



HM Revenue
& Customs

Strengthening Sanctions for Tax Avoidance - A Consultation on Detailed Proposals

Summary of Responses

9 December 2015

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1. Introduction

Background

- 1.1** On 22 July 2015, the Government published the consultation document *Strengthening Sanctions for Tax Avoidance – A Consultation on Detailed Proposals*, which discussed the detail of a series of measures to change the behaviour of those who persist in engaging in tax avoidance. This developed proposals from an earlier consultation published on 30 January 2015.
- 1.2** The document outlined options to change the behaviour of serial users of tax avoidance schemes; proposals for how a penalty for the General Anti-Abuse Rule (GAAR) would work; and a new threshold condition for Promoters of Tax Avoidance Schemes (POTAS). It asked for views on detailed design features such as:
- how the serial avoiders' regime should be structured, how a surcharge might work, restricting access to certain reliefs and when it would be appropriate to name the most persistent serial avoiders;
 - the circumstances under which the penalty for the GAAR will be charged, the penalty rate chargeable and safeguards to ensure proportionality; changes to the GAAR procedure to improve the GAAR's ability in tackling marketed avoidance schemes; and
 - details of new threshold criteria for POTAS, including the number of schemes to be considered over a specified period of time.

Overview of responses

- 1.3** HMRC received 24 responses to the consultation, including written responses and comments made in meetings. A breakdown of the representative capacities in which respondents made comments is below:
- 8 from representative bodies
 - 6 from accountancy firms
 - 4 from law firms
 - 3 from consultants
 - 1 from individuals
 - 1 from other businesses
 - 1 from public bodies
- 1.4** A list of the respondents to the consultation, excluding individuals, is at Annex A.
- 1.5** HMRC is grateful for the responses to the consultation document. We appreciate the opportunity to continue our discussion with stakeholders in respect of the detail of these measures. Please note that further information regarding the measures can be found in the draft legislation that has been published alongside this document.

2. Responses – New Measures for Serial Avoiders

Proposals in outline

2.1 Serial avoiders are a high-risk group of tax avoiders who persistently use avoidance schemes to avoid their true tax liability. The Government is committed to ensuring a robust regime to deter the serial use of avoidance schemes. These proposals achieve that through a range of escalating sanctions when schemes are defeated. Once an individual hits the trigger to enter into the new regime, they would remain in it for an initial 5 year warning period, aimed to establish an enduring pattern of improved behaviour.

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

Q2. What would you consider would be a suitable length for a warning period?

2.2 While there was general agreement from respondents with the model proposed for the regime, several felt that a clear definition of what constitutes an avoidance scheme was lacking. Some were concerned that a defeat in relation to a scheme entered into many years ago could trigger a warning notice, which they felt could potentially be unfair, and questioned the principle of issuing a warning notice following just one defeat. Most respondents agreed that 5 years would be a suitable period of warning, though a small number felt that the period should be shorter. One questioned whether there should be a warning period at all.

Comments included:

“We think it disproportionate to introduce large amounts of new legislation to deter the very few individuals who still intend to regularly use avoidance schemes.”

“The model proposed may work in theory but our experience of the enquiry process suggests that it will be unworkable in practice.”

“We broadly agree with the proposed regime model.”

“We agree that the model adopted is appropriate...”

Government response

2.3 The Government is grateful for these views and believes the proposed model is an appropriate response to deter serial tax avoiders, who remain a high-risk group. The warning period needs to be of sufficient length to establish improved behaviours. The Government considers that 5 years is appropriate for this purpose.

Q3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used, help discourage further avoidance?

2.4 Responses to this proposal were mixed, with some expressing concern that 'avoidance scheme' was too loosely defined, and a single definition should apply across the whole serial avoiders' regime. Some felt additional reporting requirements could be a disproportionate burden on taxpayers. However, the majority of respondents felt a reporting requirement would be a useful tool both to provide more detailed information on schemes to HMRC and to keep the risks of entering avoidance at the forefront of taxpayers' minds.

Government response

2.5 The Government is grateful for these views and believes a reporting requirement will be a valuable aspect of the serial avoiders' regime. The definition of 'avoidance scheme' for the reporting requirement will be used for the regime as a whole.

