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## THE GENERAL ANTI-AVOIDANCE RULE CONSULTATIVE COMMITTEES

### Abstract

*A General Anti-Avoidance Rule (GAAR) is currently included in many tax systems to counteract the use (considered abusive) of the optimisation possibilities inherent in tax laws and available to taxpayers. A GAAR is applied if the sole or main purpose of the taxpayer's legal activity was avoiding taxation. Owing to its nature, the GAAR inevitably uses vague terms. Its structure always gives the tax authorities a large margin of discretion when making decisions. Therefore, even though the decisions made by tax authorities are subject to judicial review, some countries operate the system in which the position is worked out by the tax administration with the participation of special consultative bodies appointed for that purpose. They are to some degree independent of the tax administration. In Australia, the authority is called The Australian GAAR Panel, in France – Comité de l'abus de droit fiscal (CADF), in Canada – The GAAR Committee, and in the United Kingdom – The GAAR Advisory Panel.*

*This article presents the composition, functions and proceedings of these consultative bodies. It is useful to study and consider the role of the committees from a comparative perspective, because the idea of introducing a GAAR into the Polish tax system is being presently considered. The draft amendment to the Tax Ordinance Act published in 2013 by the Polish Ministry of Finance also provides for the establishment of such an advisory body.*

### Keywords

*tax avoidance – anti-avoidance rule – GAAR – GAAR Panel*

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## I. INTRODUCTION

The objective of a General Anti-Avoidance Rule (GAAR) – a provision or a regime which is currently included in many tax systems – is to counteract the use (considered abusive) of the optimisation possibilities inherent in tax laws and available to taxpayers. Tax law abuse is traditionally known also under the name of “tax avoidance” or (sometimes) “aggressive tax planning”. Generally speaking, tax is avoided where taxpayers achieve tax effects which are beneficial to them, but have not been intended by the legislator. Tax avoidance practices consist in minimising or eliminating the tax burden as a result of undertaking activities which are admittedly legal, but have been performed only or mainly to achieve tax benefits. A GAAR targets arrangements involving a course of action that would not likely have been taken, other than for the reason of a tax advantage for the taxpayer<sup>1</sup>. Technically, a GAAR does not prohibit such practices, but empowers the tax authority to disregard or reclassify the transactions for tax purposes. The primary policy objective of a GAAR is to deter taxpayers from entering into abusive arrangements<sup>2</sup>. GAARs are designed to counteract the tax advantage which the abusive arrangements would otherwise (that is in the absence of the GAAR) achieve<sup>3</sup>. Tax arrangements (most of which are transactions) are “abusive” if entering into them or carrying them out, having regard to all the circumstances, cannot be viewed as a reasonable course of action in relation to the relevant tax provisions<sup>4</sup>. Abusive tax arrangement defeats the object, spirit, and purpose of the tax provisions that would otherwise apply<sup>5</sup>.

GAARs – always making use of vague terms and criteria – define which activities undertaken by a taxpayer may be deprived of their effectiveness under the tax law. Anti-avoidance rules implemented throughout the world take various forms – referring to the purpose

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<sup>1</sup> R.A. Tooma, *Legislating Against Tax Avoidance*, Amsterdam: IBFD 2008, p. 27.

<sup>2</sup> This phrase captures the essence of regulation. It comes from the British HMRC’s (Her Majesty Revenue and Customs’) GAAR Guidelines, B 3.1.

<sup>3</sup> HMRC’s GAAR Guidelines B 6.1.

<sup>4</sup> Section 204(2)-(6) of the Financial Bill 2013, which contains the British GAAR.

<sup>5</sup> Commission Recommendation of 6.12.2012 on aggressive tax planning, 2012/772/EU, OJ L 338/41-43, 4.5.

