**Study on Aggressive Tax Planning**

*Specific contract No13 under FWC TAXUD/2012/CC116*

**Appendix 1 - Questionnaire to national tax experts**

**Filled in for United Kingdom**





**QUESTIONNAIRE**

**United Kingdom**

## Abbreviations

**CTA 2009: Corporation Tax Act 2009**

**TAAR: Targeted Anti-Avoidance Rule**

**HMT: Her Majesty’s Treasury**

**HMRC: Her Majesty’s Revenue and Customs**

**DTT: Double Taxation Treaty**

**SME: Small and Medium Sized Enterprise**

**MNE: Multinational Enterprise**

**APA: Advance Pricing Agreement**

|  |  |
| --- | --- |
| Questions | Answers |
| *Corporate tax rate* | |
| 1. What is the standard rate of corporate income tax applicable for the fiscal year 2015? | 20% with effect from 1/4/2015 (a higher rate of 30% applies for companies with ‘ring fenced profits’ from oil extraction rights). |
| 1. Some states offer special offshore tax regimes, providing for corporate tax-exemption of certain mobile income types (e.g. royalty) from abroad. Does your MS offer such a tax regime? If yes, please briefly explain, including the conditions to be met. | No. |
| *Dividends received* | |
| 1. Is it possible for a company in your MS to receive dividends from a foreign company free of tax (or at a greatly reduced rate of tax, e.g. 95% tax-exemption)? | A dividend, or other income distribution, received by a UK tax resident company is subject to UK corporation tax. However there are five exemptions (see below) which mean that in practice most income distributions are exempt. The exemptions only apply where the distribution is not tax deductible to the payer and are subject to anti-avoidance rules.  A simpler exemption applies to Small companies (using the EU definition of small).  Credit relief (for withholding and underlying tax) is available where the exemption does not apply, and there are complex rules that allow for excess foreign tax to be carried back, forward etc.  A company can elect for the exemption not to apply which may be beneficial if, for example, the dividend is paid from a country with which the UK has negotiated a Double Taxation Treaty (‘DTT’) where withholding tax is only reduced if the dividend is taxable.  The five exemptions are for:   * Distributions from controlled companies (section 931E CTA 2009) (except those paid out of profits earned before the recipient acquired control). * Distributions in respect of non-redeemable ordinary shares (s931F CTA 2009). * Distributions in respect of portfolio holdings (s931G CTA 2009) (except where the shareholder and connected persons own > 10%). * Dividends paid out of ‘good’ profits (essentially profits derived from transactions not designed to achieve a reduction in UK tax) (s931H CTA 2009). * Dividends in respect of shares accounted for as liabilities (s931I CTA 2009).   There are anti-avoidance rules which target schemes intended to obtain a tax advantage by manipulating these exemptions, in particular schemes designed to replace taxable profits with exempt distributions. |
| 1. If yes to question 3: |  |
| 1. Does this apply regardless of the tax residence of the distributing company, e.g. Member State, treaty state, tax haven? | Yes. |
| 1. Does this apply regardless of the level of shareholding or voting rights held in the distributing company? | No, see above. |
| 1. Does this also apply if the dividends have been deducted by the distributing company in its taxable income? | No, see above. |
| 1. If yes to b, how will the recent amendment of Article 4 of the EU Parent/Subsidiary Directive, which requires Member States to tax dividends if they have been deducted by the subsidiary, affect your answer? | N/A. |
| *Dividends paid* | |
| 1. Is it possible for a company in your MS to distribute dividends to a foreign company without any withholding tax? | Yes, the UK does not impose a withholding tax on dividends. |
| 1. If yes to 5, |  |
| 1. Does this apply regardless of the amount or percentage of shares, which the foreign company holds? | Yes. |
| 1. Does this apply regardless of the tax residence of the foreign company, e.g. member state, treaty state, tax haven? | Yes. |
| 1. Is the withholding tax exemption subject to a beneficial ownership requirement similar to that of the OECD model tax convention? | No. |
| 1. Is the withholding tax exemption subject to any other anti-avoidance requirements, e.g. based on substance of the recipient? If yes, please briefly explain. | No. |
| 1. Is any other tax levied upon a distribution of a dividend by a company in your MS? | No. |
| 1. Are dividend equivalents (typically a buy-back of shares, a capital reduction-payment or a payment of liquidation proceeds) treated in a similar way as dividends and subject to withholding tax when paid to a foreign company? Please refer to question 4 and 5 above. | The UK does not impose a withholding tax on a buy-back of shares or a capital reduction-payment or a payment of liquidation proceeds.  Such payments have different commercial consequences to dividends and are not ‘dividend equivalents’. |
| *Interest income* | |