Q4. Which of these approaches would best meet the five penalty principles?

Q5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?

Q6. What other key features should form part of the surcharge to ensure it meets the five principles?

2.6 The consultation set out two possible surcharge models: a simple, low-level, charge similar to late-payment penalties; or a higher surcharge rate with possible reductions to reflect co-operation or disclosure. Both would increase should the avoider submit multiple returns during the warning period containing avoidance schemes that were defeated. Most respondents felt that, of the two approaches, the lower surcharge would be a better option, with some noting that a hybrid may combine the benefits of behavioural change with a system that was easy to understand and administer. A minority of respondents were concerned that the need for a penalty to deter serial avoiders ought to be more strongly evidenced and some felt that imposing a surcharge on a taxpayer for past actions may introduce an element of retrospection as a surcharge could be imposed on the failure of a scheme that was entered into before this legislation came into effect. A small number believed the surcharge should be imposed only once per scheme, not for each time the same scheme appeared on a taxpayer's returns, for example in multiple years.

2.7 Of those who considered that the surcharge should be set at a high level, most felt that actions such as co-operation (for instance making a full disclosure) and timely resolution on the part of the taxpayer should lead to the surcharge being reduced. Others believed that, for consistency and simplicity, the criteria for reduction that appear in Schedule 24 to FA 2007 should be applied to the surcharge.

2.8 Of those respondents who expressed a view on Q6, most considered that a sliding scale of surcharge should be used for those repeatedly using avoidance

schemes but differed markedly on how this should be realised. Some preferred a scale with reductions for co-operation and disclosure, a few argued for starting low and gradually increasing, whilst others suggested that the scale should start at a high level and increase further for non-compliance. However, some were concerned that the surcharge could discourage genuine investments as there was no single definition of 'tax avoidance,' a term which could range from egregious tax avoidance schemes to what some people might consider genuine technical disputes. One respondent suggested creating incentives for voluntary exit from avoidance schemes by imposing a lower penalty for taxpayers who settle before their case reaches tribunal or within a set time period of an FTT decision.

Government response

2.9 The Government is grateful for these views and considers that a simple surcharge, starting at a low level, with the rates of charge increasing with the number of scheme defeats but no reductions for co-operation will best discourage serial tax avoidance. The application of appropriate safeguards, as discussed below, will ensure that the impact of a surcharge is proportionate and focused on those who do not take proper precautions to ensure their tax affairs are in order.

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

2.10 Roughly half of the respondents considered that excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, was a good idea, whilst the other half felt that it would not be fair to the taxpayers who would be forced to seek extra advice that may not otherwise be needed. Some of those opposed to restricting the defence of reasonable excuse in this way suggested that HMRC should widely publicise their view that reliance upon advice on a generic transaction alone is unlikely to constitute reasonable care.

Comments included:

"...excluding reliance upon advice addressed to a third party would not only be reasonable but most logical."

"There are a very broad range of circumstances under which advice will be sought and given in respect of arrangements caught by the rules. It is very hard to be prescriptive about the nature of such advice."

"...it would not be fair to taxpayers to exclude from the 'reasonable excuse' defence those cases where reliance has been placed on third party advice on the efficacy of an arrangement."

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

2.11 The responses received were generally against putting the onus of proof on the taxpayer to demonstrate reasonable care. Reasons given comprised the belief that HMRC already has adequate information and inspection powers to enforce prompt compliance in avoidance cases; that delays are often caused by the promoter rather than the taxpayer; that this proposal would be unfair as it would amount to an attack on taxpayer rights; and that, although it would be likely to change taxpayer behaviour, such a move is not justified under these circumstances. Others felt this proposal would have little practical effect.

Government response

2.12 The Government believes that the defence of reasonable excuse in an appeal against a surcharge will provide a more effective and appropriate safeguard than reasonable care. With reasonable care, the onus is on the taxpayer to demonstrate that he has a reasonable excuse once it has been established that a failure or inaccuracy has occurred. A defence of reasonable excuse should specifically exclude cases where the taxpayer has relied on advice that was not made by reference to his or her particular circumstances. It is entirely reasonable that the taxpayer should not be able to rely on generic advice given which has not taken into account their own circumstances in establishing that they had a reasonable excuse. The Government considers that this approach provides an appropriate level of protection for the taxpayer while allowing HMRC to administer the regime effectively to achieve its objectives.

