



HM Revenue
& Customs

HM Revenue and Customs (HMRC)

General anti abuse rule (GAAR) guidance

(With effect from 31 March 2017 - not subject to GAAR Advisory Panel approval)

Part E – GAAR procedure 2

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Part E – GAAR procedure

E1 Application of the GAAR

E1.1 There are broadly two ways in which tax advantages can be counteracted under the General Anti Abuse Rules (GAAR), either through a self-assessment adjustment (or filing of accounts and payment of tax in the case of Inheritance Tax (IHT) by the taxpayer or through counteraction by HM Revenue and Customs (HMRC).

E2 Counteraction by the taxpayer

E2.1 In making a self-assessment (or filing of accounts and payment of tax in the case of Inheritance Tax), a taxpayer must adjust, on a just and reasonable basis, the tax advantages arising from any abusive tax arrangement that is relevant to that self-assessment (or filing of accounts and payment of tax).

E2.2 The taxpayer must do this despite the fact that the taxpayer has not received a notice from HMRC, stating that the taxpayer must apply the GAAR, and despite the fact that no opinion has been given by the GAAR Advisory Panel on the abusive tax arrangements the taxpayer has entered into.

E2.3 More detail on counteraction by self-assessment adjustment is contained in E5 below.

E3 Counteraction by HMRC

E3.1 Process prior to application of the Schedule called General Anti-abuse Rule: Procedural Requirements (the 'Procedural Schedule')

E3.1.1 To ensure uniformity of approach HMRC's Counter-Avoidance Directorate will consider all arrangements where it appears that the GAAR may potentially apply before the issue is raised with taxpayers or agents. In addition cases will also be reviewed at a senior level, including by senior officers in the relevant business area and Counter-Avoidance, before a recommendation is made that HMRC should pursue any formal GAAR challenge.

E3.2 Procedural Schedules

E3.2.1 If HMRC wishes to go ahead and apply the GAAR, then HMRC must follow the requirements of the Procedural Schedules before it can give notice that tax advantages are to be counteracted under the GAAR.

E3.2.2 These requirements are a safeguard for the taxpayer. They involve both a designated officer and the GAAR Advisory Panel.

E3.2.3 The designated officer is an officer of HMRC who has been designated by the Commissioners for the purposes of the GAAR. He or she will be a senior officer in HMRC. Requiring the officer to be designated ensures consistency in the way that the GAAR is used by HMRC.

E3.2.4 As described further at E4 below, the GAAR Advisory Panel is appointed by the Commissioners and provides an independent view of tax arrangements.

E3.2.5 HMRC is permitted to make a provisional counteraction (see para E3.3) either before or part way through following the requirements of the procedural schedules, however

where the adjustments made under the provisional counteraction are appealed the procedural schedules must then be followed in order for a counteraction to be made final.

E3.2.6 The detailed requirements of the Procedural Schedules are set out below. More detail on how HMRC can counteract by adjustment is contained in E5 below.

E3.3 Provisional Counteractions

E3.3.1 From 15 September 2016 provisions within section 209A FA 2013 apply to enable an officer of HMRC to make a provisional counteraction under the GAAR.

E3.3.2 Ordinarily where there is a potential GAAR challenge assessing action cannot be taken until the case has progressed through the GAAR process to the GAAR Advisory Panel and a notice of final decision has been issued under either paragraph 12 of Schedule 43, paragraphs 8 or 9 of Schedule 43A or paragraph 8 of Schedule 43B. In practice this may risk the expiry of the time limit for making an assessment before the GAAR process can be completed.

E3.3.3 To prevent this risk a provisional counteraction can be made prior to the procedure being completed where an officer of HMRC reasonably believes that a counteraction under the GAAR may be required. This allows HMRC to make adjustments within the statutory assessing time limits whilst at the same time making sure that the safeguards given to the taxpayer under Schedules 43, 43A and 43B Finance Act 2013 are preserved.

E3.4 Provisional counteraction notices

E3.4.1 In order to make a provisional counteraction an officer of HMRC must issue a provisional counteraction notice to the taxpayer. The provisional counteraction notice must specify:

- the adjustments (the notified adjustments) that the officer reasonably believes may be required under section 209(1) to counteract the tax advantage arising to the taxpayer from tax arrangements
- the arrangements and the tax advantage
- the taxpayer's rights of appeal

E3.4.2 The provisional counteraction notice is given either before or at the same time as the making of the adjustments. It is important that the adjustments are not made first as this will prevent HMRC from applying the GAAR.

E3.4.3 Any appeal is made against the making of the adjustments, not the provisional counteraction notice itself.

E3.4.4 Adjustments made by an officer of HMRC which are specified in a provisional counteraction notice and which effect a valid counteraction in respect of a tax advantage arising from abusive tax arrangements are treated for all purposes as though a valid counteraction has been made even though the formal GAAR procedures within Schedules 43, 43A and 43B have not been completed when the provisional adjustments are made.

E3.5 12 month period for taking action if an appeal is made

E3.5.1 Where the taxpayer does not appeal against the making of the notified adjustments specified in the provisional counteraction notice those adjustments will become final.

E3.5.2 However, where the taxpayer does make an appeal HMRC must take one of a number of actions either before the provisional counteraction notice is given or within 12 months from that date. The actions are specified in section 209B(4). If HMRC does not take one of those actions within the 12 month period the notified adjustments will be treated as cancelled with effect from the end of the 12 months.

E3.5.3 No steps are taken in relation to the appeal until HMRC takes one of the actions.

E3.5.4 The actions that HMRC may take are:

- Section 209B(4)(a) - An officer of HMRC notifies the taxpayer that the notified adjustments are cancelled
- Section 209B(4)(b) - An officer of HMRC gives the taxpayer written notice that the provisional counteraction notice has been withdrawn but without cancelling the notified adjustments

This action is only permitted where the officer is authorised to make the notified adjustments under another provision of the tax code

- Section 209B(4)(c) - A designated HMRC officer gives the taxpayer a notice of proposed counteraction under paragraph 3 of Schedule 43 (see para E3.8) which sets out the specified arrangements and tax advantage which are set out in the provisional counteraction notice and which specifies notified adjustments of the same or lesser amounts as those in the provisional counteraction notice that the officer considers ought to be taken as the counteraction
- Section 209B(4)(d) - A designated HMRC officer gives the taxpayer a pooling notice under paragraph 1 of Schedule 43A (see para E3.17.5) or a notice of binding under paragraph 2 of Schedule 43A (see para E3.17.5) which sets out the specified arrangements and tax advantage which are set out in the provisional counteraction notice and which specifies notified adjustments of the same or lesser amounts as those in the provisional counteraction notice that the officer considers ought to be taken as the counteraction
- Section 209B(4)(e) - A designated HMRC officer gives the taxpayer a notice of proposal to make a generic referral of pooled arrangements under paragraph 1(2) of Schedule 43B (see para E3.23.3) which sets out the specified arrangements and tax advantage which are set out in the provisional counteraction notice and which specifies notified adjustments of the same or lesser amounts as those in the provisional counteraction notice that the officer considers ought to be taken as the counteraction

E3.5.5 For cases falling within section 209B(4)(c), (d) or (e), where the adjustments specified in the notice of proposed counteraction, the pooling notice, notice of binding or notice of proposal to make a generic referral are in lesser amounts than in the provisional counteraction notice, the officer must amend the notified adjustments accordingly. The only exception to this is where the action is taken before the provisional counteraction notice is given. Where this is the case the notified adjustments should not be amended to a lower amount.

E3.5.6 It doesn't matter whether the action in section 209B(4)(c), (d) or (e) is taken before or after the provisional counteraction notice is issued.

E3.6 Next steps after action is taken under section 209B(4)

E3.6.1 Cases within section 209B(4)(c)

E3.6.1.1 In a case where a designated HMRC officer has given the taxpayer a notice of proposed counteraction under paragraph 3 of Schedule 43 (see para E3.8) and the designated HMRC officer subsequently decides that the matter should not be referred to the GAAR Advisory Panel, the designated officer must issue a notice of that decision under paragraph 6(3) of Schedule 43.

E3.6.1.2 Where the only reason for making the notified adjustments was the consideration of the GAAR, the adjustments are treated as cancelled with effect from the date of the decision. However, where HMRC is authorised to make those adjustments under another provision of the tax code, the notice under paragraph 6(3) of Schedule 43 may specify that they are not to be treated as cancelled.

E3.6.1.3 If the designated HMRC officer decides that the matter should be referred to the GAAR Advisory Panel and after receiving the Panel's opinion(s) the designated HMRC officer concludes that the tax advantage is not to be counteracted under the GAAR, the designated officer must issue a notice of decision under paragraph 12 of Schedule 43.

E3.6.1.4 Where the only reason for making the notified adjustments was the consideration of the GAAR, the adjustments are to be treated as cancelled. However, where HMRC is authorised to make those adjustments under another provision of the tax code the notice under paragraph 12 of Schedule 43 may specify that they are not to be treated as cancelled.

E3.6.1.5 Where the designated HMRC officer concludes that the tax advantage should be counteracted under the GAAR the designated officer must issue a notice of decision under paragraph 12 of Schedule 43 and must specify the adjustments required to give effect to the counteraction within that notice.

E3.6.1.6 The notified adjustments specified in the provisional counteraction notice will only be confirmed to the extent that they are specified in the paragraph 12 notice. To the extent that they are not confirmed, the notified adjustments will be treated as cancelled.

