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The Hundred Group
of Finance Directors

Tax Committee

Mr Chris Davidson
HM Revenue and Customs
AAG Policy
3rd Floor
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Dear Mr Davidson

Consultation on the introduction of a general anti-abuse rule 'GAAR' targeted at artificial and abusive tax avoidance

We welcome the opportunity to contribute to the proposed introduction to the Finance Bill of a general anti-abuse rule 'GAAR' and believe that this legislation represents an important part of HMRC's ability to pursue companies and individuals who are engaged in abusive tax avoidance schemes.

Who we are

The Hundred Group represents the views of the finance directors of FTSE 100 and several large UK private companies. Our member companies represent almost 90% of the market capitalisation of the FTSE 100, collectively employing over 7% of the UK workforce and in 2011, paid, or generated, taxes equivalent to 13% of total UK Government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

Our views

As representatives of responsible businesses we welcome proposals to introduce provisions that are focussed on abusive and wholly artificial arrangements and which are balanced and proportionate. We are, however, concerned that the proposed legislation may go beyond the desired balanced and proportionate intent.

We are concerned that the scope of the proposed legislation is too broad. Specifically, we would recommend that the GAAR Study Group Report's ("the Report") definition of the purpose of the GAAR being to *"counteract **abnormal** arrangements which, but for this Part, would achieve an abusive tax result from the application to the arrangements of the provisions of the Acts, and which are **contrived** to achieve such a result"* be included in the legislation in order to limit the GAAR to what we believe is the intended purpose. We believe the use of the words 'abnormal' and 'contrived' are important in this definition in the identification of arrangements which would be covered by the GAAR. We would also recommend the clarification that 'tax arrangements' fall within the scope of the GAAR 'if and only if' the inclusion of any abnormal feature can reasonably be considered to have as its main purpose the achievement of an abusive tax result. We would also

recommend that the wording of the "double reasonableness" test is revised such that it provides more positive assurance than currently. We would suggest the wording from the Report is adopted, which provided more certainty to the taxpayer that an arrangement is not considered abusive if it could be considered to be a reasonable exercise of choices of conduct afforded by the tax code. We believe the current lack of definition and broad scope proposed creates uncertainty for taxpayers and will undoubtedly have an effect on the competitiveness of the UK tax regime and UK business.

We believe that the proposed legislation should include some level of materiality or significance in the arrangements which are covered by the GAAR. This was recommended in the Report and could be included within the definition of tax advantage in order to clarify that HMRC will adopt a common sense approach to investigations of arrangements where the benefits are immaterial to the transaction and clearly trivial to the taxpayer involved.

We believe that the proposed GAAR legislation is an opportunity to reduce the number of targeted anti-avoidance rules 'TAARs' that exist and to help simplify the large amount of legislation and guidance that is currently in place. The consultation paper does note that the need for new TAARs may be reduced, but we would like to see a firm commitment to review of all current TAARs and consideration given if they can be eliminated with the introduction of the GAAR.

The consultation document seems unnecessarily complicated regarding the commencement date of the GAAR, without being entirely clear on what constitutes a 'fully completed' arrangement. We would welcome additional guidance on what a fully complete arrangement is (our view is that it would be one where the documentation is completed regardless of whether the scheme would run past 1 April 2013) and believe it would be simpler to state that any arrangement that is fully completed prior to the commencement date is grandfathered and any arrangement that is not fully complete is covered by the GAAR.

We fully support the formation of an Advisory Panel 'the Panel' and the issuance of guidance around the GAAR and believe that these are critical to the application of this legislation. We would welcome additional clarity on the constituents of the Panel and believe more guidance could be issued to confirm the number of people on the panel and the mix of HMRC and non-HMRC personnel. We welcome the proposals to include subject matter experts on the Panel. We are concerned however, that the initial guidance will be drafted by HMRC prior to the formation of the Panel, as we believe this (along with the ambiguity as to the Panel member numbers and constituents) could lead to a situation where the guidance has been unduly influenced by HMRC and is not prepared by a truly independent Panel. We believe that there could be a benefit in delaying the commencement date until Royal assent in order for the guidance to be properly prepared by the Panel. This would also have the benefit of reducing the cost of implementation due to the Panel having to review and redraft the initial guidance prepared by HMRC as suggested in the consultation paper.

We have also responded to a number of the specific questions raised in the consultation paper and include these in the annex to this letter. We would welcome the opportunity to engage further with HMRC on these proposals as we believe it is in all our interests to ensure that the reforms of business taxes continue to give businesses confidence in the tax regime of the United Kingdom and to allow a competitive environment for them to operate in.

Yours sincerely

Andrew Bonfield
Chairman
The Hundred Group Tax Committee

Annex - Answers to questions raised in the consultation paper

We have not addressed all 15 questions raised in the consultation paper, instead focussing on the ones that are most relevant to our membership, which are set out below:

1. Do you agree that the GAAR should be limited to the taxes and duties set out in clause 1(3) of the Draft GAAR initially? Are there any particular issues relating to how the GAAR would function in relation to the taxes (including NICs) that are proposed to be included?

We understand that the Report considered all forms of taxation and that all were excluded except for income tax, corporation tax, capital gains tax and petroleum revenue tax due to technical and other reasons that meant that inclusion in a GAAR would be inappropriate. Whilst we were not directly involved in the preparation of the Report, we would welcome clarification on why the additional taxes (over and above the ones in the Report) have been included in the GAAR and what the rationale for their inclusion is.