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

2.13 Only a minority of respondents believed that public naming of the most persistent users of tax avoidance schemes that HMRC defeats would be a fair and effective deterrent. Those against this proposal argued that naming would give an impression of illicit behaviour despite their belief that they had acted within the law. Others wanted further research to understand the compliance impact other naming provisions have had and more consideration as to what would constitute a 'defeat,' which could result in naming. Of those who agreed with the proposal, one suggested that HMRC provide promoters with guidance on fulfilling their fair processing obligations under the Data Protection Act and to direct them to the ICO's privacy notices code of practice. A small number of respondents believed there should be a right of appeal against a decision to name or tribunal approval sought ahead of publishing names.

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

2.14 There was an even split in terms of respondents agreeing or disagreeing with the safeguards proposed for naming serial avoiders. However, there was a general view that tribunal approval should be obtained and that a right to appeal the decision be incorporated into the safeguards. Other suggestions for further safeguards included ensuring that the same format for publishing is used as for Publishing Details of Deliberate Defaulters (PDDD) at present; that HMRC set a precise time limit for publication as has been done for PDDD; and that the taxpayer details to be published be established and publicised early on.

Comments included:

“These safeguards should prove to be sufficient...subject to HMRC’s internal procedures being set up in a way such that the bar for entering into the naming regime is set at a suitably high level and sufficient caution is then applied.”

“...tribunal approval should be obtained before naming.”

Government response

2.15 The Government notes these views. It believes that the potential naming of serial avoiders will be a useful tool to counter serial avoidance. To ensure clarity and to maintain the effectiveness of the regime, a ‘defeat’ of a scheme should be defined in the same way as for the other sanctions. The application of appropriate safeguards have been modelled on PDDD to ensure consistency of approach and that details of an individual engaged in serial avoidance could only be published once objective tests were met. The Government believes that, as with PDDD, neither a right of appeal against a decision to name nor a requirement for a tribunal to approve naming would be appropriate. However, HMRC should advise any taxpayer if they are considering publishing that person’s details and give a suitable time for the taxpayer to make any representations as to why their details should not be published. Once a person’s details are published by HMRC, they will be removed from publication after 12 months.

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

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

2.16 Regarding the restriction of reliefs, the consultation set out two possible approaches, including restricting access to the relief abused and restricting access to categories of reliefs. Most respondents were opposed to this proposal. Many considered that a blanket restriction to certain reliefs, given the range of reliefs in point, would not be appropriate or proportionate. Some believed that a taxpayer’s historic activity should not determine their right to access reliefs and others that such a

restriction would be overly complex and could act as a disincentive to investment designed to stimulate growth.

2.17 However, a small number of respondents saw the merits in this proposal and called for HMRC to only apply restrictions to 'incentive' reliefs, though no definition was provided of these, and not those integral to tax structure, or accounting or financial procedures. It was also suggested that HMRC should clarify how this restriction would apply to cases that could be many years old that were being dealt with before this legislation comes into effect. One respondent recommended ensuring that a definition of relief was consistent with the Taxes Management Act, whilst another suggested that instead of a proposal to restrict access to reliefs, it would be more appropriate to impose a further penalty on returns which abused reliefs.

Government response

2.18 The Government notes these views. It believes that this measure will discourage future use of tax avoidance schemes which exploit reliefs in a way not intended by Parliament. Reliefs are an important part of the tax system and are designed for a number of specific purposes. Taxpayers who exploit reliefs in a way or to a scale not intended when the relief was designed not only give themselves an unfair advantage over those who abide by the rules, they undermine the reliefs themselves. Restricting reliefs would have a behavioural impact deterring people from repeatedly entering into schemes which abuse reliefs.

2.19 However, the Government accepts that to deny access to reliefs for 5 years, extended if HMRC defeats another tax avoidance scheme within that time, could have a significant effect on businesses and individuals. Therefore, the Government proposes to reduce the period that a taxpayer can be denied access to reliefs to 3 years and that this period can only be extended if there is a further defeat of a scheme used within the three years and which exploits a relief. Avoiders that had been caught by the regime would be able to make claims once they are out of the regime. Reliefs relating to donations to charities and to contributions to registered pension schemes will also be excluded from the restriction of reliefs. The Government hopes this reassures those who expressed concerns.