E3.6.2 Cases within section 209B(4)(d)

E3.6.2.1 Where a designated HMRC officer gives the taxpayer a pooling notice under paragraph 1 of Schedule 43A or a notice of binding under paragraph 2 of Schedule 43A and, having considered the opinion(s) of the GAAR Advisory Panel, and any representations made by the taxpayer under paragraph 7(3), the designated HMRC officer decides that the tax advantage is not to be counteracted under the GAAR, the designated officer must issue a notice of decision under paragraph 8(2) of Schedule 43A for pooled arrangements, or paragraph 9(2) of Schedule 43A for bound arrangements.

E3.6.2.2 Where the only reason for making the notified adjustments was the consideration of the GAAR, the adjustments are to be treated as cancelled. However, where HMRC is authorised to make those adjustments under another provision of the tax code the notice under paragraph 8(2) or paragraph 9(2) of Schedule 43A may specify that they are not to be treated as cancelled.

E3.6.2.3 If after considering the opinion(s) of the GAAR Advisory Panel and any representations made by the taxpayer, the designated HMRC officer concludes that the tax arrangements should be counteracted under the GAAR the designated officer must issue a notice under paragraph 8(2) or 9(2) of Schedule 43A, setting out the

designated officer's conclusions and specifying within that notice the adjustments required to give effect to the counteraction.

E3.6.2.4 The notified adjustments in the provisional counteraction notice will only be confirmed to the extent that they are specified in the final notice issued under paragraph 8(2) or 9(2) of Schedule 43A. To the extent that they are not confirmed, the notified adjustments will be treated as cancelled.

E3.6.3 Cases within 209B(4)(e)

E3.6.3.1 In a case where a designated HMRC officer gives the taxpayer a notice of proposal to make a generic referral to the GAAR Advisory Panel under paragraph 1(2) of Schedule 43B and that notice is later withdrawn, the notified adjustments are to be treated as cancelled where the only reason for making them was due to the consideration of the GAAR. However, where HMRC is authorised to make those adjustments under another provision of the tax code, the notice of withdrawal may specify that they are not to be treated as cancelled.

E3.6.3.2 If, following the issue of a notice of proposal to make a generic referral, the designated HMRC officer refers the matter to the GAAR Advisory Panel and, after considering the opinions of the panel and any representations made by the taxpayer, the designated HMRC officer concludes that the tax advantage should not be counteracted under the GAAR the designated officer must issue a notice of decision under paragraph 8(2) of Schedule 43B.

E3.6.3.3 Where the only reason for making the notified adjustments was the consideration of the GAAR, the adjustments are to be treated as cancelled. However, where HMRC is authorised to make those adjustments under another provision of the tax code the notice under paragraph 8(2) of Schedule 43B may specify that they are not to be treated as cancelled.

E3.6.3.4 If following referral to the GAAR Advisory Panel the designated HMRC officer considers the opinions of the panel and any representations made by the taxpayer and concludes that the tax advantage should be counteracted under the GAAR, the designated officer must issue a notice of decision under paragraph 8(2) of Schedule 43B specifying the adjustments required in order to give effect to the counteraction.

E3.6.3.5 The notified adjustments in the provisional counteraction notice will only be confirmed to the extent that they are specified in the notice under paragraph 8(2) of Schedule 43B. To the extent that they are not specified in that notice, they will be treated as cancelled.

E3.7 Appeals against provisional counteractions

E3.7.1 There is no appeal against a provisional counteraction notice. The appeal is made against the adjustments when these are made. Where an appeal is made against the adjustments specified in a provisional counteraction notice, no action is taken with regard to that appeal until HMRC has issued one of the following notices in respect of the tax arrangements concerned:

- A notice withdrawing the provisional counteraction notice which does not also cancel the notified adjustments
- A notice of decision not to refer the matter to the GAAR Advisory Panel under paragraph 6(3) of Schedule 43 which does not also cancel the notified adjustments

- A notice of final decision after considering the GAAR Advisory Panel's opinion under paragraph 12 of Schedule 43
- A notice of final decision after considering the GAAR Advisory Panel's opinion and any representations made by the taxpayer in relation to pooled or bound cases under paragraph 8(2) or 9(2) of Schedule 43A
- A notice of final decision after considering the GAAR Advisory Panel's opinion and any representations made by the taxpayer in relation to a generic referral of pooled cases under paragraph 8 of Schedule 43B

E3.7.2 Once the taxpayer has received the notice specified above the taxpayer has 30 days from the date of receipt to specify the grounds for appeal.

E3.8 Notice to taxpayer of proposed counteraction of tax advantage

E3.8.1 If a designated officer considers that both of the following apply:

- that a tax advantage has arisen to a taxpayer from tax arrangements that are abusive
- that the advantage ought to be counteracted

the officer must give the taxpayer a written notice to that effect.

E3.8.2 The notice must do all of the following:

- specify the arrangements and the tax advantage
- explain why the officer considers that a tax advantage has arisen to the taxpayer from tax arrangements that are abusive
- set out the counteraction that the officer considers ought to be taken including details of the adjustments required and how they have been calculated
- inform the taxpayer of the period for making representations
- explain what will happen next if the taxpayer does, or does not, make representations

The content of the notice will take into account the information the GAAR Advisory Panel has indicated they will require from HMRC, as set out in Section 3 of the GAAR Advisory Panel's guidance on procedures for dealing with referred cases, which is entitled 'Guidance to HMRC on submission of cases'.

HMRC will send a copy of the GAAR Advisory Panel document 'Procedures for dealing with referred cases' to the taxpayer with the notice.

E3.8.3 If a notice is given to the taxpayer, the taxpayer has 45 days beginning with the date on which the notice is given, to send written representations in response to the notice, to the designated officer. Section 4 of the GAAR Advisory Panel's guidance which is entitled 'Guidance to taxpayers on submission of cases' sets out best practice regarding the content of those representations. The legislation allows the

designated officer to extend this time limit if the taxpayer needs additional time to prepare representations. Any request for an extension to this time limit must be made in writing by the taxpayer. In practice we would expect such occasions to be the exception as the arguments will have been the subject of previous correspondence in the period before the notice is issued. There is no set form which the taxpayer's representations must take.

E3.9 Corrective action by the taxpayer

E3.9.1 For tax arrangements entered into on or after 15 September 2016, where the taxpayer receives a notice of proposed counteraction, the taxpayer can prevent the matter from being referred to the GAAR Advisory Panel by taking 'relevant corrective action'.

E3.9.2 The relevant corrective action must be taken before the beginning of the 'closed period' as set out in paragraph E3.10.

E3.9.3 Relevant corrective action means that the taxpayer must either:

- amend the relevant return or claim in order to counteract the tax advantage specified in the notice of proposed counteraction
- where the taxpayer has made an appeal on the basis that the tax advantage specified in the notice of proposed counteraction does actually arise from the tax arrangements, the taxpayer must take all necessary action to enter into a written agreement with HMRC to give up that advantage

The taxpayer must also notify HMRC of any additional tax that has become due and payable as a result.

E3.9.4 In a case where the taxpayer has made an appeal, the taxpayer is not treated as taking the relevant corrective action where they do not enter into the written agreement with HMRC.

E3.9.5 The taxpayer is not permitted to make an appeal against an amendment made in a closure notice under:

- Paragraph 35(1)(b) of Schedule 33 FA 2013
- Section 31(1)(b) or (c) of TMA 1970
- Paragraph 9 of Schedule 1A to TMA 1970
- Paragraph 34(3) of Schedule 18 to FA 1998
- Paragraph 35(1)(b) of Schedule 10 to FA 2003

to the extent that the amendment takes into account an amendment made as a result of the taxpayer's relevant corrective action.

E3.10 The closed period

E3.10.1 The closed period relates to arrangements entered on or after 15 September 2016.

E3.10.2 Where the matter is to be referred to the GAAR Advisory Panel the taxpayer must not make any GAAR related adjustments in respect of the taxpayer's tax affairs during the closed period

E3.10.3 The closed period for cases within Schedule 43 begins on the 31st day after end of the 45 day period for making representations in relation to the notice of proposed

counteraction. It ends immediately before the date on which a notice of final decision is issued after considering the opinion of the GAAR Advisory Panel.

E3.11 Referral to the GAAR Advisory Panel

E3.11.1 For arrangements entered into on or after 15 September 2016, where the taxpayer does not take relevant corrective action before the start of the closed period the designated officer must decide whether to refer the matter to the GAAR Advisory Panel.

E3.11.2 If no representations are made by the taxpayer, a designated officer must refer the matter to the GAAR Advisory Panel.

E3.11.3 If representations are made by the taxpayer, a designated officer must consider them and, if he or she still considers the tax advantage ought to be counteracted, refer the matter to the GAAR Advisory Panel. The designated officer must give the taxpayer a written notice of decision whether or not to refer the matter to the GAAR Advisory Panel as soon as practicable after making that decision.

E3.11.4 There is no set time limit for a designated officer to refer matters to the GAAR Advisory Panel. However, where a taxpayer has made representations, the officer will aim to refer within the 45 day period beginning with the day on which representations are received by the officer.

E3.11.5 If the matter is referred to the GAAR Advisory Panel, the designated HMRC officer must provide certain information to the panel and the taxpayer at the same time as the referral.

E3.11.6 The officer must provide the GAAR Advisory Panel with all of the following:

- a copy of the initial notice sent to the taxpayer
- a copy of any representations made by the taxpayer
- any comments that the officer has on any such representations
- a copy of the notice sent to the taxpayer by the officer on referral of the matter to the GAAR Advisory Panel

E3.11.7 The officer must provide the taxpayer with a notice which:

- specifies that the matter is being referred
- contains a copy of any comments made by the officer on any representations made by the taxpayer
- informs the taxpayer he has a further chance to make representations to the GAAR Advisory Panel

E3.12 Further chance to make representations to GAAR Advisory Panel

E3.12.1 Once a matter has been referred to the GAAR Advisory Panel, a taxpayer may send the panel (copied to the designated officer) written representations about the

proposed counteraction or about any comments which have been provided to the panel by the designated officer. The taxpayer has 21 days to do this. The legislation allows the GAAR Advisory Panel to extend this time limit if the taxpayer needs additional time to prepare representations. Again, any such request by the taxpayer must be made in writing.