of taxpayer's activities, that is obtaining a tax benefit, or specifying additional circumstances, such as the lack of commercial substance of a transaction or the artificiality of a legal construction used by a taxpayer. Where certain steps within the operation are viewed as contrived or abnormal, a GAAR makes it possible for a tax authority to identify the tax consequences of the arrangement based not on its formal and legal characteristics, but rather on the commercial substance<sup>6</sup>. Under such provisions the tax authority is entitled to disregard or modify the tax consequences of legal acts undertaken by a taxpayer which are beneficial to him and to specify and assess their tax implications based on a hypothetical situation which – according to the authority carrying out such an assessment – would be more appropriate considering the commercial substance of the operation<sup>7</sup>. A GAAR is applied if the sole or main purpose of the taxpayer's legal activity was avoiding taxation<sup>8</sup>, which in turn resulted in the taxpayer's violation of the "spirit" of the tax act, the "spirit" being understood as referring to the objective and meaning of the regulation shaping the scope of taxation<sup>9</sup>. A GAAR is based on the principle that the "intention of Parliament" has to be found in the words used in the legislation – in the actual text of law. As a result, GAARs require consideration not only of the express terms of the legislation but also of any underlying assumptions or broader policy objectives relating to the particular tax rules<sup>10</sup>.

Regulations of the discussed type are quite widespread throughout the world<sup>11</sup>.

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<sup>6</sup> A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania* [General Anti-Avoidance Rule], Toruń: TNOiK 2013, p. 17.

<sup>7</sup> Ibidem.

<sup>8</sup> "The main purpose" or "one of the main purposes" of the transaction was to obtain a tax benefit or – in other words – tax advantage.

<sup>9</sup> V. Krishna, *Tax Avoidance. The General Anti-Avoidance Rule*, Toronto-Calgary-Vancouver: Carswell 1990, p. 42. See also A. Seely, *Tax Avoidance: a General Anti-Abuse Rule*, Library Standard Note: SN6265, House of Commons, 9.05.2013, p. 11. Seely quoted a parliamentary document, which stated: "[such rule] is intended to help prevent behaviour that reduces tax liabilities through transactions that satisfy the letter of the law but are said to violate the spirit of the law in some way".

<sup>10</sup> See HMRC GAAR Guidance C5 7.2.

<sup>11</sup> *Inter alia* in: Australia, Austria, Belgium, Brasil, Canada, China, Columbia, Finland, France, Germany, Great Britain, Hong-Kong, Hungary, Ireland, Israel, South Korea, New Zealand, Portugal, Republic of South Africa, Singapore, Spain, Sweden.

The research concerning the GAARs which are in force in various legal systems reveals the significant exchange of ideas and concepts between the tax systems of different countries<sup>12</sup>. Such studies are not only interesting for the sake of knowledge, but also seem to be particularly useful for modelling the relevant regulation and predicting potential problems that may arise in connection with its application. This issue gains in importance for the Polish tax system given the legislative work, aimed at introducing the GAAR in our country, that was launched in 2013 (the legislative process is still at the stage of preliminary drafts)<sup>13</sup>.

Historically, even though the Polish tax system contained the GAAR, it remained in force for the very short time – in the years 2003 and (partly) 2004. Article 24b of the Tax Ordinance Act dated 1997 had the following wording:

§ 1 When deciding tax matters tax authorities shall disregard the tax effects of legal acts if they prove that no significant benefits could have been obtained from the performance of such acts other than the benefits arising from the reduction of the tax liability, the increasing of the loss, the increasing of the overpayment or tax refund.

§ 2 If the parties performing the legal act referred to in § 1 achieved the intended commercial result for which other legal act or legal acts are more appropriate, then the tax effects shall be derived from such other legal act or legal acts.

This regulation became partially ineffective (§ 1) as a result of its being pronounced unconstitutional by the Polish Constitutional Tribunal (judgement dated 11 May 2004, K 4/03), and the remaining part (§ 2) was repealed by the Polish parliament (Sejm)<sup>14</sup>.

As has been already mentioned, at the present time the idea of introducing a GAAR into the Tax Ordinance Act 1997 is being revisited. Considering the factors contributing to the favourable climate for the legislative change in this respect, one should mention

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<sup>12</sup> See: Olesińska, *supra* note 6, p. 19.

<sup>13</sup> See more: *ibidem*, p. 347.

<sup>14</sup> History of the Polish GAAR was presented by B. Brzeziński, K. Lasiński-Sulecki, *Poland*, [in:] K.B. Brown (ed.), *A Comparative Look at Regulation of Corporate Tax Avoidance*, Dordrecht, New York: Springer 2012, pp. 269-273. See also Olesińska, *supra* note 6, pp. 245-291.

the recommendation on aggressive tax planning addressed by the European Commission to the EU Member States<sup>15</sup>. In order to combat aggressive tax planning the Member States are encouraged to introduce the following clause in their national legislation<sup>16</sup>: “An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance”.