Q13. Would focusing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?

2.20 Many agreed with the stated proposal while others expressed concerns that the definition of 'tax advantage' in the DOTAS rules is very wide, which may bring into the regime arrangements they had previously considered legitimate tax planning. One respondent stated that they would also welcome a comprehensive review of the DOTAS regime with the intention of determining the extent to which it should be used to underpin other mechanisms and sanctions, whilst another called for further consideration to be given to any link to arrangements covered by DOTAS on the basis that some DOTAS categories remain broad.

Comments included:

“...it seems a very sensible approach...”

“...focusing on a definition based on schemes notifiable under ...DOTAS and ...VADR would assist in deterring potential serial avoiders from entering into multiple schemes.”

“We note that such an approach might be too wide and could bring within scope into the regime certain arrangements which we would not expect to be considered in the context of the serial avoiders’ regime.”

Government response

2.21 The Government notes these views and believes that both DOTAS and VADR provide a useful and easily understood definition of avoidance schemes for the serial avoiders’ regime.

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

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

2.22 The majority of respondents to Q14 felt that it would be appropriate to include arrangements defeated by the GAAR, given the policy context. Some felt that the inclusion of Follower Notices in this definition would bring into the scope of the regime arrangements that only HMRC believed to be avoidance, with no independent oversight. Although the issue of a Follower Notice is indicative of a taxpayer participating in an avoidance scheme, many felt that this does not necessarily mean that the scheme has been ‘defeated.’

2.23 Respondents agreed that a scheme should be viewed as ‘defeated’ once a dispute is settled by final litigation in HMRC’s favour. However, responses were mixed over whether a dispute settled by agreement with the taxpayer should be viewed as a ‘defeat.’ Most considered that this would provide an incentive to taxpayers to persist with their dispute with HMRC. Some felt that the specific terms of an agreement between HMRC and the taxpayer should be carefully considered as taxpayers settle their cases for a variety of reasons. Suggestions included that a case settled by agreement should only constitute a ‘defeat’ when the taxpayer had capitulated rather than reached a compromise.

Government response

2.24 The Government notes these views. As outlined in the consultation documents, the Government considered that the serial avoiders’ regime should include schemes subject to Follower Notices and GAAR counteraction notices. Follower notices are issued to those whose schemes are very similar to an avoidance scheme that has

been defeated in court by another user's litigation. The regime contains inbuilt definitions, which ensure that it applies to tax arrangements that are intended to give a tax advantage and are found by a Tribunal or court not to work.

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

2.25 Some respondents felt that a transition period during which avoiders could withdraw from schemes in order for them to avoid being a potential trigger would work well. However, others were concerned that this proposal would amount to retrospective legislation and that if schemes entered into before the regime came into force could trigger a warning period, the regime could operate as a disincentive to settle past schemes.

Government response

2.26 The Government is grateful for these views. The transitional provisions for this regime will work to give taxpayers currently engaged in avoidance schemes until the start of the next tax year following the Finance Act it has been introduced in to consider their position. Any who withdraw from their schemes before the regime comes into effect will not be caught by it. Those who persist in their schemes which they entered into before the regime comes into effect will be issued with warning notices when their schemes are defeated and will have to meet the reporting requirement, but no sanctions will apply in respect of these defeats. In terms of concerns surrounding an element of retrospection, the Government believe that giving taxpayers currently engaged in avoidance schemes the opportunity to withdraw from these schemes before the regime comes into effect would mean that they would not be caught by it. There will be no prospect of penalties, naming or restricting reliefs in respect of tax avoidance schemes used before Royal Assent and the Government hopes this reassures those concerned.

3. Responses – Penalties for the GAAR

Background

3.1 The consultation made a number of proposals concerning the introduction of a penalty for GAAR cases. Specifically, it considered:

- Whether a penalty for GAAR cases would increase the GAAR's deterrent effect.
- Whether the proposed opportunity for taxpayers to correct their tax position is appropriate.
- A model for a GAAR Penalty and the circumstances in which it would be charged.
- The rate at which a GAAR penalty would be charged.
- The inclusion of safeguards to ensure that the level of penalty is correct.
- Whether further measures are needed to strengthen the impact of the GAAR.