| 1. Is interest income from a loan granted by a company in your MS to a foreign group member company taxable? | Yes (assuming the company is UK tax resident). |
| 1. If such a loan is granted free of interest (i.e. on non-arm’s length-conditions), would the creditor company resident in your MS have to include any deemed interest income in its taxable income? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo B is tax resident in your MS. | Yes. The UK transfer pricing rules apply to the provision of finance, so companies must use arm’s length principles to assess their tax liability. |
| 1. Is it possible that an interest bearing financial instrument (hybrid loan) granted by a company resident in your MS to a foreign group member company could be qualified as an equity investment in your MS with the result that the return on the investment (treated as deductible interest in the state of the debtor company) is considered a tax exempt dividend or similar? When responding, please consider Model ATP-Structure no. 2 and assume that B Holdco is tax resident in your MS (regardless of the non-MS assumption in the description of the Model). | No. The UK dividend exemptions are only available if the payment is not tax deductible for the payer (s 931D CTA 2009). |
| 1. If yes to 11, |  |
| 1. Please briefly explain which requirements should be fulfilled. | N/A. |
| 1. How will the amendment of Article 4 of the EU Parent/Subsidiary Directive affect your answer? | N/A. |
| *Interest costs* | |
| 1. Are inter-group interest payments on a loan granted by a foreign group member company tax deductible to a resident in your MS? | Yes, funding costs are broadly deductible on an accounts basis, subject to a number of domestic law requirements and TAARS (see below). |
| 1. If yes to 13, |  |
| 1. Does the tax deductibility depend on how the interest income is qualified for tax purposes in the creditor’s state? If yes, please briefly explain. | Yes. The UK has arbitrage legislation which aims to counter tax avoidance using contrived arrangements to avoid UK tax through the use of hybrid entities and hybrid instruments, and which apply to both deductions and receipts.  The legislation is aimed at schemes where companies are seeking to achieve asymmetry of tax treatment, by claiming a tax deduction in the UK for an expense where the corresponding receipt is untaxed overseas on the recipient, or through ‘double dips’ where deductions are available for the same expense in both the UK and overseas.  The rules apply where the scheme has a main purpose of achieving a UK tax advantage.  In December 2014, HMT and HMRC issued a document entitled Tacking aggressive tax planning: implementing the agreed G20 – OECD approach for addressing hybrid mismatch arrangements. This outlines the UK’s current position and seeks views on its legislative proposals. |
| 1. In particular, would your MS still allow a tax deduction if the creditor state treats the corresponding interest income as a non-taxable dividend or similar, i.e. if the loan is a hybrid loan? When responding, please consider Model ATP-Structure no. 2 and assume that C Holdco is tax resident in your MS. | See above. |
| 1. Is the tax deduction of interest cost on inter-group debt subject to any thin capitalisation-rules or other interest deduction limitations-rules? | Yes, there are a number of domestic law requirements and TAARS. |
| 1. If yes to 15 |  |
| 1. Please briefly explain the general scope and mechanism of the rules. | The starting point is that expenditure must be wholly and exclusively incurred for trading purposes.  A deduction for interest expense can be denied where there is an ’unallowable purpose’ i.e. a non-business or commercial purpose and this can include a main purpose of ’tax avoidance’ (securing a UK tax advantage).  The key focus of the thin capitalisation rules is the arm’s length principle (there are no explicit safe harbours). The UK transfer pricing regime applies to the provision of finance so a deduction for interest expense can be challenged on the basis that: the loan would not have been made if the lender was an unrelated party; or the amount loaned would have been less; or the interest rate would have been lower.  The UK also has a ‘Worldwide Debt Cap Rule’ (’WWDC’) which essentially restricts the UK deduction for financing expenses of large groups (those which are not small or medium sized under the EU definition) to the gross financing expense of the worldwide group. |
| 1. In particular, do the rules apply only to interest costs on inter-group debt or more generally to all interest costs? | The focus is on inter-group financing costs. |
| 1. Do the rules take into account the worldwide debt ratio of the group of companies? | The WWDC provisions are based on worldwide debt. |
| 1. In general, how effective do you consider these rules in countering ATP? When responding, please consider Model ATP-Structures 1 – 4 and assume that C Holdco, B Hybrid and OpCo are tax resident in your MS. | Whilst there are no common international tax rules three common key principles are that groups should be taxed on a separate entity basis, that interest (and not dividends) are deductible, and the transactions between connected parties should be on an arm's length basis.  With this background the UK rules are effective in limiting the interest deductions in the UK to a reasonable arm’s length amount. |