E3.12.2 If the representations are not the first representations sent by the taxpayer in relation to the matter, then HMRC cannot make comments on the further representations.

E3.12.3 If these representations are the first representations which have been sent by the taxpayer in relation to the matter, the designated officer may provide the GAAR Advisory Panel with comments (copied to the taxpayer) on these representations. There is no set time limit. However, the officer will seek to provide comments within the 45 day period beginning with the day on which the taxpayer representations are received by the officer.

E3.12.4 If the designated officer was not given the opportunity to provide further comments, then a taxpayer could avoid making representations when the taxpayer received the first notice from a designated officer that the officer considers that the GAAR applies. The taxpayer could then wait until a matter was referred to the GAAR Advisory Panel in order to make representations. There would then be no opportunity for HMRC to respond to these representations. The taxpayer would be put in an advantageous position by delaying making representations.

E3.12.5 The GAAR Advisory Panel is not a fact-finding body. The Procedural Schedule will work best if HMRC and the taxpayer give the GAAR Advisory Panel the information set out in Sections 3 and 4 of the GAAR Advisory Panel's guidance on procedures for dealing with referred cases (without excessive evidence to back up the case) and disclose views about the proposed counteraction as quickly as possible and can respond to each other's views.

E3.13 Decision of GAAR Advisory Panel

E3.13.1 If the GAAR Advisory Panel receives a referral, the Chair of the panel must select a sub-panel of three members (one of whom may be the Chair) to consider the referral.

E3.13.2 The sub-panel can invite HMRC or the taxpayer to provide further information within a specified period. There is no statutory obligation on the taxpayer or the designated officer to supply this information, although it will help the sub-panel members to reach a better informed opinion if information is supplied and the Panel will be expected to draw appropriate conclusions where there is no, or an inadequate, response.

E3.13.3 Any further information supplied by the designated officer must be copied to the taxpayer, and any information supplied by the taxpayer must be copied to the designated officer.

E3.13.4 The sub-panel must produce an opinion, or opinions, on the tax arrangements and give a copy of the opinion(s) to the designated officer and taxpayer. Each opinion must state:

- 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

- or that it is not possible, on the information available, to reach a view on that matter
- reasons for that opinion

E3.13.5 Each opinion is to be given on the assumption that the arrangements under consideration are 'tax arrangements' as defined in the legislation. In other words, a sub-panel member does not give an opinion on whether there is a tax advantage or whether obtaining a tax advantage was one of the main purposes of the arrangements. However, this does not stop the taxpayer from arguing before a court or tribunal that the GAAR does not apply because the arrangements are not 'tax arrangements'.

E3.13.6 There is no set time limit by which the sub-panel must produce its opinion(s). However section 5.3 of the GAAR Advisory Panel's guidance, entitled 'Timetable for sub-panel's consideration of case', together with a timetable included in the Appendix to the guidance, provide a guide as to how long this would normally take.

E3.14 Notice of final decision after considering opinions of GAAR Advisory Panel

E3.14.1 A designated officer, having considered the opinions of the sub-panel, must give the taxpayer a written notice setting out whether the tax advantages arising from the arrangements are to be counteracted. If they are to be counteracted, the notice:

- must set out the adjustments required to give effect to the counteraction
- if relevant, also must set out any steps that the taxpayer is required to take to give effect to the counteraction

E3.14.2 HMRC is not prevented from continuing a case in the light of an opinion from the GAAR Advisory Panel that the arrangements are 'reasonable', HMRC would however need to give careful consideration to its reasons for continuing and ensure that there is robust governance around the decision-making process.

E3.15 What effect does the counteraction notice have

E3.15.1 The notice given by the designated officer which sets out the adjustments required to give effect to a counteraction does not actually give effect to the counteraction, and the notice itself does not carry an appeal right. Instead, the issue of the notice allows steps to be taken by an HMRC officer to counteract the tax advantages arising from abusive tax arrangements.

E3.15.2 Once a notice setting out the adjustments is given, the adjustments will be made within the administrative and assessment procedures of the relevant tax (whether Corporation Tax, Income Tax, NICs, Inheritance Tax etc).

E3.15.3 In terms of the steps set out in the counteraction notice that the taxpayer might be required to take to give effect to the counteraction, one example would be if losses which a company has surrendered are reduced due to counteraction. The company could be required under para 75 Sch.18 FA 1998 to withdraw an original surrender consent, or replace it with a new one, as appropriate.

E3.16 What can a taxpayer do if the taxpayer considers that HMRC is taking too long to carry out its obligations under the Procedural Schedule?

E3.16.1 Although the Procedural Schedule sets out time limits within which a taxpayer must carry out various obligations, there are no statutory time limits for HMRC or the sub-

panel. However, there are various routes which may assist a taxpayer who considers that HMRC is taking too long to carry out its obligations.

E3.16.2 For example, in the context of corporation tax, under para 33 Sch.18 FA 1998 a company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a closure notice within a specified period. The tribunal must give a direction unless satisfied that an officer has reasonable grounds for not giving a closure notice within a set period. Similar taxpayer rights exist in the context of income tax and capital gains tax at ss28A(4) to 28A(6) of TMA 1970.

E3.17 Pooling and binding of tax arrangements under the GAAR

E3.17.1 With effect from 15 September 2016 new provisions within Schedule 43A FA 2013 enable tax arrangements (even those entered into before that date as long as that was on or after the GAAR commencement date, broadly 17 July 2013) that are equivalent to one another to be either:

- pooled with lead arrangements
- bound to counteracted arrangements

This will mean that a GAAR Advisory Panel opinion can apply equally to the equivalent arrangements without referring each individual case to the panel.

The following guidance details when tax arrangements can either be placed in a pool with lead arrangements or bound to counteracted arrangements.

E3.17.2 Pooling of equivalent tax arrangements

E3.17.2.1 Where a notice of proposed counteraction under paragraph 3 of Schedule 43 has been issued to a taxpayer in respect of the taxpayer's tax arrangements those arrangements may be treated as 'lead arrangements' for the purpose of pooling.

E3.17.2.2 Where the 45 day period for making representations in respect of the notice under paragraph 3 of Schedule 43 has passed in respect of the lead arrangements and HMRC has not issued a notice under either paragraph 12 of Schedule 43 (notice of final decision on whether arrangements should be counteracted after considering the opinion(s) of the GAAR Advisory Panel) or paragraph 8 of Schedule 43B (notice of final decision on whether arrangements should be counteracted after considering the opinion(s) of the GAAR Advisory Panel in respect of a generic referral), similar arrangements may be pooled with the lead arrangements as set out below.

E3.17.2.3 Where a designated HMRC officer considers that another taxpayer has received a tax advantage arising from abusive tax arrangements which ought to be counteracted and that those arrangements are equivalent to the lead arrangements (see para E3.17.4), providing no notice has been issued under paragraph 3 of Schedule 43 in respect of the equivalent arrangements, the designated HMRC officer can issue a 'pooling notice' to the taxpayer.

E3.17.2.4 The effect of the pooling notice is to place the equivalent arrangements in a single pool with the lead arrangements. Any tax arrangements which the designated HMRC officer considers are equivalent to the lead arrangements, and for which the designated officer has issued a pooling notice, will go into the same single pool.

E3.17.2.5 Tax arrangements that have been placed in the pool will remain there unless the taxpayer carries out the necessary steps to complete the 'relevant corrective action' (see para E3.17.6). Only once the taxpayer has completed those steps are they

treated as no longer being in the pool. This is the case even where the lead arrangements themselves cease to be in the pool.

E3.17.2.6 The purpose of pooling is to prevent the need to refer each individual case to the GAAR Advisory Panel for an opinion. Instead, one or more lead cases will be referred to the panel for an opinion and that opinion will then be applied to the equivalent cases.

E3.17.3 Binding of equivalent tax arrangements

E3.17.3.1 Where a taxpayer's tax arrangements are in a pool and, after considering the GAAR Advisory Panel's opinion, a notice of final decision to counteract has been issued under paragraph 12(2) of Schedule 43 (in the case of lead arrangements) or paragraph 8(3) of Schedule 43B (where there has been a generic referral), the arrangements are treated as 'counteracted arrangements' for the purposes of binding.

E3.17.3.2 If a designated HMRC officer considers that a tax advantage has arisen to another taxpayer from tax arrangements which ought to be counteracted and which are equivalent to the counteracted arrangements, providing the taxpayer has not already received a pooling notice or a notice of proposed counteraction under paragraph 3 of Schedule 43 in respect of the equivalent arrangements, the designated HMRC officer can issue a 'notice of binding' to the taxpayer.

E3.17.3.3 The effect of the notice of binding is to bind the equivalent arrangements to the counteracted arrangements such that the opinion of the GAAR Advisory Panel can be applied to the equivalent arrangements. Again, this prevents the need for referring each individual case to the GAAR Advisory Panel for an opinion.

E3.17.4 Equivalent Arrangements

E3.17.4.1 'Equivalent arrangements' are defined in paragraph 11 of Schedule 43A as arrangements which are substantially the same as one another with regard to all of the following:

- The substantive results of the arrangements
- The means of achieving those results
- The characteristics on the basis of which it could reasonably be argued that the arrangements, in each case, are abusive tax arrangements under which a tax advantage has arisen to a taxpayer

E3.17.5 The Pooling or Binding Notice

E3.17.5.1 As soon as HMRC becomes aware of the relevant facts of a case that might lead to the conclusion that a pooling or binding notice should be issued, HMRC must decide whether to issue a notice, and must issue any notice as soon as reasonably possible.