## II. APPLICATION OF THE GAAR

Owing to its nature, the GAAR inevitably uses many vague terms. Its structure always gives the tax authorities a large margin of discretion when making decisions. Such legal norm applied *ex post* and based on unclear criteria offers the possibility of making negative assessments of taxpayers’ legal activities and assigning to them tax consequences typical of such activities which have not been actually undertaken by them, and of refusing the application of those consequences which are stipulated by the tax act for the activities actually undertaken. Thus, it is no wonder that the cases of such type are one of the most controversial among all tax disputes. Therefore, even though the decisions made by tax authorities are subject to judicial review, some countries operate the system in which the position is worked out by the tax administration with the participation of special consultative bodies appointed for that purpose. Those bodies have different names in different countries (for the purpose of this article they will be generally called “consultative committees” or “advisory panels”), but they have similar functions; also, in organisational terms they are similarly located on the peripheries of the state administration structures and are to some degree independent of them. In Australia, it is an authority called The Australian GAAR Panel, in France – Comité de l’abus de droit fiscal (CADF), in Canada – The GAAR Committee, and in the United Kingdom – The GAAR Advisory Panel.

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<sup>15</sup> Commission Recommendation of 6.12.2012, *supra* note 5.

<sup>16</sup> *Ibidem*, para 4.2.

Such committees are entrusted with some functions in the process of making decisions by tax authorities; it is what makes this solution so interesting and – and in a sense unique – that it is worthwhile to pay more attention to it. This is so in particular considering the fact that the draft amendment to the Tax Ordinance Act 1997 published in December 2013, including the tax avoidance clause and associated organisational and legal solutions, also provides for appointing such an advisory body (on the assumption that the clause itself is enacted)<sup>17</sup>.

### III. THE ROLE OF GAAR COMMITTEES

Consultative committees are ancillary to administration authorities. They are characterised as advisory or consultative bodies and sometimes consulting them is a necessary element of a decision-making process. Yet, they do not issue decisions which are binding. Still, their role, importance and authority are in fact greater than it appears on the basis of the description of functions and organisational position. Such functions are specified in a slightly different manner in countries where such committees exist.

In Canada and Australia, the committees function as purely consultative bodies for administration authorities and it is assumed that their role does not fall outside the internal administration sphere.

In Australia, the function of the panel is to assist tax officers who consider the application of the tax avoidance clause in a specific case under scrutiny. Its role is purely consultative<sup>18</sup>. According to Practice Statement 2005, “[t]he primary purpose of the Panel is to assist the Tax Office in its administration of the GAARs in the sense that decisions made on the application of GAARs are objectively based and there is a consistency in approach to various issues that arise from time to time in the application of the GAARs. The Panel does this by providing independent advice to a GAAR decision-maker in those matters which are

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<sup>17</sup> Rada do Spraw Unikania Opodatkowania [The Council for Tax Avoidance Proceedings], <http://legislacja.rcl.gov.pl/docs//1/161550/161572/161573/dokument96691.pdf>, pp. 33-34 [last accessed: 26.01.2014].

<sup>18</sup> Tooma, *supra* note 1, p. 179.

referred to it"<sup>19</sup>. Thus, the Australian GAAR Panel is ancillary to administration authorities and provides them with professional assistance – it does not protect the taxpayers' rights. However, in the document stating the grounds for the operation of the panel, it is said that this assistance should consist in monitoring the cases in such a manner that the clause is applied on a justified and objective basis, and in ensuring that the decisions issued by tax authorities in this type of cases are uniform and consistent. It has been emphasised that the panel provides independent and professional advice to tax authorities and therefore it is made up of experienced high-ranking officers as well as practitioners that are not affiliated with the tax administration but have relevant expertise. Therefore, despite the fact that the officially stated function of the GAAR Panel is to provide assistance to the tax administration (the Australian Tax Office, ATO), the panel actually fulfils also tasks which are important for the protection of taxpayers, being the subjects of decisions made on the basis of the clause. As a result it is hardly surprising that the literature emphasises the significant role of that panel in the aspect of enhancing public trust in the activities performed by the administration<sup>20</sup>. It certainly contributes to the increased transparency of activities undertaken by administration authorities.