| 1. If a loan is granted free of interest (non-arm’s length-condition) by a foreign group member company, could a debtor company resident in your MS claim any tax deduction for a hypothetical (deemed) interest cost? When responding, please consider Model ATP-Structure no. 4 and assume that FinanceCo D is tax resident in your MS. Moreover, please explain whether any deemed deduction would be contingent on a corresponding adjustment in the foreign state. | No. |
| 1. Would the benefit of such a loan compared to a normal interest-bearing loan on arm’s length conditions be taxable to the debtor company in your MS? If yes, how? | No. |
| 1. Does your MS levy any withholding tax on interest payments? | Yes, UK domestic law requires companies making interest payments to withhold tax. There are a number of exclusions:   * If the beneficial owner is subject to UK corporation tax on the receipt. * Payments of ’short interest’ (broadly, interest on a loan with a duration of less than a year). * Payments of interest that qualify for exemption under the EU Interest and Royalties Directive. * Interest on a quoted Eurobond. * Payments of interest that do not ’arise’ in the UK. * Payments of interest to another country after HMRC has given authorisation for this to be paid gross (or with a reduced rate of withholding tax) under a DTT. |
| 1. If yes to 19 |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20%. |
| 1. Are there special withholding tax rules for interest paid on a loan from a group member company? | No. |
| 1. Does this apply regardless of the tax residence of the creditor company, e.g. member state, treaty state, tax haven? | Yes. |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | Yes, the UK is a firm advocate of beneficial ownership requirements. |
| 1. Is such exemption, reduction or refund subject to other anti-avoidance requirements? If yes, please explain briefly. | No. |
| *Allowance for corporate equity* | |
| 1. Does your MS offer any tax deduction for a notional (fictitious) interest cost on the share capital of a company? If yes, please briefly explain and include any anti-avoidance provisions. In particular, can the deduction be claimed against financial income? | No. |
| 1. Does your MS offer any tax deduction for dividends declared or paid? If yes, please briefly explain. | No. |
| *Royalty and other income from intangible property* | |
| 1. Please consider Model ATP-Structure no. 5 and assume that Company B is tax resident in your MS. Does your MS offer any preferential tax regime (compared to the standard corporate income tax) for income from patents and other intellectual property rights? If yes, please briefly explain its main scope, characteristics and any anti-avoidance provisions. In particular, can the preferential tax treatment be applied to income from patents or other IP which has not been developed by the taxpayer (company) itself? Must the company have its own substantial R&D activities? Can the preferential tax treatment be applied also to income from other taxpayers in your MS? | The UK has a patent box regime under which a broad range of qualifying patent profits can be taxed at a lower rate. For 2014 the rate is 12% reducing to 10% from 1 April 2017. The regime is based around transfer pricing principles – the 10% rate applying to all residual profit attributable to patents after adjustment for routine returns and, where relevant, a notional ‘marketing royalty’.  The regime requires the Patent Box Company to have developed the intellectual property asset or to undertake the active management of the commercialization of the intellectual property.[[1]](#footnote-2)  Following scrutiny by the EU Code of Conduct group, a joint statement was issued by the UK and Germany agreeing the ‘modified nexus’ approach.  As a result it has been announced that the current UK Patent Box Regime will be closed to new participants in June 2016 with transitional arrangements for existing participants to continue to benefit until June 2021. It is anticipated that a new regime will be introduced based on the modified nexus approach. |
| 1. Can a company in your MS obtain R&D tax credits (typically enhanced tax deduction or tax refund) for costs incurred, e.g. in developing IP rights? | Yes, a Research and Development Expenditure Credit (RDEC) is available on 11% of qualifying revenue expenditure. Large companies can essentially recognise this ‘above the line’ (i.e. rather than within the tax line) and loss makers may claim a refund.  More generous reliefs are available to SMEs. |
| 1. If yes to 24, |  |
| 1. Please briefly explain the requirements which have to be met, e.g. requirements for certain activity or successful development, etc. | Essentially the expenditure must relate to a project that seeks to achieve an advance in overall knowledge or capacity in a field of science or technology through the resolution of scientific or technological uncertainty. |