E3.17.5.2 A pooling or a binding notice must specify the following:

- The tax arrangements in relation to which the notice is given
- The tax advantage
- why the officer considers the arrangements to be equivalent to the lead arrangements or the counteracted arrangements

- why the officer considers that a tax advantage has arisen to the taxpayer from tax arrangements that are abusive
- The counteraction that the officer considers ought to be taken
- The effect of corrective action that can be taken by the taxpayer (see para E3.17.6)
- The effect of the 'closed period' in section 209(9) on making GAAR related adjustments [see para E3.22]
- The effect of the GAAR penalty provisions in section 212A (see para E3.24)

In addition a pooling or binding notice can set out the steps that the taxpayer can take to avoid the proposed counteraction.

E3.17.6 Corrective action by the taxpayer

E3.17.6.1 Where a taxpayer receives a pooling notice or a notice of binding, the taxpayer may take 'relevant corrective action' in relation to the tax arrangements and the tax advantage specified in the notice before the beginning of the closed period set out in section 209(9) (see para E3.22).

E3.17.6.2 For pooled cases the closed period commences 31 days from the date on which the pooling notice is issued, therefore the taxpayer has 30 days from the date the notice was issued to take the relevant corrective action. The application of the closed period for bound cases is explained at para E3.22.5.

E3.17.6.3 The purpose of allowing a taxpayer to take relevant corrective action is to ensure that the taxpayer has the opportunity to settle with HMRC prior to a penalty being imposed under the GAAR provisions.

E3.17.6.4 If the taxpayer takes the relevant corrective action, they are treated for the purposes of the notice of final decision for pooled or bound cases under paragraphs 8 and 9 of Schedule 43A, and for the purposes of Schedule 43B (generic referral of tax arrangements see para E3.23), as not having been given the notice in question - such that they are no longer in a pool or they are no longer bound.

E3.17.6.5 Relevant corrective action is classed as having been taken where the taxpayer takes the following two steps:

Step one

- The taxpayer amends a return or claim in order to counteract the tax advantage specified in the notice or
- If a taxpayer has made a tax appeal on the basis that the tax advantage specified in the pooling notice or notice of binding does arise from the tax arrangements specified in the notice, the taxpayer must take all necessary action to enter into a written agreement with HMRC for the purpose of giving up that advantage

For the purposes of this provision, a person is not prevented from making an amendment to a return or claim before the tax enquiry is closed by virtue of any other statutory time limits.

Step two

- The taxpayer notifies HMRC that the first step has been taken and
- The taxpayer notifies HMRC of any additional amount which has or will become due and payable as a result of the first step being taken

If in taking the first step a taxpayer who has made a tax appeal fails to enter into the written agreement with HMRC, HMRC can proceed as if no corrective action had been taken.

E3.17.6.6 Once a taxpayer who has made a tax appeal takes all necessary action to enter into a written agreement with HMRC for the purpose of giving up the tax advantage and the only matter outstanding is the determination of the additional amount of tax payable, the agreement is treated as entered into even though the final determination of the tax may be agreed outside the 30 day period. However if the taxpayer fails to enter into the agreement, they will remain in the pool and HMRC will proceed as if no corrective action had been taken.

E3.17.6.7 No appeal can be brought against an amendment made by a closure notice under any of the following provisions to the extent that the amendment takes into account an amendment made by the taxpayer to counteract the tax advantage specified in the notice (the action taken under step one) :

- Paragraph 35(1)(b) of Schedule 33 FA 2013
- Section 31(1)(b) or (c) of TMA 1970
- Paragraph 9 of Schedule 1A to TMA 1970
- Paragraph 34(3) of Schedule 18 to FA 1998
- Paragraph 35(1)(b) of Schedule 10 to FA 2003

E3.18 Corrective action by the lead taxpayer

E3.18.1 Where the lead taxpayer takes the relevant corrective action within 75 days of the date that they were given a notice of proposed counteraction under paragraph 3 of Schedule 43, the lead arrangements will not be referred to the GAAR Advisory Panel and are treated as having ceased to be in the pool.

Where this happens HMRC will either identify a new lead case from the pool or commence action to make a generic referral to the GAAR Advisory Panel (see para E3.23).

E3.19 Pooled and bound arrangements opinion notices

E3.19.1 Where a taxpayer has received a pooling notice and the designated HMRC officer has subsequently been given an opinion notice under paragraph 11(2) of Schedule 43 in relation to 'the referred arrangements', the officer must give that taxpayer a 'pooled arrangements opinion notice'.

E3.19.2 'The referred arrangements' are either the original lead arrangements or another set of arrangements from the pool which has been referred to the GAAR Advisory Panel as the lead case.

E3.19.3 A taxpayer may only be given one pooled arrangements opinion notice in respect of any one set of tax arrangements.

E3.19.4 A pooled arrangements opinion notice is a written notice which:

- Sets out a report prepared by HMRC of any opinion of the GAAR Advisory Panel about the referred arrangements
- Explains the taxpayer's right to make representations and the time limit for making those representations

E3.19.5 Where a designated HMRC officer gives a taxpayer a notice of binding, unless the taxpayer who receives the notice of binding takes relevant corrective action, those tax arrangements will be bound to 'counteracted arrangements' on which the GAAR Advisory Panel will already have given an opinion notice. As such the designated HMRC officer must, at the same time as giving the notice of binding, give the taxpayer a bound arrangements opinion notice.

E3.19.6 A bound arrangements opinion notice is a written notice which:

- sets out a report prepared by HMRC of any opinion of the GAAR Advisory Panel about the counteracted arrangements
- explains the taxpayer's right to make representations and the time limit for making those representations

E3.19.7A taxpayer who receives either a pooled arrangements opinion notice or a bound arrangements opinion notice has 30 days from the day on which the notice is given to make representations. Any representations must be in the following categories:

- representations that no tax advantage has arisen to the taxpayer from the arrangements to which the notice relates
- representations as to why the arrangements to which the notice relates are or may be materially different from either
 - the referred arrangements (in cases of pooled arrangements)
 - the counteracted arrangements (in the case of bound arrangements)

The term 'arrangements' for this purpose includes any circumstances which would be relevant to determine whether the tax arrangements in question are abusive under section 207.

E3.20 Notice of final decision after considering the Panel's opinion

E3.20.1 Pooled cases

E3.20.1.1 Where a taxpayer's tax arrangements have been placed in a pool and a designated HMRC officer gives a notice of final decision under paragraph 12 of Schedule 43 in relation to referred arrangements from the same pool, the designated officer must give the taxpayer a written notice setting out whether the tax advantage arising from the arrangements the taxpayer entered into are to be counteracted under the GAAR.

E3.20.1.2 In making the decision regarding whether the taxpayer's arrangements should be counteracted the designated HMRC officer will consider the opinion(s) of the GAAR Advisory Panel and any representations that the taxpayer has made in response to the pooled arrangements opinion notice. The written notice of final decision is given under paragraph 8(2) of Schedule 43A

E3.20.1.3 Where the notice sets out that the tax advantage is to be counteracted it must also set out the adjustments required to give effect to the counteraction and, where applicable, any steps that the taxpayer is required to take to give effect to it.

E3.20.2 Bound cases

E3.20.2.1 Where a taxpayer has been given a notice of binding and a bound arrangements opinion notice the designated HMRC officer must give the taxpayer a written notice

setting out whether the tax advantage arising from the arrangements specified in the notice of binding is to be counteracted under the GAAR.

E3.20.2.2 In deciding whether the taxpayer's tax arrangements should be counteracted under the GAAR the designated HMRC officer will consider both the opinion(s) of the GAAR Advisory Panel and any representations made by the taxpayer in response to the notice of binding. The written notice of final decision is given under paragraph 9(2) of Schedule 43A.

E3.20.2.3 Where the notice sets out that the tax advantage is to be counteracted it must also set out the adjustments required to give effect to the counteraction and, where applicable, any steps that the taxpayer is required to take to give effect to it.

E3.21 Notices may be given on the assumption that a tax advantage does arise

E3.21.1 A designated HMRC officer is permitted to give a notice or take any action under Schedule 43A, where the designated officer considers that a tax advantage might have arisen to the taxpayer concerned. As such any notice given can be expressed to be given on the assumption that a tax advantage does arise without accepting that it does.

E3.22 The closed period

E3.22.1 'The closed period' is the period during which a taxpayer is not permitted to make any GAAR related adjustments. This gives effect to the period in which a taxpayer may take relevant corrective action prior to the referral of arrangements to the GAAR Advisory Panel. The purpose of allowing the taxpayer to take corrective action in this way is to ensure that the taxpayer has the opportunity to settle with HMRC prior to a GAAR penalty being imposed. If a taxpayer wants to take relevant corrective action (as explained above) and avoid a potential penalty under the GAAR provisions (see para E3.24) the taxpayer must do so before the start of the closed period.

E3.22.2 For the purpose of pooled and bound cases a GAAR related adjustment is an adjustment which wholly or partly gives effect to the proposed counteraction set out in the pooling notice or notice of binding.

E3.22.3 Where a taxpayer has been given a pooling notice the closed period begins 31 days after the day on which the notice was given and ends immediately before the day on which the notice of final decision under paragraph 8(2) or 9(2) of Schedule 43A or a notice of final decision in relation to a generic referral under paragraph 8(2) of Schedule 43B is given.

E3.22.4 During the closed period for pooled cases HMRC will take action to obtain the opinions of the GAAR Advisory Panel in respect of the referred arrangements.