The external role of the Canadian committee seems to be less significant as it particularly emphasises its consultative function towards the authorities applying the clause. The committee gives the representatives of different high-ranking administrative positions – not only tax-related ones – a forum for exchanging their views and working out a common position as to whether the clause should be applied in a given case. The meetings of the committee cannot be attended either by taxpayers or their representatives, and the composition of the committee does not include any experts that are not related to the administration. Therefore, among four committees described in this article and representing different model solutions, this one seems to be the most

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<sup>19</sup> Practice Statement LA 2005/24 [23].

<sup>20</sup> G.T. Pagone, *GAAR Conference London February 2012. The Australian GAAR Panel*, p. 1, available online: <https://assets.justice.vic.gov.au/scv/resources/0257735c-5023-42f9-871d-713f9de01888/the%2BAustralian%2Bgaar%2Bpanel.pdf> [last accessed: 15.12.2013].

closely linked with the administration and subordinated to its functions and objectives.

The French model, on the other hand, as compared to the Canadian model, is focused more on the independence of opinions. Admittedly, the relevant act does not define the CADF as an autonomous entity and does not attribute any independence to its opinions, yet such characteristics are clearly indicated by the manner of regulating the tasks to be performed by the committee. It is so because the act stipulates that the examination of a case by the committee may be requested by a taxpayer or a tax authority<sup>21</sup>, and therefore it may be assumed that the committee is considered by the legislator as an entity that is separate from and independent of the administration. The independence of the committee and the tax authority is also manifested by the principle that when the tax authority decides the case as not in compliance with the opinion issued by the committee, it bears the burden of proof that the law has been abused<sup>22</sup>. The considerable independence of the French committee is evidenced by the fact that although all its members are appointed by the minister responsible for the budget, the vast majority of them are unrelated to the tax administration.

In the United Kingdom, the reasons behind the appointment of the panel were as follows (pursuant to the government's declarations): to ensure effective protection for those activities undertaken by taxpayers which should be considered as manifestations of permissible tax optimisation and not as tax avoidance or – in other words – “aggressive tax planning”. Such an objective was planned in the experts' report of 2011 that recommended the introduction of a rule counteracting tax avoidance in Great Britain<sup>23</sup>. It included the suggestion concerning the appointment

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<sup>21</sup> Article L 64 Livre des Procédures Fiscales (LPF): *L'administration peut également soumettre le litige à l'avis du comité.*

<sup>22</sup> Article L 64 LPF: *Si l'administration ne s'est pas conformée à l'avis du comité, elle doit apporter la preuve du bien-fondé de la rectification.*

<sup>23</sup> In December 2010 the Government asked Graham Aaronson QC to lead a study that would consider whether there should be a general anti-avoidance rule in the UK. Graham Aaronson assembled a Study Group of tax experts which published its Report on 11.11.2011: *GAAR Study. A Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced into the UK Tax System* (available online: [http://www.tax.org.uk/Resources/CIOT/Documents/2012/01/111111\\_GAAR\\_final\\_report.pdf](http://www.tax.org.uk/Resources/CIOT/Documents/2012/01/111111_GAAR_final_report.pdf)). The report recommended the introduction into the UK tax system of a general



of an independent Advisory Panel composed in such a way that the majority of its members would not be in any way involved in finance services and its task would be to issue opinions on the cases in which the rule is applied (those opinions would afterwards be published).

The application of the GAAR has just commenced in the United Kingdom (the norm became effective in July 2013) and therefore it is almost impossible to say anything about the actual role and significance of the panel. However, the GAAR guidance, which is also the grounds for the operation of the panel, is far from giving it an ancillary role to the administration. On the contrary – it emphasises its independence of government tax services.

The purpose of the Advisory Panel is to bring an independent and non-HMRC<sup>24</sup> perspective to the application of the GAAR. As is clear from the HMRC's GAAR Guidelines, the Advisory Panel represents a spread of interests including business, tax advisers and wider taxpayer interests. The panel provides a view which is independent of HMRC, and no HMRC officer is a member of the panel<sup>25</sup>. The role of the Advisory Panel is particularly to express a view as to whether, having regard to all the circumstances, the tax arrangement "is a reasonable course of action" in relation to the relevant tax provisions. Where tax arrangements are carried out in a business context, it will also bring a commercial perspective to the application of the GAAR. This is to provide a safeguard for taxpayers<sup>26</sup>.

The panel performs two types of tasks.