| 1. Can such credits also be obtained for costs that are ultimately reimbursed by a group member company to the company in your MS? | Yes, R&D relief is available under the large company scheme where a company is contracted to do work by a member of the same group, however the paying company would not be able to claim in this situation and the relief is only available if the expenditure would have been R&D for the paying company - so it has effectively been transferred to the payee. |
| 1. Can a company in your MS transfer ownership of a patent, trademark or other IP right to a foreign group member company without incurring capital gains tax? When responding, please consider Model ATP-Structure no. 5 and assume that MNE Group is tax resident in your MS. Please also assume that the IP has no significant fair market value at the time it is transferred but it becomes highly valuable shortly (1-2 years) after. | This example states that the transfer of existing rights take place as a sale or pursuant to a cost-sharing agreement. In both cases there would be a disposal for UK capital gains purposes based on its value at that time.  Valuation is a complex issue and each case needs to be considered on its facts and circumstances. If significant work was carried out by the recipient to enhance the value after the tranfer the value should be low. The value of intellectual property can go up and down overnight – so the mere fact that it becomes highly valuable shortly after transfer is not necessarily an indication that its value on transfer should be high.  Commercially, this is a difficult area for MNEs as in a global organisation many separate entities can collaborate to develop intellectual property, rather than having a single fixed place which undertakes all the reasearch and development work. |
| 1. If no to 26, i.e. your MS would impose tax on the disposal, |  |
| 1. Is the relevant capital gains tax rate lower than the standard rate? | A gain would be subject to corporation tax at the standard rate. |
| 1. Does taxation arise as a result of an anti-abuse provision or similar? | No. |
| 1. Would any R&D tax credits obtained in the past be reversed upon a disposal? | No. |
| 1. Can a ruling confirming the value of the IP be obtained? | Unlikely. |
| *Royalty and other IP costs* | |
| 1. Is royalty paid by a company in your MS to a group member company in another MS or for utilization of IP tax deductible? | Yes. There are a number of domestic law requirements and TAARS. |
| 1. If yes to 28, |  |
| 1. Is the tax deduction dependent on whether the royalty income is taxed in the hands of the IP-licensor/IP-owner? | No. |
| 1. Are there types of royalty payments which cannot be deducted? | The payment must be wholly and exclusively incurred for the trade. |
| 1. Does your MS levy any withholding tax on royalty payments? | Yes. |
| 1. If yes to 30, |  |
| 1. What is the rate of withholding tax (ignoring tax treaties)? | 20%. |
| 1. Are there types of royalty payments which are not subject to withholding tax? | The current UK domestic withholding tax regime only provides for income tax to be deducted from a limited subset of payments to overseas persons in respect of intellectual property.  These are:   * 1. Payments in respect of copyright (with restrictions);   2. Payments in respect of a right in design;   3. Payments in respect of the public lending right in respect of a book;   4. Payments of royalties etc. in respect of the use of patents; and   5. Payments of royalties etc. that are “annual payments”.   These withholding rights only encompass payments for the use of intangible assets such as trademarks and brand names if the receipt is an annual payment. The meaning of annual payment has been determined by case law and excludes payments that are not pure income profit in the hands of the recipient. |
| 1. In connection with an exemption, reduction or refund of withholding tax under a tax treaty or the EU Interest/Royalty Directive, is it common tax practice to apply a beneficial ownership requirement similar to that of the OECD model tax convention? | Yes, the UK is a firm advocate of beneficial ownership requirements. |
| 1. Is the tax exemption/reduction/refund subject to any other anti-avoidance requirements, e.g. based on a test of the substance of the recipient? If yes, please explain briefly. | No.  Clearly substance is relevant when looking at payments for services (and where there is no UK withholding tax). |
| *Group taxation* | |