2. Do you agree that the GAAR should be capable of counteracting UK tax advantages obtained under double tax agreements?

We are concerned that the ability for HMRC to use the GAAR to deny treaty rights without reference to specific provisions of the treaty or other agreement procedure would undermine both the UK's international position and business's ability to rely on international treaties. We believe that instead of relying on the GAAR legislation, HMRC should negotiate anti-abuse provisions with the relevant authorities and include them in the relevant treaties to ensure a consistent international application.

3. Do you agree that (1) the proposed "main purpose" rule serves as a useful filter, when coupled with the concept that arrangements must also be "abusive" and (2) a specific exclusion for arrangements without tax intent is not required? If you think a specific exclusion is required, please explain why.

We agree that a "main purpose" rule would serve as a useful filter for abusive arrangements, however are concerned that, as has been seen with other legislation, the "main purpose" rule as currently drafted is too vague and subjective to be applied confidently by many taxpayers. We believe that the scope of the GAAR has been widened too much when compared to the Report and would recommend removing the words 'or one of the main purposes' from the legislation to ensure that the GAAR remains focussed on abusive and artificial arrangements whose sole purpose is obtaining a tax advantage. We recommend the inclusion of the words "abnormal" and "contrived" when defining which arrangements are caught by the GAAR (as drafted in the Report), to ensure that only egregious abuse is covered by the GAAR rather than activities which are within the bounds of reasonable tax planning.

4. Do you agree that the proposed "double reasonableness" test operates as intended to counteract only artificial and abusive schemes (such as those described in Annex B)?

We believe that as drafted, the "double reasonableness" test does not provide the clarity and certainty taxpayers require. We prefer the original Report wording "An arrangement does not achieve an abusive tax result if it can reasonably be regarded as a reasonable exercise of choices of conduct afforded by the provisions of the Acts." We believe this provides more certainty to the taxpayer than the current negative assurance wording as it puts more of the burden of proof on HMRC to show that an arrangement is not a reasonable choice for a taxpayer under the tax code furnished by Parliament. We also believe that without a clear definition of what is considered reasonable, this legislation could provide HMRC with a mandate to investigate arrangements that were not initially considered to be within the scope of the GAAR.

7. The Government would welcome views on the options set out regarding commencement, how transitional arrangements should be dealt with, and whether there should be different rules for different taxes where appropriate.

We believe that, as noted previously, the consultation paper is unnecessarily complicated regarding commencement and transitional arrangements. We do not believe that there needs to different rules for different taxes, and would suggest that all arrangements that are fully completed prior to commencement date are excluded from the GAAR. We strongly recommend further guidance on what a 'fully completed' arrangement is, to enable taxpayers to evaluate if their arrangements are included in the GAAR or not and we suggest that a 'fully completed' arrangement would be one where all documentation is signed prior to 1 April 2013, even if it results in an annual tax deduction for the next five years.

8. The Government welcomes views on clause 5(1) of the Draft GAAR.

Whilst we agree with the broad intent of clause 5(1), we do not understand why the phrase "to the civil standard of proof" has been omitted from the draft GAAR, having been included in the Report. Whilst the consultation paper states that the Government agree that the civil standard of proof will apply to all cases under the GAAR, they do not believe it is necessary to state this in the legislation. We believe that the simple clarification of the burden of proof in clause 5(1) could prevent any costly future legal arguments on the level of proof required when the GAAR is enacted.

12. The Government invites comments on whether time limits should be set for each of stages two, three and four and if so what those time limits should be.

As with all investigations, there is a risk of unnecessary cost and uncertainty for the taxpayer if the investigative process does not have defined time limits. Therefore, we support setting time limits for each stage of the Advisory Panel process. In line with other response periods, we would recommend a 30 day period for each of stages two, three and four. However, we also believe that the taxpayer should be able to apply for an additional 30 days for stage two (i.e. increase the time limit to 60 days), should they believe that they require additional time to formulate an appropriate response to the initial written notification from HMRC. This would be granted on the condition that the taxpayer understood that stages three and four would also be extended to 60 days each. We believe this would be appropriate for the more complicated cases investigated by HMRC which by their nature are likely to need more time at each stage to consider the facts and circumstances.

13. The Government welcomes comments on the proposals relating to the Advisory Panel.

We believe that, as noted previously in the response letter, further clarification is required as to the make up of the Advisory Panel and the relative weight of views of the members to ensure that it does not risk becoming a subcommittee of the HMRC and therefore losing its objectivity and independence when drafting the guidance and considering cases presented to it.

14. The Government would welcome views on the proposals for producing and updating the guidance.

We believe that clear guidance is a vital part of the implementation of the GAAR and application by the taxpayers however the guidance should not be a substitution for clear legislation. We have already noted our concerns about the drafting of the initial guidance by HMRC rather than the Advisory Panel and reiterate that this could be resolved with the formation of the Advisory Panel on 1 April 2013 with the commencement date for the

legislation at Royal assent, when guidance written by the Advisory Panel would also be released.

We also believe that whilst it is informative to include examples of abusive schemes (Annex B of the Consultation), the inclusion of examples of schemes which are not considered abusive would assist the taxpayer in their self assessment of their particular circumstances.