Firstly, HMRC have to obtain the opinion of an independent advisory panel as to whether an arrangement constituted a reasonable course of action before they can proceed to apply the GAAR<sup>27</sup>. The procedure for applying the GAAR to any arrangement requires that the proposed

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anti-abuse rule targeted at abusive tax avoidance schemes. The GAAR in British legislation (Financial Bill 2013) is largely based on the principles developed in the GAAR Study Group Report, but with some material differences reflecting the results of the formal consultation process. See HMRC's GAAR Guidelines Part B, 1.1, 1.2, 1.4.

<sup>24</sup> Her Majesty Revenue and Customs.

<sup>25</sup> HMRC'S GAAR Guidance, Part E – GAAR procedure, p. 11, available online: <http://www.hmrc.gov.uk/avoidance/gaar-part-e-procedure.pdf> [last accessed: 15.12.2013].

<sup>26</sup> HMRC'S GAAR Guidance E4.1.4.

<sup>27</sup> HMRC'S GAAR Guidance B12.1.

application of the GAAR should be put before an advisory panel of independent experts who will give their opinion (or opinions if they are not unanimous) as to whether the arrangements in question constitute a reasonable course of action<sup>28</sup>. The panel is not acting in a judicial capacity; rather, it is expressing its own view (or, in the event of non-unanimity, the views of each individual member) as to the reasonableness of the course of action<sup>29</sup>.

The other function of the Advisory Panel is to approve the GAAR guidance drafted by HMRC. In practice this means that the guidance must be reviewed by the Advisory Panel and, where necessary, updated by HMRC to reflect recommendations made to them, before final approval<sup>30</sup>. The guidance must be taken into account by a court or tribunal considering any issue in relation to the GAAR<sup>31</sup>.

#### IV. THE LEGAL BASIS FOR OPERATION OF CONSULTATIVE COMMITTEES AND THEIR COMPOSITION

In Australia and Canada, notwithstanding the fact that the committees are not established by law, they have been operating for many years. They operate at the outskirts of tax administration structures and are consultative bodies for them (whereas in France and the United Kingdom – where they also have consultative function supporting the administration – they are established by law and are far more independent of the administration).

It seems that the Canadian consultative committee, that is the GAAR Committee, is the one which is the most closely linked to the tax administration. It was established in 1988, that is when the GAAR was introduced to the Income Tax Act. The Canadian GAAR Committee members are senior officials from the Department of Finance, the Department of Justice and the Canada Revenue Agency (Legislative Policy and Regulatory Affairs Branch and Compliance Programs Branch).

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<sup>28</sup> HMRC'S GAAR Guidance B14.1.

<sup>29</sup> HMRC'S GAAR Guidance C6.5.8.

<sup>30</sup> HMRC'S GAAR Guidance E4.3.1.

<sup>31</sup> HMRC'S GAAR Guidance E4.3.2.

There are members from the Legal Services as well<sup>32</sup>. There are no independent experts in it and no strict rules exist concerning the number of committee members. It is not a committee of independent advisers, but rather a kind of forum that is used by the representatives of different organisational units of the tax administration and other types of administration to exchange their views and work out a common position on whether the application of the GAAR in a given case is justified. You could say that the Canadian GAAR Committee is the most mysterious body of all the committees described in this article, as little information about it is available.

At the beginning of its activities, the consultative committee existing in France was similar in character to the Canadian one. Yet, it seems that after the reform introduced in 2008, the French solution has evolved towards the model of an advisory committee of more expert character, whose functions would not be limited only to the analysis whether the application of the clause is justified from the point of view of the tax administration.

In France, the advisory committee dealing with the application of the tax avoidance clause was established as early as in 1941 when this clause was introduced in order to tax income issues. At the beginning it was called Le comité consultatif pour la répression des abus de droit (CCRAD), but at present (from 2008) it is called the Committee for the Abuse of Tax Law (Comité de l'abus de droit fiscal - CADF)<sup>33</sup>. Pursuant to the regulations applicable at present, the composition of the committee is precisely defined and it includes a member of Conseil d'État (the chair

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<sup>32</sup> Composition of the GAAR Committee according to presentation by Y. Moreno (Income Tax Rulings Directorate) and S. Saydeh (GAAR and Technical Support Section at the Aggressive Tax Planning Division of the International and Large Business Directorate and member of the CRA's GAAR Committee), 6.05.2013, available online: <http://www.canadiantaxlitigation.com/wp-content/uploads/2013/06/Application-of-the-GAAR.pdf>, p. 16 [last accessed: 15.12.2013]. See also W.I. Innes, P. Boyle, J.A. Nitikman, *The Essential GAAR Manual: Policies, Principles and Procedures*, Toronto: Wolters Kluwer 2006, p. 90.