| 1. Does your MS allow for group taxation of local group member companies with the effect that profits and losses of different companies are set-off against each other? If yes, please briefly explain. (Please note that group taxation also includes other standard arrangements offered to replicate the benefits of group taxation, e.g. group contributions from a profitable company to a loss-making group member company). | Essentially losses may be surrendered by one member of the group to another. No actual transaction takes place; the surrender is noted in the companies' tax returns. There are a number of restrictions, for example the offset is only for current year losses against current year profits and for corresponding accounting periods.  Following Case C-446/03 Marks and Spencer v Halsey the requirement that both companies are UK tax resident has been extended so that group relief is available for certain EEA losses provided it is not possible for the relief to be given in the country of origin.  Similar provisions apply for consortia[[2]](#footnote-3). |
| 1. If yes to 32, is group taxation restricted in situations where a (holding) company has solely been inserted in connection with a leveraged acquisition of the operating company (so-called debt push-down)? When responding, please consider Model ATP-Structures no. 1 – 3 and assume that C Holdco and B Hybrid are tax resident in your MS. | In all the examples, the amount of interest that is deductible may be restricted under the rules discussed above. The amount of group relief that can be surrendered would be based on that restricted amount. |
| *CFC rules* | |
| 1. Does your MS apply CFC rules to foreign subsidiaries of a parent company in your MS? | Yes – the UK has CFC rules and a recently introduced Diverted Profits Tax. |
| 1. If yes to 34, please briefly explain the rules and their scope. | Highly complex CFC rules apply to non-UK resident companies that are controlled by UK residents and to non-UK branches of UK resident companies which have made an exemption election. If a CFC has profits that do not qualify for exemption they are taxed on any UK resident companies with an interest of 25% or more.  The CFC rules contain a series of gateways and exemptions to target profits that have been artificially diverted from the UK. A CFC charge only arises if the CFC’s profits pass through one of the “gateways” and none of the exemptions apply. The gateways cover profits attributed to UK activities, non-trading finance profits, trading finance profits, and captive insurance. For example, the filter for UK activities excludes the majority of companies where:   * The purpose is not mainly to achieve a UK tax advantage. * The management and control of the CFC’s assets and risks are not carried out in the UK – other than through a UK PE. * The CFC’s activities are independent of the UK. * The CFC only has property income and /or non-trading finance profits.   The exemptions include: where the CFC is highly taxed; resident in a qualifying territory; has low profits or a low profit margin; local business premises and the business is not principally related to the UK; or intellectual property transferred from the UK.  Full or partial exemption may also be available for profits from lending to other CFCs (full exemption in very limited circumstances), both being subject to TAARS.  **Diverted Profits Tax**  This applies a 25% tax (55% for ring-fenced oil and gas companies) charge to diverted profits relating to UK activity which applies from 1 April 2015. The UK CONSIDERS that DPT is a new and separate tax, so as a formal matter it is outside the terms of the UK’s treaties. As a matter of domestic law, UK tax treaties can only apply to income tax, corporation tax and capital gains tax. IN ADDITION AS the DPT only applies to contrived arrangements that seek to abuse the provisions of the UK’s tax treaties, THE UK CONSIDERS THAT there would in any event be no obligation to subject the operation of the DPT to the provisions of those treaties, AS the DPT will ONLY apply in circumstances where the denial of treaty benefits is permissible under principles set out in paragraphs 9.4 and 9.5 of the Commentary on Article 1 of the OECD Model Tax Convention.  The first rule applies to arrangements which avoid a UK PE, essentially where a person is carrying on activity in the UK in connection with supplies of good and services by a non-UK resident company to customers in the UK, where the detailed conditions are met.  The second rule applies to arrangements which lack economic substance involving entities with an existing UK taxable presence, which exploit tax differentials where the detailed conditions are met (including ’effective tax mismatch’ and insufficient economic substance).  There is an exception[[3]](#footnote-4) where the effective tax mismatch arises wholly from a loan relationship (or a loan relationship and a relevant contract). There are also exemptions for SMEs. |
| 1. Please consider the attached Model ATP-Structures no. 1, 2 and 4 - 6. Assuming that MNE Group is tax resident in your MS, would your MS’s CFC-rules be applied to the structures? If yes, what would be the likely effects? | In all cases where there is an overseas subsidiary of a UK parent or holding company, the CFC rules could be applied to subject the profits to UK tax, and the MNE has to report the position under self-assessment. |
| *Mismatch in qualification of legal entities* | |