E3.22.5 For bound cases the taxpayer may take relevant corrective action from the date the notice of binding is issued until the date that the notice of final decision on whether the arrangements should be counteracted is issued under paragraph 9(2) of Schedule 43A.

E3.23 The Generic Referral of Tax Arrangements

E3.23.1 Where the lead arrangements have ceased to be in the pool, HMRC may make a generic referral of pooled arrangements to the GAAR Advisory Panel under the provisions in Schedule 43B FA 2013.

E3.23.2 A generic referral to the GAAR Advisory Panel enables the panel's opinion to be applied to equivalent arrangements without the need for referring each individual case.

The following guidance explains how and when a generic referral can be made to the GAAR Advisory Panel.

E3.23.3 The notice of proposal to make a generic referral of tax arrangements

E3.23.3.1 A designated HMRC officer can decide to give a notice of a proposal to make a generic referral to the GAAR Advisory Panel where, although one or more sets of tax arrangements had been placed in a pool with the lead arrangements, the lead arrangements have ceased to be in the pool and no set of tax arrangements within the pool has been referred to the GAAR Advisory Panel.

E3.23.3.2 The designated HMRC officer can only give one notice of proposal to make a generic referral in relation to any one pool.

E3.23.3.3 The notice of proposal to make a generic referral is given to the taxpayer to whom the pooling notice in question was given (the notified taxpayer) and must specify the arrangements (the specified arrangements) and the tax advantage (the specified advantage) to which the notice relates.

It must also inform the taxpayer that the taxpayer has 30 days from the day on which the notice was given in which to propose to HMRC that:

- HMRC should give the taxpayer a notice of proposed counteraction under paragraph 3 of Schedule 43 in respect of the arrangements to which the notice of proposal to make a generic referral relates,
- HMRC should not proceed with the proposal to make a generic referral to the GAAR Advisory Panel

E3.23.3.4 In making the proposal, the notified taxpayer is effectively volunteering to have their arrangements referred to the panel. The designated HMRC officer must consider all such proposals from notified taxpayers.

E3.23.3.5 If none of the notified taxpayers of a single pool make a proposal within the 30 day time limit the officer must refer the arrangements to the GAAR Advisory Panel.

E3.23.3.6 If at least one of the notified taxpayers makes a proposal within the 30 day time limit then, at the end of the 30 days, the officer must decide whether to give a notice of proposed counteraction under paragraph 3 of Schedule 43 in respect of one set of tax arrangements within the pool thereby making them the referred arrangements. Alternatively, the officer may decide not to issue a notice under paragraph 3 of Schedule 43 and instead make a 'generic referral' to the GAAR Advisory Panel in respect of the tax arrangements in the pool.

E3.23.3.7 Where a generic referral is made to the GAAR Advisory Panel the designated HMRC officer must provide the Panel with a general statement of the material characteristics of the specified arrangements and a declaration that the statement is applicable to all of the specified arrangements. HMRC must also confirm to the panel that nothing material has been omitted from the referral.

E3.23.3.8 The general statement referred to above must:

- Contain a factual description of the tax arrangements

- Set out HMRC's views on whether the tax arrangements accord with established practice at the time when the arrangements were entered into
- Explain why it is the designated HMRC officer's view that a tax advantage of the nature described in the statement which arises from tax arrangements which have the characteristics described in the statement would be a tax advantage arising from arrangements that are abusive
- Set out any matters that the designated HMRC officer is aware of which may suggest that any view of HMRC or the designated HMRC officer expressed in the general statement is incorrect
- Set out any other matters which the designated HMRC officer considers are required for the exercise of the GAAR Advisory Panel's functions

E3.23.3.9 The content of the general statement, as far as possible will take into account the information that the GAAR Advisory Panel has indicated they will require from HMRC as set out in Section 3 of the GAAR Advisory Panel's guidance on procedures for dealing with referred cases which is entitled 'Guidance to HMRC on submission of cases'.

E3.23.3.10 At the same time as making the referral the designated HMRC officer must give each notified taxpayer a notice specifying that a generic referral is being made and a copy of the general statement of the material characteristics of the specified arrangements which has been provided to the GAAR Advisory Panel.

E3.23.4 The decision of the GAAR Advisory Panel

E3.23.4.1 Where a generic referral is made to the GAAR Advisory Panel the Chair of the panel will arrange a sub-panel of three members who will consider it. In forming an opinion the sub-panel will consider all of the matters set out in the general statement and will take into account the legislative examples in Section 207 of what might indicate that the tax arrangements are, or are not, a reasonable course of action or what might indicate that the arrangements are, or are not abusive. The examples in Section 207 are not an exhaustive list. The sub-panel will also assume that the arrangements that they are considering do not form part of any other arrangements unless the contrary is stated in the general statement.

E3.23.4.2 Once the sub-panel have considered the referral, they will produce either one joint opinion notice of all the members or, where opinions differ, two or three opinion notices which, taken together, state the opinions of all of the members and will provide a copy to the designated HMRC officer.

E3.23.4.3 The opinion notice(s) will either state:

- That the entering into and carrying out of the tax arrangements as described in the general statement is a reasonable course of action in relation to the tax provisions
- That the entering into or carrying out of the tax arrangements is not a reasonable course of action
- That it was not possible on the information available to reach a view

E3.23.5 Taxpayer's right to make representations

E3.23.5.1 Where the designated HMRC officer is given an opinion notice or notices in relation to a generic referral the designated officer must give each of the notified taxpayers a copy of the opinion notice(s), together with a written notice setting out the right to make representations and the time limit for making them.

E3.23.5.2 The time limit for making representations is 30 days from the day on which the opinion notice(s) was given and any representations must be made under one of the following categories:

- Representations that no tax advantage has arisen from the specified arrangements
- Representations that the notified taxpayer has already received a pooled arrangements opinion notice or a bound arrangements opinion notice under paragraph 6 of Schedule 43A in relation to the specified arrangements
- Representations that a matter set out in the general statement is materially inaccurate as regards the taxpayer's arrangements

E3.23.6 Notice of final decision

E3.23.6.1 Once a designated HMRC officer has received an opinion notice from the sub-panel in respect of a generic referral, the designated officer must consider the opinion(s) in relation to each notified taxpayer together with any representations made by the notified taxpayer. The designated officer must then give a written notice to each taxpayer setting out whether the specified advantage is to be counteracted under the GAAR.

E3.23.6.2 Where the tax advantage is to be counteracted the notice must specify the adjustments required and any steps that the taxpayer is required to take in order to give effect to the counteraction.

E3.23.7 Notices may be given on the assumption that a tax advantage arises

E3.23.7.1 A designated HMRC officer is permitted to give a notice or take any action under Schedule 43B where the designated officer considers that a tax advantage might have arisen to the taxpayer concerned. As such, any notice given can be expressed to be given on the assumption that a tax advantage does arise without accepting that it does.

E3.24 Penalties where the GAAR has been applied

E3.24.1 The GAAR legislation makes specific provision for a penalty to be charged in any case where all or part of a tax advantage arising from abusive tax arrangements is counteracted under the GAAR.

E3.24.2 The penalty provisions apply where the tax arrangements were entered into on or after 15 September 2016. The amount of the penalty chargeable is a fixed rate of 60% of the 'counteracted advantage'.

E3.24.3 In order for a penalty to apply under these provisions:

- HMRC must have issued either:
 - a notice of final decision to counteract a tax advantage
 - a notice of final decision to counteract a tax advantage in relation to tax arrangements for which a pooling notice or a notice of binding has been issued or

- a notice of final decision to counteract a tax advantage in relation to tax arrangements for which a generic referral to the GAAR Advisory Panel has been made

stating that a tax advantage arising from the tax arrangements in question is to be counteracted

- a taxpayer must have submitted a 'tax document' to HMRC on the basis that a tax advantage arises to the taxpayer from the tax arrangements. Or another person must have submitted a tax document to HMRC in circumstances where the taxpayer knew, or ought to have known, that it was submitted on the same basis
 - the tax advantage must have been counteracted by making just and reasonable adjustments

A 'tax document' for this purpose is widely drawn and means any document, for example a claim or return, which is submitted to HMRC under any statutory provision or any provision made under any statutory provision.

E3.25 The calculation of the 'counteracted advantage'

E3.25.1 The method of calculating the value of the counteracted advantage is set out in a 'basic rule' which applies to all cases except those where the counteracted tax advantage relates to a loss or deferred tax. There are specific rules which apply where there are losses or deferred tax which are explained below.

E3.25.2 The Basic Rule

E3.25.2.1 The basic rule provides that the value of the counteracted advantage is the amount of tax that has become due or payable as a result of the adjustments made in counteracting the tax advantage. This will include any amount that has been repaid by HMRC in error, or would be repaid if there was no such counteraction, as a consequence of the tax arrangements.

E3.25.2.2 In calculating the counteracted advantage using the basic rule however, no account should be taken of either group relief (except in cases where there are aggregate losses) or any relief available under section 458 CTA 2010 (relief in respect of repayment or release of a loan to a participator) which has been deferred under section 458(5) CTA 2010.

E3.25.3 Cases where losses are incorrectly recorded

E3.25.3.1 Where there are losses, the value of the counteracted advantage is calculated by reference to the part of the loss generated as a result of the tax advantage. This means that where the value of the loss differs from what it would have been had there been no tax advantage, the value of the counteracted advantage is based on the difference between the recorded loss and the true amount of the loss.

E3.25.3.2 In cases where, due to the nature of the loss or due to the person's circumstances, there is no reasonable prospect of the loss being used to reduce the tax liability, the value attributed to the loss is nil.

E3.25.3.3 The calculation of the advantage will depend on whether the loss has been wholly or partly used in reducing the amount of tax due or payable.

