calls in applying the filters, we recognise that from a public policy viewpoint DOTAS has been successful up to now in delivering targeted information which HMRC have frequently used to change the law early and combat avoidance in other ways. However, every time HMRC extend the regime, there is a new risk that they inadvertently tip the balance towards receiving large numbers of unnecessary disclosures.

15.3 We would welcome a more comprehensive review of the DOTAS regime with the intention of determining the extent to which it should be used to underpin other mechanisms and sanctions.

16 Q14. Should arrangements to which Follower Notice or GAAR have been applied be included in the definition of a scheme for these purposes? If not, please explain why you do not think this would be appropriate.

16.1 A concern with including arrangements to which Follower Notices (FN) have been issued within the definition of a scheme for these purposes is that a FN can be issued if ‘HMRC is ‘of the opinion’ that there is relevant judicial ruling\(^3\). The test is one of HMRC’s opinion rather than one of objective fact.

16.2 We can see that schemes that have the same promoter and are mass-market are more likely to be the same or have only minor differences in application. However, not all schemes that appear to be the same are implemented in the same way. Because the test relies only on ‘HMRC’s opinion’, without any independent oversight, we have reservations about whether arrangements subject to a FN should be included within the definition of a scheme for these purposes.

16.3 We are more comfortable with arrangements that have been counteracted by the GAAR being included within the definition, but think that there should be oversight by the Tribunal before a GAAR Follower Notice can be issued (see further comments at paragraph 31 below).

17 Q15. Should a scheme be viewed as ‘defeated’ once a dispute is settled in HMRC’s favour, either by agreement with the taxpayer (or, as the case may be, acceptance of a Follower Notice or GAAR counteraction), or by final litigation being settled in HMRC’s favour? If not, what criteria would you apply?

\(^3\) Finance Act 2014 section 204 (4)
17.1 We note that it is intended that the proposals apply at an individual level, so would apply to the taxpayer who settles with HMRC, even if other users of the same or similar scheme continue and may eventually be successful. There is a significant risk that this could act as a disincentive for taxpayers to settle with HMRC.

18 Q16. How do you think a transitional provision should best work to encourage avoiders to withdraw from avoidance schemes they have already employed?

18.1 As mentioned above, a concern is that many taxpayers who entered into schemes many years previously (but who subsequently changed their behaviour) will fall into the annual certification regime if the scheme they entered into is defeated after this legislation takes effect. The proposal for transitional arrangements is therefore sensible and worth considering, but we would point out that it does seem to be premised on the basis that the arrangements will not be successful.

18.2 We think it would be wrong for HMRC to try to encourage taxpayers to withdraw from schemes they have already employed without explaining their options to them and without recommending that they take independent advice to ensure that they fully understand the options and consequences.

19 Q17. Do you agree that the proposed opportunity for taxpayers to correct their tax position is appropriate? Please explain your view.

19.1 We strongly object to the principle that only a taxpayer who corrects their tax position up until the referral of the arrangements is made by HMRC to the GAAR Advisory Panel will not be at risk of being charged a penalty. This is in effect telling the taxpayer that there is a cost and risk of going to the GAAR Advisory Panel for an independent opinion.

19.2 We agree that a taxpayer who correctly self-assesses that the GAAR applies or who settles with HMRC in line with the Litigation and Settlement Strategy prior to a referral of the relevant arrangements to the GAAR Advisory Panel should not be charged a GAAR penalty.

19.3 Given the current uncertainty about what might be caught by the GAAR, coupled with the lack of cases referred to the GAAR Advisory Panel, we also think that a taxpayer who makes a protective ‘white space’ disclosure on their tax return because they are not sure whether the GAAR might apply or not should not be charged a GAAR penalty. In this regard, we would point out that the GAAR Guidance recommends that a taxpayer who is uncertain whether an arrangement is within the scope of the GAAR may wish to make a ‘white space disclosure’ on their tax return indicating the uncertainty [4].