| 1. Does your MS’s tax qualification of a foreign legal entity (e.g. a partnership) follow that of the foreign state, or does it apply its own criteria? Please briefly explain. When responding, please consider Model ATP-Structure no. 3 and assume that MNE Group is tax resident in your MS. | The UK applies common law in generally treating a partnership as fiscally transparent for tax purposes so the members of the partnership are responsible for the payment of tax.  HMRC provide a list of foreign entities which it has considered in overseas jurisdictions and classifies them as opaque or transparent for UK purposes (INTM180030). This is both helpful and transparent. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a legal entity (company) resident in your MS? If yes, please briefly explain the rules and their scope. When responding, please consider Model ATP-Structure no. 3 and assume that B Hybrid is established and tax resident in your MS. | No. |
| 1. Does your MS apply rules to counter another state’s mismatch in tax qualification of a transparent entity (partnership or similar) in your MS? If yes, please briefly explain the rules and their scope. | No. |
| *Tax residence of company* | |
| 1. Based on domestic tax rules, without the application of any tax treaty, can a company incorporated in your MS be considered non-tax resident if its management and control is situated in another state? If yes, please explain under which circumstances. | No. A UK incorporated company is treated as UK tax resident - s14 CTA 2009. Domestic law specifically provides that a UK incorporated company which is treated as non-UK resident under a DTT is a non-UK resident - s18 CTA 2009. |
| 1. If yes to 40, please consider Model ATP-Structure no. 6. Would the Structure work if Company B1 is incorporated in your MS but managed and controlled abroad in an offshore-state? | No. See above. |
| *Tax ruling practices* | |
| 1. Some states offer tax rulings (incl. so-called APAs) that confirm non-arm’s length-transactions or the amount of spread between interest or royalty income and cost in various international flow through-structures. As an example, please refer to Model ATP-Structure no. 1. Does your MS offer this form of tax ruling practices or APAs? | The UK provides APAs (both unilateral and bi-lateral) to groups operating globally in relation to intra-group transactions. The focus is on trading transactions – not ‘international flow through-structures’.  MNEs would generally not choose the UK as a country in which to locate B Holdco unless it provides a wider function as for example a European holding company or an active treasury function.  The UK does levy withholding tax on interest and royalties which the structure assumes is not the case. |
| 1. Do your local transfer pricing-rules allow for the stripping of income from a domestic company by taking away legal ownership of functions, assets and risks? In other word, is it accepted that relatively small amounts of the group’s income is taxed in your MS on the basis of low risk, few assets held and only few functions performed in your MS? | The UK applies the OECD Transfer Pricing Guidelines – if there are few assets, risks and functions in the UK an arm’s length profit would be expected to be low.  Where legal ownership or assets and risks are ‘taken away’ there is usually a disposal for capital gains tax purposes. |
| 1. Can a company in your MS obtain a ruling or APA that a) provides for tax exemption of profits considered to exceed an arm’s length-income or considered to have been left to the company by its shareholders (capital contribution), or b) provides for the deduction of deemed expenses that would have been due under arm-‘s length conditions? | A capital contribution is not recognised under UK accounting practice, and so are treated as a gift and not taxed in the UK. A deduction for deemed expenses is not possible.  There is, however, a risk that such a payment could be regarded as revenue in nature (e.g. where there are several receipts) and therefore taxed as trading profits. This is a result of old UK case law. |
| *GAAR/SAAR* | |
| 1. Please consider Model ATP-Structures no. 1-7. Are you aware of any general or specific anti-avoidance rules or practice in your MS which could impede or counter the ATP objective of any of the structures? If yes, please describe briefly the scope of the rules/practice and how they could be applied to each of the structures. | The UK has a general anti-abuse rule (GAAR) which applies where a tax advantage has arisen to a taxpayer from tax arrangements that are abusive. The primary policy objectives are to deter taxpayers from entering into abusive arrangements, and to deter ’would be promoters’ from promoting them.  Given the difficulty in determining what is unacceptable avoidance and what is efficient tax planning it applies a ‘double reasonableness test’ which seeks to catch arrangements that cannot reasonably be considered to be a reasonable exercise of a taxpayer’s options.  Detailed Guidance notes have been published and are available on HMRC’s website. In the international context example D12 provides an illustration of an arrangement the GAAR might be expected to apply to (being one that purported to prevent people trading in the UK from being taxed in the UK by exploiting the terms of the UK/Isle of Man DTT).  Where the GAAR applies, unacceptable tax outcomes based on a strict interpretation of the tax legislation are ignored if a more reasonable higher tax charge can be determined.  In the view of the writer all 7 ATP Structures can generally be viewed as a reasonable exercise of the taxpayers options. |