E3.25.3.4 In cases where the loss has been wholly used to reduce the amount of tax, the value of the counteracted advantage is calculated by reference to the basic rule above.

E3.25.3.5 Where the loss is only partly used the value of the counteracted advantage is:

- the value of the tax advantage which arises, or would arise, from the part of the loss being used to reduce the amount of tax plus
- 10% of the amount of the unused loss

E3.25.3.6 In cases where the tax advantage creates or increases an aggregate loss for a group of companies, group relief may be taken into account in calculating the counteracted advantage.

E3.25.4 Cases where there is a deferral of tax

E3.25.4.1 Where the advantage gained from the tax arrangement is that tax is deferred, the value of the counteracted advantage is 25% of the amount of the deferred tax for each year of the deferral.

E3.25.4.2 Where the deferral period is not a whole number of years the value of the counteracted advantage is a percentage of the amount of deferred tax equivalent to 25% per year for each period of deferral.

E3.25.4.3 The value of the counteracted advantage is capped at 100%. So for example if tax was deferred for 5 years the value of the counteracted advantage would be 25% multiplied by 5 years which is 125%, so the value would be capped at 100%.

E3.25.5 The assessment of the penalty

E3.25.5.1 Where a taxpayer is liable for a penalty under the GAAR provisions, HMRC must assess the penalty within 12 months from the end of the appeal period for the assessment giving effect to the counteraction notice. In cases where there is no such assessment the penalty must be assessed within 12 months from the date on which the counteraction becomes final, that being the date on which the adjustments can no longer be varied.

E3.25.5.2 In assessing the penalty HMRC must notify the person who is liable for it and state within the notice the tax period that the assessment relates to. The penalty must be paid within 30 days of the penalty notification being issued.

E3.25.5.3 For procedural and enforcement purposes a penalty assessment is treated as if it were an assessment to tax.

E3.25.5.4 A penalty assessment may only be altered in the following very limited circumstances:

- where the original assessment was based on an underestimate of the value of the counteracted advantage, in which case a supplementary assessment may be made

- where the original assessment was based on an overestimate of the value of the counteracted advantage, in which case a revision of the assessment may be made
- where the original assessment does not take into account a consequential adjustment relating to the counteraction, in which case HMRC must make just and reasonable alterations to the assessment
- on appeal

E3.25.6 Aggregate penalties

E3.25.6.1 Where a taxpayer incurs two or more penalties in respect of the same amount of tax, one of which is incurred under the GAAR penalty provisions and one or more is incurred under a provision covering:

- penalties for errors
- penalties for failure to notify
- penalties for failure to make returns for example
- penalties under Serial Avoiders Regime

The total amount of the penalty should not exceed the greater of the 'relevant percentage' of the amount of tax.

E3.25.7 Relevant Percentage

E3.25.7.1 The value of 'relevant percentage' to be applied to an amount of tax is aligned with the penalty provisions within Schedule 24 Finance Act 2007, Schedule 41 Finance Act 2008 and Schedule 55 FA 2009.

E3.25.7.2 Where the penalties are for errors, failure to notify, or failure to make returns for example, the relevant percentage will be as follows:

- 200% in cases where at least one of the penalties is for deliberate and concealed action and where tax is at risk or where information has been withheld in relation to income tax or capital gains tax involving an offshore matter with a category 3 territory
- 150% in cases where at least one of the penalties is for deliberate and concealed action and where tax is at risk or where information has been withheld in relation to income tax or capital gains tax involving an offshore matter with a category 2 territory
- 140% in cases where at least one of the penalties is for deliberate but not concealed action and where tax is at risk or where information has been withheld in relation to income tax or capital gains tax involving an offshore matter with a category 3 territory
- 105% in cases where at least one of the penalties is for deliberate but not concealed action and where tax is at risk or where information has been withheld in relation to income tax or capital gains tax involving an offshore matter with a category 2 territory

In all other cases the relevant percentage will be 100%.

E3.25.8 Appealing against a penalty

E3.25.8.1 An appeal can be made against either the imposition of a penalty under the GAAR provisions, or the amount of the penalty that has been assessed.

E3.25.8.2 For the former the appeal must be made on the grounds that the arrangements in question were not abusive or that there was no advantage to be counteracted. For the latter the grounds for appeal must be that the assessment was based on an overestimate of the value of the counteracted advantage.

E3.25.8.3 In either case an appeal must be made within 30 days of the notification of the penalty being given by HMRC and must be treated by HMRC in the same way as an appeal against an assessment such that the taxpayer is entitled to a review of the decision and may notify the appeal to the Tribunal.

E3.25.8.4 The taxpayer is not required to pay the penalty in order to make an appeal.

E3.25.9 Mitigation of penalties

E3.25.9.1 HMRC may, at its discretion reduce or cancel a penalty in exceptional circumstances to prevent disproportionate outcomes arising under the GAAR provisions.

E3.25.9.2 An example of when the penalty might be mitigated could be if a taxpayer's ill health prevented them from taking relevant corrective action prior to the case going to the GAAR Advisory Panel.

E4 The GAAR Advisory Panel

E4.1 Composition and overview of function

E4.1.1 The GAAR Advisory Panel is a committee established by the Commissioners for the purposes of the GAAR.

E4.1.2 Each of the GAAR Advisory Panel members is appointed by the Commissioners. The 'Chair' is appointed by the Commissioners to chair the GAAR Advisory Panel. During the period of his or her appointment, the Chair will advise the Commissioners on all GAAR Advisory Panel appointments.

E4.1.3 The GAAR Advisory Panel represents a spread of interests including business, tax advisers and wider taxpayer interests. It provides a view which is independent from HMRC, and no HMRC officer is a member of the panel. This is to provide a safeguard for taxpayers. Where tax arrangements are carried out in a business context, it will also bring a commercial view to the application of the GAAR.

E4.1.4 The GAAR Advisory Panel has two specific functions: to provide opinion(s) on cases referred to it and to approve HMRC's guidance on the GAAR.

E4.2 Opinions

E4.2.1 The first function is to provide reasoned opinion(s) to HMRC and the taxpayer on the relevant tax arrangements (as set out in the Procedural Schedules).

E4.2.2 The Chair will select a suitably experienced three member panel to form a sub-panel to provide the opinion(s). The sub-panel can produce one joint reasoned opinion, or, if the three members cannot agree, it can provide two or three different reasoned opinions.

E4.2.3 The opinions are given on whether or not the entering into and carrying out of the relevant tax arrangements is a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances, including those circumstances listed in the definition of 'abusive' in the GAAR.

E4.2.4 The opinions are to be given on the basis that each of the examples in the legislation of what might indicate that tax arrangements are, or are not, 'abusive' is also an indicator that the tax arrangements are, or are not, a reasonable course of action. An abusive indicator will indicate that tax arrangements are not a reasonable course of action. The examples of what is, or is not, reasonable are not exhaustive.

E4.2.5 Essentially, the sub-panel is answering a 'single reasonableness' question: in the view of the sub-panel members, is the arrangement a reasonable course of action? This is different to the 'double reasonableness' question which must be taken into account when deciding whether tax arrangements are abusive. This is on the basis that the panel members are particularly well-placed to form a view on this question, and also to distinguish the panel's role from that of the courts and tribunals.

E4.2.6 If the sub-panel does not believe it has been provided with sufficient information to reach a view on whether tax arrangements are a reasonable course of action, then it is possible for the sub-panel to give an opinion that it is not possible to reach a view on that matter.

E4.2.7 The opinions of the sub-panel must be taken into account by the court or tribunal in determining any issue in connection with the GAAR and the relevant tax arrangements. See E8 below for further information on how this works.

E4.2.8 It is expected that in most cases, shortly after each opinion is given, an anonymised version of the opinion which has been approved by the sub-panel will be published by HMRC. HMRC will give very careful consideration to the form in which opinions are published to ensure that taxpayer confidentiality is protected; and it may be necessary to withhold publication in some instances if it is not possible to publish the opinion in a form that ensures that taxpayer confidentiality is maintained.

E4.2.9 The GAAR Advisory Panel does not perform a judicial function and the GAAR Advisory Panel process does not involve formal hearings where cases will be presented and heard. The GAAR Advisory Panel delivers an opinion, not a judicial decision. The opinions are not binding on HMRC or the taxpayer.

E4.3 GAAR guidance

E4.3.1 The other function of the GAAR Advisory Panel is to approve the GAAR guidance drafted by HMRC. As noted at paragraph A4 of Part A, in practice, this means that Parts A to D of the guidance will be reviewed by the GAAR Advisory Panel and, where necessary, updated by HMRC to reflect recommendations made to them, before final approval.

E4.3.2 A court or tribunal must take into account, when considering any issue in relation to the GAAR, the guidance that was approved at the time the tax arrangements were entered into.

E5 Counteracting tax advantages

E5.1 Just and reasonable adjustments

E5.1.1 If there are tax arrangements that are abusive, the tax advantages that would arise from the arrangements are to be counteracted by the making of adjustments.

E5.1.2 The adjustments required to counteract the tax advantages are those which are just and reasonable. Determination of these adjustments will involve considering whether there is an appropriate comparison. Part A to C of the guidance at paragraph C2 discusses comparisons in the context of concluding whether or not there is a 'tax advantage.' The comparison used to identify the tax advantage should follow through to the assessment of the adjustments that would be just and reasonable in the circumstances.

E5.1.3 Such adjustments may be made by way of an assessment, the modification of an assessment, amendment or disallowance of a claim or otherwise. Adjustments occur within the relevant tax (whether Corporation Tax, Income Tax, NICs, Inheritance Tax for example). The relevant tax assessment provisions are then triggered under the legislation for each relevant tax. The adjustments may be made in respect of the tax in question or any other tax.