General responses on the proposals for Penalties for the GAAR

3.2 Responses to the consultation were mixed. Some respondents queried whether any further anti-avoidance legislation was needed at all with regard to the GAAR, saying that there had been no time to evaluate the effectiveness of the suite of anti-avoidance measures introduced in Finance Act 2014. Many expressed the view that there had not been sufficient time to evaluate the impact of the GAAR and queried the need to introduce a penalty at this stage. However, responses to the consultation largely confirmed that proposed safeguards are appropriate and agreed with the development of these measures.

Government response

3.3 The Government is committed to ensuring there is an effective range of deterrents to those who engage in tax avoidance. Introducing a GAAR penalty is one aspect of HMRC's continued work to develop ways of responding to those who seek to circumvent the rules and engage in abusive arrangements.

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

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

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

3.4 Responses here were mixed but the majority agreed that the taxpayer should have the opportunity to correct their affairs for matters potentially caught by the GAAR. However, of those that disagreed with the proposal, some were concerned about the uncertainty surrounding what arrangements could be 'caught' by the GAAR.

3.5 As for agreement over the proposed rate for the GAAR Penalty, the majority of respondents felt that the proposed rate was too high, with some suggesting limiting the rate to 25%. Most respondents considered that the proposed penalty model was premature or disproportionate. Some felt that a preferred model would be structured so that a penalty would only be considered where a taxpayer had already been involved in a GAAR case and lost.

Government response

3.6 The Government is grateful for these views. For the reasons outlined in the consultation document, the GAAR aims to deter taxpayers from engaging in abusive tax avoidance but there is currently no specific disincentive from entering into GAAR arrangements as opposed to other types of tax avoidance. The Government considers that a GAAR-specific penalty will further discourage participation in these forms of tax avoidance, thereby strengthening the GAAR's deterrent effect.

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

3.7 Most of the respondents agreed that this safeguard, detailed below, would be appropriate for the GAAR Penalty, with some suggesting the need for detailed guidelines to be developed on how this safeguard will be applied in practice.

Government response

3.8 The safeguard involves ensuring that a GAAR Penalty reflects the binary nature of the GAAR, that the level of penalty is proportionate, and protects taxpayer rights. The Government is pleased that stakeholders agree with these views and will consider the need for guidance as the measure develops. A limited mitigation power (such as that which currently exists at Section 102 Taxes Management Act 1970) for exceptional cases would ensure that no such disproportionate outcomes could arise and would allow HMRC to stay or agree a compromise regarding a GAAR penalty in circumstances where charging such a penalty produced a response that is contrary to the policy intention of this penalty.

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

3.9 The measures proposed suggest allowing a GAAR Advisory Panel opinion to enable counteraction of the same arrangements by other users and align GAAR procedures with the overarching enquiry framework. Responses here were mixed, with a number of respondents agreeing in principle that it should be possible for a GAAR Advisory Panel opinion to counteract the same arrangements used multiple times, and that this would considerably streamline the GAAR procedure in cases of marketed avoidance schemes. However, opinions on how this ought to be done varied considerably, whilst many other respondents felt that a Panel opinion should not enable counteraction of marketed avoidance schemes due to the non-judicial nature of the Panel, as it might not necessarily take account of other taxpayers' facts and circumstances. Most respondents did not comment on whether it ought to be possible to make a GAAR "protective" assessment, with those that did mainly considering that such a measure would be unlikely to be problematic.

Government response

3.10 The Government notes these responses. It remains of the view that the GAAR procedure could be streamlined more effectively to tackle marketed tax avoidance. Currently, the GAAR procedure requires individual cases to be referred to the GAAR Advisory Panel, even if they are part of the same marketed avoidance scheme, which seems an inefficient use of HMRC and the Panel's resources. It therefore intends to amend the GAAR procedure such that a GAAR Advisory Panel opinion can be applied to counteract multiple users of the same arrangements under the GAAR.