<sup>33</sup> P. Michaud, *Historique du régime de l'abus de droit fiscal*, Le Cercle des Fiscalistes, Septembre 2010, p. 7, available online: <http://www.le-cercle-des-fiscalistes.com/media/02/02/1999685093.pdf> [last accessed: 15.12.2013].

of the Committee), a member of Cour des Comptes<sup>34</sup>, a member of Cour de Cassation, a lawyer practising tax law, a notary public, a statutory auditor, and a professor of law or economics<sup>35</sup>. In 2008, to the committee new experts were added that were not related to the administration, that is a lawyer, a notary public and a statutory auditor. The members of the Committee are appointed by the Minister responsible for the state budget. The obligations and principles defined in the act include, but are not limited to, the committee members' obligation to observe the confidentiality clause, the principle of their exclusion in circumstances which may undermine their objectivity, and the obligation to inform the committee chair about the functions performed in companies<sup>36</sup>.

The organisation position and the degree of independence of the Australian advisory panel seems to be similar to the aforementioned one. It was established in Australia many years after the tax avoidance clause had become effective<sup>37</sup>. Initially, this panel was called the Part IVA Panel, as the scope of its competence included only the cases of the employment of the GAAR applicable to income tax, that is the Part IV Income Tax Assessment Act dated 1936. Afterwards the area of the Panel's competence also included cases of applying the tax avoidance clause to other Australian taxes<sup>38</sup>. Therefore, the name of the panel was changed in 2005 to a more universal one, that is the Australian GAAR Panel. The manner of appointing the members and the functioning of the panel is regulated by the internal administrative act, namely the ATO Practice Statement Law Administration of 2005<sup>39</sup>.

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<sup>34</sup> Which is the national administrative body controlling public accounts, see S. de Monès, P.-H. Durant, J.-F. Mandelbaum, *France*, [in:] *Abuse of Tax Law Across Europe*, Part I, EC Tax Review 2010, no. 2, p. 89.

<sup>35</sup> L'article 1653 C CGI (Code général des Impôts).

<sup>36</sup> L'article 1653 D CGI. See also *Comité de l'abus de droit fiscal. Rapport Annuel 2012*, p. 3, available online: [http://www.impots.gouv.fr/portal/deploiement/p1/fichedescriptive\\_6662/fichedescriptive\\_6662.pdf](http://www.impots.gouv.fr/portal/deploiement/p1/fichedescriptive_6662/fichedescriptive_6662.pdf) [last accessed: 15.12.2013].

<sup>37</sup> The Panel met for the first time in April 1998, see Tooma, *supra* note 1, p. 264, footnote 1167.

<sup>38</sup> *Inter alia* Fringe Benefit Tax Act 1986, s 67 and Goods and Services Tax Act 1999, div 165.

<sup>39</sup> PS LA 2005/24, available online: <http://law.atolaw.gov.au/atolaw/view.htm?locid='PSR/PS200524/NAT/ATO'&PiT=99991231235958> [last accessed: 15.12.2013].

The Panel is an informal body<sup>40</sup>, made up of business and professional experts chosen for their ability to provide informed advice, with the other members of the Panel being senior Tax officers. The Chair of the Panel is a senior Tax officer<sup>41</sup>. Since 2012, there have been two panels in Australia: in Sydney and Melbourne<sup>42</sup>. The panel includes ATO personnel from the Tax Counsel Network (TCN) and is chaired by senior ATO officer. External members are selected and invited by the Commissioner<sup>43</sup>. They serve for an unspecified term.

The literature on the subject highlights the need to reform the manner of appointing the panel members recruited from outside the tax administration. It has been noted that the lack of any normative rules to be followed by the Commissioner when selecting the members of the committee and the lack of transparency in the members' recruitment process negatively influence the image of the administration<sup>44</sup>. In particular, the independence of the committee is not guaranteed by the fact that its members are appointed for an indefinite period of time and may be recalled at any time. Researchers argue that the role of the external members on the GAAR Panel, their identity, the manner in which they are selected, and their term of service should be reviewed and improved<sup>45</sup>. The external members do not feel independent of the Commissioner. The selection process should be more transparent and the term of service should not depend only on the will of the Commissioner<sup>46</sup>.

