

# Will the GAAR create cost and uncertainty for business?

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Businesses are keen to operate in the UK and individuals want to live here, but both are constantly being blandished by other jurisdictions with tax breaks of one kind or another. The UK has rightly responded by introducing incentives to make the UK a competitive place to live and do business. The risk is that any GAAR, however carefully crafted, will undermine the UK's attractiveness.

On the other side of the debate are those who are offended by distasteful tax planning. The pressure from this camp is for a widely drafted GAAR. The pressure is increased by the ill-informed or politically motivated who fail to understand the disaster that would follow from an uncompetitive tax system. There are also those who think that there is some morally "right" amount of tax that should be paid that is distinct from the amount legally required to be paid – this, however, is a fundamental misunderstanding of the rule of law.

Until there is a body of case law and practice, the impact of the GAAR, if introduced, is impossible to judge. The risk is that the GAAR satisfies none of the interested parties. I think Graham Aaronson QC and his study group have made a decent fist of their task, but only time will tell whether it leads to an improvement in the tax system or merely an increase in complexity.

If the GAAR remains in the limited form proposed by the Aaronson Report, it would be unlikely to affect ordinary business transactions. In that respect, we believe the Report has succeeded in its aim. However I fear "mission creep", as do the Report's authors themselves. One risk is that Parliament may "refine" the GAAR to catch wider classes of transaction. Even if that does not happen, there are elements of the proposed GAAR that make it susceptible to expansion by subsequent caselaw, for example by interpreting the definition of "arrangements" to refer to individual elements of a large transaction (and this is the kind of approach that led to the scope of the Australian GAAR expanding over time). I can also see HMRC using this kind of argument as a stick to frighten taxpayers out of tax planning that is objectively reasonable.

The Aaronson Report's proposed GAAR is designed to minimise this risk, even to the (unprecedented) extent of proposing that their guidelines be given statutory force. But the subjective nature of the reasonable tax planning safeguard means that the scope of the GAAR may become highly controversial.

The problem is that the question of what is acceptable tax planning and what is avoidance is as political and philosophical as much as it is legal. There are some who still hold to the

traditional view that a taxpayer has the absolute right to arrange his or her affairs to minimise tax. There are others who believe that we all have a duty to contribute to society by paying the "right" amount of tax (whatever that is).

The application of the safeguards will therefore be contested. Many well known companies pay a low effective rate of corporation tax on profits because of the application of tax reliefs and exemptions (such as capital allowances, designed to encourage investment, and the exemption from tax on sale of subsidiaries, designed to encourage the UK as an attractive location for multinational holding companies). Objectively such companies are simply arranging their affairs to rely on reliefs and exemptions for their intended purpose; however it is clear a number of journalists, activists and politicians do not regard such companies as paying the "right" amount of tax. It is easy to see how political pressure could be brought on HMRC to apply the GAAR to such arrangements, even if that was not its authors' intent.

The temptation may therefore be to apply the GAAR more widely, or to amend it into something that can be applied more widely. That would create significant cost and uncertainty for business.

Even in its current form there is going to be risk of abuse in relation to the application of the GAAR despite Aaronson Report's attempts to give taxpayer safeguards. Some in HMRC may be tempted to apply the GAAR in

wider circumstances that the Report intends, and that will damage British business. The proposal is laced with comforting language for taxpayers (what upright citizen would be worried that they were going to enter

"abnormal arrangements" or achieve an "abusive tax result"). But behind these comforting words are tests that are much less comforting and which rely on ultimately the subjective judgment of HMRC and the Courts.

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