3.11 It will ensure that this process includes appropriate safeguards so that the taxpayer retains the opportunity to explain how their individual circumstances differ from other users of the same arrangements. The Government also considers that the GAAR should be aligned to the rest of the overarching enquiry framework, so it therefore intends to introduce the ability for HMRC to make "protective" assessments in cases where they consider the GAAR applies. Further information regarding these changes can be found in the draft legislation that has been published with this document.

4. Responses – New POTAS threshold condition for promoters whose schemes are regularly defeated

Background

4.1 The POTAS regime aims to change promoter behaviour by targeting certain high risk behaviours. These are set out in the legislation as a series of “threshold conditions” which the promoter may exhibit in their behaviour; for example, failure to comply with information notices. Where these thresholds are met, the promoter may be issued with a conduct notice requiring them to meet certain conditions during a two year period. If they do not comply with the conduct notice where one is issued, they can be issued with a monitoring notice, which carries certain consequences.

4.2 The consultation document proposed an additional threshold condition which would be met, firstly, where there are 3 defeats of a promoter’s schemes in a three-year look-back period. Secondly, if there was one defeat in this time, the period would then look forward 6 years and two further defeats of schemes in this 6 year period would trigger the threshold condition. The intention behind this proposal is to change the behaviour of promoters who repeatedly market schemes that HMRC defeat.

General responses on the proposals for new POTAS threshold conditions

4.3 Although responses to the consultation were mixed in terms of showing support for the introduction of the proposed new POTAS threshold, most respondents understood the Government’s wish to introduce effective sanctions to reduce the supply of tax avoidance arrangements, particularly in relation to promoters who market arrangements for multiple schemes that HMRC defeats.

Government response

4.4 The Government is grateful for all views and considers that there is a need to strengthen POTAS. Allowing this threshold condition to apply to schemes that were promoted in the past will provide an effective incentive to change promoter behaviour in relation to the types of scheme they might consider promoting going forwards.

Q22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?

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

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

4.5 Although responses were mixed on what types of defeated scheme should be included as triggers (schemes notifiable under DOTAS or VADR; defeated under the

GAAR or a TAAR; or following the issue of a Follower Notice), respondents mostly disagreed with the inclusion of schemes defeated under a TAAR or following the issue of a Follower Notice. The argument put was that TAARs are often applied by reference to the motives of particular participants in a transaction and a promoter may be unable to determine with any certainty whether or not the motives of other scheme participants are such that a TAAR applied. Some were not clear on what legislative provisions would be treated as TAARs or how they would be identified. One respondent argued that the defeat of an arrangement following the issue of a Follower Notice should not be relevant in this context as Follower Notices could be issued in relation to schemes promoted by an unrelated promoter, regardless of the actual promoter's behaviours.

4.6 Most respondents considered that the proposed definition of 'defeat' should include cases that are settled in HMRC's favour through litigation but that those settled by agreement should not constitute a 'defeat,' unless all users settled in this way. They argued that taxpayers decide to settle or continue a dispute for a range of their own unique reasons, and may not be influenced by promoter behaviour. Some, however, were content with the definition of defeat as proposed. Others considered that, if settlements by agreement were taken into account and the particular arrangement had a high number of users, at least 50% should have settled by agreement before the scheme could be considered 'defeated.'

Government response

4.7 The Government is grateful for these views. In relation to TAARs, thought will be given to how to make clear which TAARs are in point for the purposes of this threshold. While it may not be possible for a promoter to discern the motives of each user of the scheme, they will be aware that the scheme brings the application of the TAAR into play and will be able to make decisions about whether to promote schemes which could lead to a TAAR being invoked. The Government acknowledges that the Follower Notice provisions can apply to a scheme of promoter A where a scheme promoted by an unrelated promoter, B, is defeated. However, issuing of a Follower Notice will always include careful consideration of the context of the ruling and whether it is reasonable to apply the same reasoning to the context of another case. It would also need to be coupled with other defeats before the threshold condition is met. Should there be no other behaviours of concern in relation promoter A, the opportunity letter stage of the POTAS process will ensure that there is no need for HMRC to issue a conduct notice.

4.8 The Government appreciates that taxpayers can have many and varied reasons for agreeing to settle with HMRC and these are outside the control of the promoter. However, the intention of this threshold condition is to change the behaviours of promoters whose schemes are regularly defeated. Taking respondents' views into account, the Government has decided to increase the trigger for the proportion of cases that are settled by agreement, which can be used to count a scheme as defeated, to 75% of users. This figure gives a reasonable base to conclude that the scheme has not provided the asserted tax advantage.