E5.2 Relationship between the GAAR and priority rules

E5.2.1 Tax legislation contains various priority rules which say that particular tax provisions have effect to the exclusion of, or in priority to, anything else.

E5.2.2 One example of such a rule is s464 CTA 2009 which says that the amounts which are brought into account in accordance with the loan relationship rules in Part 5 of

CTA 2009 for any particular matter are the only amounts which may be brought into account for corporation tax purposes in respect of that matter.

E5.2.3 Any such priority rule is subject to the provisions of the GAAR itself. This means that counteraction under the GAAR cannot be excluded by other priority rules within the tax legislation.

E6 Administration of the GAAR for different taxes

E6.1 The GAAR (other than the provisions relating to consequential adjustments) fits within all the normal administrative provisions relevant for each tax it applies to. This means that normal time limits will apply, the normal assessment methods will be used and the normal appeal routes for these assessment methods apply.

E6.2 The fact that normal time limits will apply to adjustments under the GAAR is made clear in the legislation which says that the power to make adjustments is subject to any time limits in other legislation.

E6.3 Paragraphs E6.5 to E6.12 below set out an overview of how the GAAR will fit within the different tax administration rules.

E6.4 Penalties

E6.4.1 For arrangements entered into prior to 15 September 2016 there is no specific penalty regime for the GAAR. However, the normal penalties for inaccurate documents (including returns), which are set out in Sch.24 FA 2007, will potentially apply in relation to the GAAR.

E6.4.2 As with all other tax legislation, a successful HMRC challenge under the GAAR does not, on its own, indicate that the document was inaccurate and penalties are due. In order to give rise to a penalty the inaccuracy must be careless or deliberate.

For arrangements entered into on or after 15 September 2016 whilst the penalty provisions in Schedule 24 FA 2007 may also apply, the GAAR legislation includes specific provisions, enacted in Finance Act 2016, which impose penalties in certain circumstances (see paragraph E3.24). Under these provisions a penalty will apply where a taxpayer submits a 'tax document' to HMRC relating to a tax arrangement for which HMRC issues a notice of final decision stating that the tax advantage is to be counteracted and then subsequently counteracts the tax advantage by making just and reasonable adjustments.

E6.5 Self-assessment for Capital Gains Tax, Income Tax and Corporation Tax

E6.5.1 Taxpayers must consider the GAAR whenever they complete a Self Assessment return, or make a claim within Sch.1A TMA 1970. Taxpayers must counteract tax advantages arising from abusive tax arrangements by making just and reasonable adjustments to the return or claim.

E6.5.2 Following completion of the procedural requirements, HMRC can counteract by adjustment. This can be done in various ways, for example, by amending a return following closure of an enquiry, or making a discovery assessment, or a determination where no return is delivered. HMRC can also amend or disallow a claim via the closure notice process in Sch.1A TMA 1970. All the normal time limits and restrictions on such assessing methods will apply.

E6.5.3 Where an enquiry into a self-assessment return is completed the HMRC enquiry officer must issue a closure notice which

- informs the taxpayer that the enquiry is completed
- states his conclusions
- where appropriate, makes any amendment of the return that is needed to give effect to those conclusions

Detailed guidance on the basis on which a closure notice is to be issued is provided in the Enquiry Manual.

E6.5.4 In cases where the GAAR is being considered, the officer may decide that, in respect of certain arrangements, either of the following applies:

- a technical argument may apply (for example where the relevant law has been misconstrued) and the return should be amended accordingly
- a tax advantage has been obtained as a result of abusive arrangements to which the GAAR should apply, and the return should be amended to give effect to the counteraction.

E6.5.5 In more complex cases the closure notice and conclusions may have to reflect a number of matters, or alternatives, which have been the subject of the enquiry. Indeed, there may be cases where a targeted anti avoidance rule (TAAR) may apply to reduce (but not fully remove) a tax advantage and HMRC would seek to apply the GAAR to counteract the remaining tax advantage. If so, since a closure notice can state alternative conclusions from an enquiry, but the officer cannot make alternative amendments, he will amend the return to give effect to HMRC's preferred position.

E6.5.6 All the normal appeal rights for these assessment methods apply.

E6.6 Tax deductible at source

E6.6.1 PAYE is dealt with specifically below. Apart from PAYE, there are many other situations where tax is payable by deduction. Some examples of legislation requiring deduction of tax, or amounts in respect of tax, are:

- Part 15 Income Tax Act 2007 (yearly interest for example)
- Construction industry scheme legislation (Chapter 3 of Part 3 of FA 2004)
- Real estate investment trust (REIT) regulations.

E6.6.2 In each case where there is an obligation to deduct tax in the legislation, the GAAR should be applied when the tax is deducted, when returns in respect of those deductions are made and when the deducted tax (or amount in respect of tax) is paid to HMRC.

E6.6.3 Following completion of the procedural requirements, HMRC is also able to counteract by making adjustments in respect of tax payable by deduction. Examples of such adjustments are:

- directing that income is income from which amounts should have been deducted under Part 15 of ITA 2007

- directing that income is a 'contract payment' for the purposes of the construction industry scheme legislation in Chapter 3 Part 3 of FA 2004
- directing that income is a REIT distribution

E6.7 PAYE

E6.7.1 PAYE is a method which allows HMRC to collect income tax at source from relevant payments. S683 ITEPA 2003 and the Income Tax (PAYE) Regulations 2003 (the PAYE regulations) set out what is described as PAYE income and the employer's obligations in respect of PAYE income.

E6.7.2 Employers must apply the GAAR when making payments of PAYE income. This obligation also extends to filing the end of year return and to providing information in respect of expenses and benefits. The PAYE regulations set out the due dates for returning information and payments.

E6.7.3 The PAYE regulations also make provision for recovery of underpaid tax by making determinations in respect of unpaid tax. Following completion of the procedural requirements, HMRC can make such a determination in relation to the GAAR. The time limits set out in s34 and s36 TMA 1970 apply.

E6.7.4 The normal determination appeal rights apply in relation to GAAR determinations, just as the right of appeal applies to any other PAYE determination.

E6.8 Petroleum Revenue Tax

E6.8.1 Following completion of the procedural requirements, an adjustment under the GAAR to counteract a tax advantage may be made by increasing an assessment, reducing a loss determination or by an adjustment of a claim.

E6.8.2 If the adjustment is made through an assessment or loss determination then this will be using the provisions in para 12 Sch.2 OTA 1975.

E6.8.3 If the adjustment is made through a claim then this will either be as a decision on a claim or as the variation of a claim decision. See paras 3 and 9 respectively of Sch.5 OTA 1975 (and as applied to claims under Schs 6, 7 and 8 OTA 1975).

E6.8.4 The appeal process follows the normal rules. If the adjustment is by way of assessment or loss determination then an appeal must be made within 30 days following the making of the assessment (see para 14 Sch.2 OTA 1975).

E6.8.5 If the adjustment is by way of a claim decision then para 5 Sch.5 OTA allows an appeal period of 3 years from the making of the claim. If the adjustment is by way of variation of a claim decision then the time limit for appeal is 30 days following the notice of variation (see para 9(3) Sch.5 OTA 1975).

E6.9 Inheritance tax

E6.9.1 Taxpayers must consider the GAAR whenever they complete and deliver an account under s216 IHTA 1984 or corrective account under s217 IHTA 1984. They should counteract tax advantages arising from abusive tax arrangements by making the appropriate adjustments to their accounts and, where there is inheritance tax to pay on delivery of an account, payment should reflect counteraction.

E6.9.2 Following completion of the procedural requirements, HMRC can counteract by making just and reasonable adjustments. Where the appropriate adjustments cannot be agreed, HMRC will determine the matter by issuing a notice under s221 IHTA 1984.

E6.9.3 All the normal time limits and restrictions on recovering tax underpaid in respect of a chargeable transfer will apply.

E6.9.4 The normal appeal rights in respect of a determination under s221 IHTA 1984 will apply.

E6.10 Stamp Duty Land Tax

E6.10.1 Taxpayers must consider the GAAR when determining whether they are liable to pay Stamp Duty Land Tax on the acquisition of land and whether they are required to submit a land transaction return under s76 FA 2003. Taxpayers must make an adjustment to the relevant return to counteract tax advantages arising from abusive tax arrangements. Such an adjustment could result in a return being required where otherwise no return would need to be submitted.

E6.10.2 Following completion of the procedural requirements, HMRC can counteract tax advantages by adjustment. This can be done in various ways. For example, by amending a return following the closure of an enquiry, or by making a discovery assessment or a determination where no return is delivered.

E6.10.3 The procedures and time limits relating to Stamp Duty Land Tax enquiries and assessments are set out in Sch.10 FA 2003.

E6.10.4 The normal Stamp Duty Land Tax appeal rights will apply to any Stamp Duty Land Tax adjustments made by HMRC under the GAAR.

E6.11 Annual Tax on Enveloped Dwellings

E6.11.1 Taxpayers must consider the GAAR when determining whether they are within the scope of Annual Tax on Enveloped Dwellings and whether one or more of the statutory reliefs apply. If taxpayers are within the scope of the tax, but claiming a relief, they must submit a 'nil' return; if within the scope of the tax and required to pay one of the banded rates they must submit a 'charge return'. Taxpayers must make an adjustment to their returns to counteract tax advantages arising from abusive tax arrangements. Such an adjustment could result in a taxpayer needing to make a charge return rather than a nil return or no return at all.

E6.11.2 Following completion of the procedural requirements, HMRC can counteract tax advantages by adjustment. This can be done in various ways. For example, by amending a return following the closure of an enquiry, or by making a discovery assessment or a determination where no return is delivered.