19.4 No penalty should be charged if the GAAR Advisory Panel concludes that the arrangements are a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances and indicators, even if HMRC choose to ignore the Panel’s opinion and go on to issue a counteraction notice.

---

19.5 In our view, if a GAAR penalty is to be introduced, it should only be chargeable after the GAAR Advisory Panel has concluded that the arrangements are not a reasonable course of action, and at the point that HMRC has successfully counteracted abusive tax arrangements under Finance Act 2013 section 209 and all avenues of appeal have been exhausted.

20 Q18. Do you agree that the proposed rate for the GAAR Penalty is appropriate? If not, what penalty rate would you propose and why?

20.1 In our view, the proposed GAAR penalty of 60% of the tax counteracted under the GAAR is far too high, particularly compared to the level of other behavioural based penalties in Finance Act 2007 Schedule 24. A prompted deliberate understatement, for example, has a penalty range of 35% to 70%, and even with minimal levels of cooperation an imposition of a 60% penalty would be quite rare.

21 Q19. Do you agree that this penalty model will act as a fair and proportionate deterrent? Please explain your view.

21.1 No, see above comments.

22 Q20. Do you agree that this safeguard would be appropriate for the GAAR Penalty?

22.1 Yes.

23 Q21. Do you have any views on the development of these measures?

23.1 Although the arrangements will have been scrutinised by the independent GAAR Advisory Panel, we are strongly opposed to allowing a GAAR Advisory Panel opinion to enable counteraction of the same arrangements by other users. The purpose of the GAAR Advisory Panel is simply for each member to give an opinion on whether or not the entering into and 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 those listed in the legislation and taking account of the abusiveness indicators (single reasonableness). It is for the courts to determine whether the entering into or carrying out of the tax arrangements cannot be reasonably regarded as a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances (double reasonableness), and therefore fails the GAAR. Anything which gives a judicial function to the GAAR Advisory Panel would seriously change the role of that panel and should be strongly resisted.

24 Q22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?
24.1 We refer to our comments in paragraph 16 above regarding the inclusion of arrangements to which Follower Notices (FN) have been issued and where the GAAR has been applied within the definition of a scheme for these purposes.

24.2 We are unclear how ‘defeated under a Targeted Anti-Avoidance Rule (TAAR)’ would be defined. Whilst we are well aware that TAARs exist throughout tax legislation, we are not aware that there is a specific list of TAARs that HMRC might have particular concerns about in the context of POTAS legislation. If ‘defeated under a TAAR’ is to be an indicator of whether the new threshold condition has been breached, then it is incumbent upon HMRC to publish a list of TAARs which they consider to be included.

25 Q23. What are your views on the options for the trigger for the threshold condition? Please explain your reasoning.

25.1 We refer to our comments in paragraph 17 above.

26 Q24. At what point should a scheme that has high numbers of users count as having been defeated?

26.1 No further comments.

27 Q25. What are your views on the proposed methods of counting defeated schemes that will trigger this threshold condition? Do you think that a rule regarding proportions of cases defeated would be appropriate?

27.1 No comments.

28 Q26. Do you agree that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition? What are your views on the furthest date in the past the authorised officer should consider?

28.1 The look back period of three years is consistent with other threshold conditions with the POTAS legislation. However, it introduces an element of retrospection. Given that the purpose of much of the legislation is about changing behaviour, it would be unfortunate if people who had already changed their behaviour were impacted.

28.2 Therefore we question whether the three year look back period is proportionate.

29 Q27. What provisions should be made for cases that are already in the courts but have not yet concluded?

29.1 On balance, it would be fairer if the new threshold condition only applied for new schemes entered into after the legislation takes effect. This would avoid the problem
of retrospection (see 28.1 above) and ensure the condition was targeted only at promoters who continue to engage in high risk behaviour going forward.

30 The Chartered Institute of Taxation

30.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.