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

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

4.9 The majority of respondents disagreed with the proposed methods of counting defeated schemes. Some considered that testing the proportion of schemes defeated would be a more appropriate method, taking into account the size of the promoter and the nature of the practice as, otherwise, the provision could apply to some professional firms outside the intended scope of POTAS. Others felt that the proposed number of defeats (3) was too low.

4.10 Views on the time period were quite consistent, with most respondents concerned that 3 defeats over 9 years would not constitute 'regular' involvement in defeated schemes, indicating a behavioural pattern carrying a lower risk. Some suggested either increasing the number of defeats that trigger the provision or lowering the timeframe, for example three defeats in 6 years (3 years back and 3 forward) rather than a 9 year period. Others felt that this proposal could be brought more in line with Serial Avoiders (3 years back and 5 forward) for consistency.

Government response

4.11 The Government notes these views and has considered the concerns raised around the number and timing of defeats. There is a good case for fixing the number of defeats at 3, which is sufficient to provide evidence of an established pattern of behaviour. Whilst it is not essential to bring the time period for this threshold condition into line with that for the serial avoiders' proposals as they are entirely separate regimes, the Government agrees that both provisions focus on an established pattern of behaviour. The Government will therefore move to a period of 3 years back and 5 years forward (a maximum of 8 years).

4.12 The Government believes that the use of existing provisions of the POTAS rules, which require the authorised officer to consider the significance of the threshold condition breach and the amount of tax at risk, will ensure that an appropriate result is achieved. Under the existing POTAS regime, meeting a threshold condition does not lead to a conduct notice unless the authorised officer is satisfied that firstly, the meeting of the condition is significant for a promoter, and secondly, that the likely impact on tax collection of a conduct notice means it is appropriate to give one. The new threshold condition will also be subject to these controls. When an authorised officer is considering issuing a conduct notice to an organisation with a very large portfolio of tax advice, they may decide it would be relevant to take into account the size of the promoter's tax operations when determining whether they should regard the number and timing of the defeats as significant.

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

4.13 The majority of respondents considered that it would inappropriate to include any case where litigation had begun before the new threshold condition became law, and that it would be fairer if the new threshold condition only applied for new schemes entered into after the legislation took effect. Some respondents felt that this would avoid any possible retrospection, whilst others considered it reasonable to include the defeat of any scheme, even if it was already in the court system at the commencement date of these provisions.

Government response

4.14 The Government wants the new threshold condition to have a swift effect on promoter behaviour, and does not consider it appropriate to give promoters an extended period in which to continue to promote schemes destined for defeat. The intention of this threshold condition is to change the future behaviour of the promoter as quickly as possible.

4.15 It would also increase consistency of treatment between promoters to take into account schemes marketed before the new proposals took effect, provided they are defeated during the relevant time frame. For instance, a promoter may have a number of schemes that had been promoted, entered into, and litigation begun *before* the new threshold condition takes effect, but the litigation result is delivered *after* the threshold condition comes into effect. They will be in the same position as a promoter who has a mixture of schemes marketed, entered into and litigation entered into *before* and *after* the threshold condition applies, and a promoter whose schemes are all marketed, entered into and litigation commences *after* the threshold condition applies. The point here is that in all three cases the promoter is having a series of scheme defeats over the prescribed period after the threshold condition comes into effect. This pattern of behaviour is clearly high risk and the Government continues to believe that this behaviour would warrant a conduct notice being considered. If the promoter had changed their behaviour and met the terms of the conduct notice, then they would not face a monitoring notice.

Annex A: List of stakeholders consulted

HMRC does not normally identify the names of any individuals who contribute to a consultation. Where there has been any uncertainty over whether a consultation response represented personal views or those of an organisation, we have assumed that it was made in a personal capacity. Please note that whether a response is deemed to be made by an individual or organisation will have a bearing only on whether the name of the stakeholder is published below.