E6.11.3 The procedures and time limits relating to Annual Tax on Enveloped Dwellings enquiries and assessments are set out in FA 2013.

E6.11.4 The normal rights of appeal will apply to any adjustments made by HMRC under the GAAR.

E6.12 National Insurance contributions

E6.12.1 There are different classes of National Insurance. The main classes relevant for the GAAR are Class 4 contributions paid by people in respect of their self-employed

profits, Class 1 National Insurance paid by employees and employers (or people treated as employers under regulations) and Class 1A National Insurance paid mainly by employers on certain taxable benefits provided to employees.

E6.12.2 Class 1 or Class 1A National Insurance

E6.12.3 Employers must apply the GAAR when making payments to, or for the benefit of, their employees, or when making taxable benefits available to their employees. The employer should make the adjustment required by increasing the amount of earnings on which Class 1 National Insurance is to be paid, or reducing the amount to be disregarded when calculating earnings for National Insurance and then calculating Class 1 National Insurance on the revised amount. With Class 1A, the Class 1A return should be adjusted. The revised amount of National Insurance should be paid to HMRC and included in the return completed by the employer.

E6.12.4 NIC regulations provide for HMRC to collect NIC in a similar manner to income tax in relation to which the Income Tax (PAYE) Regulations 2003 (the PAYE regulations) apply (for further information on PAYE and the GAAR see E6.7).

E6.12.5 The Social Security (Contributions) Regulations (SSCR) 2001 (the NIC Regulations) set out the due dates for returning information and payments.

E6.12.6 NIC regulations also make provision for recovery of unpaid Class 1 or Class 1 A. Following completion of the procedural requirements HMRC can issue an appealable Decision under Section 8 Social Security (Transfer of Functions) Act 1999.

E6.12.7 Class 4 National Insurance

E6.12.8 Class 4 National Insurance is broadly concerned with self-employed profits and the self-assessment tax regime applies to Class 4. The same procedures as for self-assessment income tax also apply to Class 4 liabilities and the GAAR applies in the same manner as for self-assessment Income Tax set out in E6.

E6.13 Diverted Profits Tax

E6.13.1 Companies must take the GAAR into account in deciding whether they need to notify that they are potentially within the scope of Diverted Profits Tax.

E6.13.2 In considering whether to issue a preliminary notice in respect of Diverted Profits Tax, a designated HMRC officer (for the purposes of Diverted Profits Tax) will have regard to the GAAR.

E6.13.3 The GAAR procedural requirements will need to be complied with before any preliminary notice in respect of diverted profits tax that relies on the GAAR can be issued.

E6.13.4 The procedures and time limits in respect of Diverted Profits Tax are set out in Part 3 FA 2015.

E6.13.5 The normal rights of representation, review and appeal set out in Part 3 FA 15 will apply to any notices in respect of Diverted Profits Tax that rely on the GAAR .

E 6.14 Apprenticeship Levy

E6.14.1 Employers must apply the GAAR in calculating the Apprenticeship Levy. This obligation extends to making Apprenticeship Levy returns. Provisions regarding assessment and payment of the Apprenticeship Levy are included in the relevant regulations,

E16.14.2. Following compliance with the GAAR procedural requirements, HMRC can make assessments in relation to Apprenticeship Levy that relate to the GAAR.

E16.14.3 The normal appeal rights apply in relation to GAAR counteraction as to any other assessment to the Apprenticeship Levy

E7 Consequential adjustments

E7.1 Consequential adjustments sit outside the usual tax administration processes. Consequential adjustments can only be relieving adjustments. They cannot increase the liability of a taxpayer.

E7.2 Consequential adjustments are intended to ensure that overall there is no excessive taxation. For example, if counteraction involved acceleration of a tax charge, then double taxation would result if tax was later charged again in respect of the same amount.

E7.3 In some cases, a taxpayer not subject to the counteraction but connected to the transaction, may claim a consequential adjustment.

E7.4 Consequential adjustments can be claimed within 12 months of GAAR counteraction becoming final. GAAR counteraction becoming final means that the adjustments made to effect the counteraction, and any amounts arising as a result of those adjustments, can no longer be changed, whether on appeal or otherwise.

E7.5 Where counteraction has been by self-assessment, a consequential adjustment claim is only possible where HMRC has been notified of the counteraction by the taxpayer.

E7.6 On a claim being made, HMRC will make just and reasonable consequential adjustments (if any). The methods of making a claim will depend on the tax in question:

- if the claim relates to Income Tax, Capital Gains Tax or Corporation Tax, Sch.1A TMA 1970 applies
- if the claim relates to Petroleum Revenue Tax Sch.1A TMA 1970 applies
- if the claim relates to Inheritance Tax it must be made in writing to HMRC and s221 IHTA applies as if the claim were a claim under that Act
- if the claim relates to Stamp Duty Land Tax or Annual Tax on Enveloped Dwellings, Sch.11A FA 2003 applies

E7.7 All of the claim methods described above provide an appeal right for taxpayers where taxpayers believe that just and reasonable consequential adjustments have not been made.

E8 Proceedings before a court or tribunal in connection with the GAAR

E8.1 Burden of proof

E8.1.1 In proceedings before a court or tribunal in connection with the GAAR, the burden of proof is on HMRC to show that:

- there are tax arrangements that are abusive
- the counteraction of the tax advantages arising from the arrangements is just and reasonable

E8.1.2 This is different to most tax appeals (apart from some penalty appeals) where the burden of proof is on the appellant.

E8.1.3 The standard of proof in all proceedings before a court or tribunal in connection with the GAAR is the civil standard of proof (the balance of probabilities).

E8.2 What must be taken into account

E8.2.1 In determining any issue in connection with the GAAR, a court or tribunal must take into account both of the following:

- HMRC's guidance about the GAAR that was approved by the GAAR Advisory Panel at the time the tax arrangements were entered into
- any opinion of the GAAR Advisory Panel about the arrangements

E8.2.2 This means that the court or tribunal must consider such guidance or opinion carefully and give it due weight.

E8.2.3 The approved GAAR guidance and opinions of the GAAR Advisory Panel 'must' be taken into account, which contrasts with other matters specified in the GAAR (such as material in the public domain) which 'may' be taken into account by the court or tribunal (see E8.5 below).

E8.3 HMRC's guidance approved by the GAAR Advisory Panel

E8.3.1 The GAAR Advisory Panel is not a statutory body but is established and appointed by the Commissioners to carry out the functions specified in the legislation, and certain other functions set out in the Panel's terms of reference.

E8.3.2 The process by which the GAAR Advisory Panel approves HMRC's draft guidance is set out in these terms of reference, rather than in the legislation.

E8.3.3 If an approval is given in accordance with this process, the part of HMRC's guidance which has been presented to the GAAR Advisory Panel is approved by the GAAR Advisory Panel for the purposes of the GAAR legislation.

E8.3.4 An approval by the GAAR Advisory Panel of HMRC's guidance lasts until a later version of the guidance is approved. It is the guidance in existence when the relevant arrangements are entered into which must be taken into account.

E8.4 Any opinion of the GAAR Advisory Panel about the arrangements

E8.4.1 If tax arrangements are referred to the GAAR Advisory Panel by the designated officer, then the Chair of the panel must select three members of the GAAR Advisory Panel to consider it. This sub-panel must give the designated officer and taxpayer

either one, two or three opinion notices. The opinion reached in each of these notices may be different from the opinion reached in the other notices, and each opinion may be reached for different reasons.

E8.4.2 The court or tribunal must take into account all of the opinion notices issued in relation to particular tax arrangements entered into by a taxpayer. This allows for members of the sub-panel to reach differing views, and for those differing views to be taken into account.

E8.4.3 The opinions given by the members of the sub-panel are opinions on whether the entering into and carrying out of the relevant tax arrangements is a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances, including those circumstances and indicators listed in the GAAR legislation. Those opinions will be based on the panel members' own views of the taxpayer's course of action.

E8.4.4 As noted at E4.2 above, this is a different question to the question considered later by the court or tribunal in determining whether tax arrangements are abusive. The court or tribunal has to determine whether the entering into, or carrying out of the tax arrangements can reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions having regard to all the circumstances and the indicators listed in the legislation.

E8.5 What may be taken into account

E8.5.1 In determining any issue in connection with the GAAR, a court or tribunal may take into account:

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

E8.5.2 This provision gives the court or tribunal the power to take matters into account if it wishes, even if it would not otherwise be admissible as evidence. It does not oblige or force the court or tribunal to take these matters into account.

E8.5.3 The reference to statements of Ministers means that a court or tribunal may take into account not only statements made by Ministers in debate in Parliament, but also Ministerial statements made when a tax avoidance scheme was closed down that were in the public domain at the time the relevant tax arrangements were entered into.

E8.6 What about the exclusionary rule?

E8.6.1 There is a general case law rule that references to parliamentary material as an aid to statutory construction are not permissible as evidence. This is known as the exclusionary rule.

E8.6.2 There are some exceptions to the exclusionary rule. These include the rule formulated by Lord Browne-Wilkinson in *Pepper v Hart* [1992] STC 898 which says that the exclusionary rule can be relaxed where the legislation is ambiguous, obscure and certain other conditions apply.

E8.6.3 Arguably, the exclusionary rule (as amended by *Pepper v Hart*), could prevent parliamentary material being used to prove facts such as what the principles or policy objectives of relevant tax provisions are. It is put beyond doubt that parliamentary material can be used to prove such facts, because a court or tribunal can take into account any statements or other material of a Minister.

E8.6.4 In addition, the exclusionary rule (as amended by *Pepper v Hart*) could prevent parliamentary material being used to demonstrate the meaning of the GAAR legislation itself and its statutory construction. It is made clear that parliamentary material can be used to demonstrate this meaning.