| *Other ATP indicators* | |
| 1. Are you aware of any tax rules, tax practice or lack of tax rules (loopholes) – other than those discussed in the preceding answers - which could facilitate your MS’s role in ATP? If yes, please briefly explain. | No – the UK does not have tax rules or practices which aim to facilitate ATP. In fact it has a number of TAARS which aim to do the opposite.  **The UK tax system**  The UK tax system has undergone significant change in recent years partly as its historic system was prone to successful challenge through the Court of Justice, and more recently due to policy aimed at making the UK a less onerous, more competitive, place to do business.  The result is actually a complex and sophisticated tax system. The above attempts to answer the questions raised but it should be appreciated that that is hard to do so as the tax consequences of any arrangement depends on the facts and circumstances of each case, and the tax rules have become so complex that no one individual can be expected to know them all.  **The ATP Structures**  In relation to the 7 ATP Structures a key issue is that all bar one involve 3 or more countries whilst DTTs involve 2.  ATP3 is a 2 country situation which could be covered in DTTs by defining entity classification.  Several structures involve the deductibility of interest expense. The jurisdiction of the subsidiary has several tools to restrict interest deductibility to an arm’s length amount. Whilst a country in the middle benefits, that is visible at the level of the parent which can impose CFC rules to advance what is otherwise a deferral (albeit often a long term deferral) of income.  A Non Aggressive Tax Planning (’NATP’) Structure might involve a parent borrowing externally to acquire a target and paying the seller directly. With no tax planning the parent would have all the interest expense and quite possibly insufficient income to obtain a deduction. The subsidiary country would benefit as it would be an unleveraged acquisition. Using a UK holding company funded by the parent partly by equity and partly by debt (in line with thin capitalisation rules) would mean that part of the costs of borrowing would be at the level of the parent and part at the level of the subsidiary. The result would be similar to that which would result if the purchaser was able to buy assets rather than shares.  In relation to the ATP Structures involving intellectual property the position is more complex. Whilst there are arm’s length comparable for funding costs there are often none for intellectual property. The current discussions seem to be more about how the transfer pricing rules should work and which country should benefit when intellectual property is split between them. A move towards rewarding a legal owner of intellectual property on an interest alike return in today’s low interest rate environment may reduce the return it receives. However, if the same formula is used and we return to the high interest rates of the 1990s we may well find the legal owners making huge profits and other group companies losses. It may be that resolving the transfer pricing debate will inform the ATP debate. |

1. In the country validation process the representative of MS approved the answer and provided additional remark: “R&D can be undertaken anywhere. It would breach EU law in relation to the Freedom of Establishment if we required this to be undertaken in the UK.” [↑](#footnote-ref-2)
2. In country validation process the representative of MS approved the answer and provided the following remark: “The UK has adapted these rules, but this was not done as a result of the M&S judgement; it was as a result of other case law, so the two should not be linked” [↑](#footnote-ref-3)
3. In country validation process the representative of MS provided additional comment: “The exception does not guarantee that the CFC exemptions are not overridden. The exception in the legislation (s109) applies where a "tax mismatch outcome" arises wholly from a loan relationship (or a LR and a relevant contract). A tax mismatch outcome is not defined as resulting from a single transaction, but rather from "the material provision", which may be made or imposed by more than a single transaction. The exception does not guarantee that the CFC exemptions are not overridden. The exception in the legislation (s109) applies where a "tax mismatch outcome" arises wholly from a loan relationship (or a LR and a relevant contract).  A tax mismatch outcome is not defined as resulting from a single transaction, but rather from "the material provision", which may be made or imposed by more than a single transaction.” [↑](#footnote-ref-4)