- AFME
- Aiglon Consulting
- Allen & Overy LLP
- Association of Accounting Technicians
- Baker Tilly Tax and Accounting Ltd
- BBA
- BDO LLP
- Chartered Institute of Taxation
- Confederation of British Industry
- Deloitte LLP
- EDF Tax Ltd
- Ernst & Young LLP
- Gerald Hill Taxation Ltd
- Harcourt Capital LLP
- Information Commissioner's Office
- KPMG
- London Society of Chartered Accountants
- Pinsent Masons LLP
- PricewaterhouseCoopers LLP
- Slaughter and May LLP
- The Institute of Chartered Accountants in England and Wales
- The Law Society
- Virgin Money plc

Annex B: Consultation process and statistics

HMRC received 24 responses to the consultation document published by the Financial Secretary, David Gauke, on 22 July 2015.

These came from a range of businesses, representative bodies, trade associations, professional bodies, firms and individuals.

In addition to receiving written responses, HMRC held a number of meetings to discuss the proposals with businesses, representative bodies and professional firms.

Summary of Consultation Questions:

Question	No of responses
Q1. Do you agree with a regime based on this model? If not, please outline the reasons for your view.	15
Q2. What do you consider would be a suitable length for a warning period?	14
Q3. Would requiring serial avoiders to certify annually that they have not employed avoidance schemes, or to provide details of those they have used help discourage further avoidance?	16
Q4. Which of these approaches would best meet the five penalty principles?	13
Q5. If you believe the surcharge should be set at a high level, what should the taxpayer have to do to earn any reduction in the surcharge?	8
Q6. What other key features should form part of the surcharge to ensure it meets the five principles?	10
Q7. How should a reasonable excuse safeguard be structured to be fair to the taxpayer without undermining the effectiveness of the surcharge? Would excluding advice addressed to third parties, or not made by reference to the taxpayer's circumstances, achieve this aim?	17
Q8. If appealing against the surcharge on the grounds of having taken reasonable care, do you agree that putting the onus of proof on the taxpayer to demonstrate reasonable care would remove any incentive to engage in delaying tactics?	14
Q9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?	15
Q10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?	13
Q11. Which of these options would provide the best approach to restricting access to reliefs when they have been exploited by a serial avoider as part of a defeated avoidance scheme?	17

Q12. If you favour restricting the power to restrict reliefs to certain categories, how should those categories be defined?	13
Q13. Would focussing on a definition based on schemes notified or notifiable under DOTAS and VADR be sufficient to deter potential serial avoiders from entering into multiple schemes? If not, what other approach do you favour?	16
Q14. Should arrangements to which Follower Notice or GAAR have been applied be included in the definition of a scheme for these purposes? If not, please explain why you do not think this would be appropriate.	14
Q15. Should a scheme be viewed as 'defeated' once a dispute is settled in HMRC's favour, either by agreement with the taxpayer (or, as the case may be, acceptance of a Follower Notice or GAAR counteraction), or by final litigation being settled in HMRC's favour? If not, what criteria would you apply?	15
Q16. How do you think a transitional provision should best work to encourage avoiders to withdraw from avoidance schemes they have already employed?	13
Q17. Do you agree that the proposed opportunity for taxpayers to correct their tax position is appropriate? Please explain your view.	15
Q18. Do you agree that the proposed rate for the GAAR Penalty is appropriate? If not, what penalty rate would you propose and why?	14
Q19. Do you agree that this penalty model will act as a fair and proportionate deterrent? Please explain your view.	14
Q20. Do you agree that this safeguard would be appropriate for the GAAR Penalty?	15
Q21. Do you have any views on the development of these measures?	15
Q22. Would including the definitions listed above as triggering this threshold condition be sufficient? If not, what other approach do you favour?	18
Q23. What are your views on the options for the trigger for the threshold condition? Please explain your reasoning.	14
Q24. At what point should a scheme that has high numbers of users count as having been defeated?	12
Q25. What are your views on the proposed methods of counting defeated schemes that will trigger this threshold condition? Do you think that a rule regarding proportions of cases defeated would be appropriate?	14
Q26. Do you agree that a period of up to 9 years provides sufficient time to accurately establish regularity of behaviour for this threshold condition? What are your views on the furthest date in the past the authorised officer should consider?	16
Q27. What provisions should be made for cases that are already in the courts but have not yet concluded?	14