The Australian experience was taken into consideration when creating consultative committees in other countries. The last consultative committee dealing with the GAAR that has been formed, that is the British GAAR Advisory Panel, has been established (in 2013) on the basis of different principles. They were described earlier in the Report by Aaronson

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<sup>40</sup> Tooma, *supra* note 1, p. 264.

<sup>41</sup> PS LA 2005/24 [23].

<sup>42</sup> A. O'Connell, *The Australian GAAR Panel*, available online: [http://www.sbs.ox.ac.uk/sites/default/files/Business\\_Taxation/Events/conferences/summer\\_conference/2013/Ann-o-connell.pdf](http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Events/conferences/summer_conference/2013/Ann-o-connell.pdf) [last accessed: 15.12.2013].

<sup>43</sup> See O'Connell, *supra* note 42 and Pagone, *supra* note 20, p. 6.

<sup>44</sup> Pagone, *supra* note 20, p. 6.

<sup>45</sup> *Ibidem*, p. 6.

<sup>46</sup> *Ibidem*, p. 7.

who recommended the introduction of the rule into British law and the creation of the advisory panel, and offered the solutions to ensure that the panel is much more independent of the tax administration<sup>47</sup> than in the Australian model.

The British Advisory Panel is not made up (and is not intended to be made up) of tax administration representatives: the members are independent experts having relevant expertise and competence. The Panel members are appointed by the Commissioners. The candidates do not have to be formally designated: the recruitment procedure is open and it is sufficient to declare one's candidacy within the applicable time-limit<sup>48</sup>. At present, the British Panel comprises the Chair and six members. All of them come from the circles of tax advisers and accountants and are unrelated to the tax administration. They are appointed for three years, but the length of the Panel member's mandate is not determined by the law. The reader may find it interesting that the Panel members do not receive any remuneration, but only the reimbursement of justified expenses incurred in connection with the fulfilment of their duties<sup>49</sup>.

## V. GAAR COMMITTEE PROCEEDINGS

The common characteristic of all opinions issued by consultative committees is that they are not binding on tax administration authorities. However, the rules of the panels' proceedings diverge depending on the country.

In Australia each case potentially falling within the scope of tax avoidance has to be referred to the GAAR Panel for its opinion. A matter is generally referred to the Panel after the taxpayer is informed by the Tax Office that the tax officer is considering the application of the GAAR. Some important or new cases may be referred to the Panel at an earlier stage

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<sup>47</sup> "[The Panel] would provide an element of impartial supervision of the administration of the GAAR by HMRC", see *Aaronson's Report* (note 23), para 5.25 (i), p. 34.

<sup>48</sup> HMRC simply announces that applications are invited from suitably qualified and experienced individuals to be a member of the GAAR Advisory Panel.

<sup>49</sup> *General Anti-Abuse Rule (GAAR) Advisory Panel: Terms of Reference*, p. 2, available online: <http://www.hmrc.gov.uk/gaar/gaar-tor.pdf> [last accessed: 15.12.2013].

for preliminary advice<sup>50</sup>. Matters initially referred to the Panel for preliminary advice should be referred again to the Panel following the consideration of a taxpayer's response to the Tax Office's position paper, before a decision is made to apply the GAAR<sup>51</sup>. A taxpayer (or a representative of a taxpayer) is normally invited to attend a meeting of the Panel and address the Panel (a taxpayer may accept or decline the invitation), except when the matter is referred to the Panel at an early stage for preliminary advice<sup>52</sup>. Additionally, the Chair of the Panel may request the taxpayer to provide a written submission. If the taxpayer who has been invited to attend the Panel meeting fails to provide such a submission, the invitation may be withdrawn. Generally, the decision-maker attends the Panel meeting to which the taxpayer is invited<sup>53</sup>. The Panel reviews the papers before the meeting and may hear an oral submission by Tax officers before hearing from the taxpayer. The taxpayer is given an opportunity to address the Panel, and the Panel members may ask questions and discuss issues with him<sup>54</sup>.

Taxpayers participating in the meetings of the Panel are not examined and it is hoped that their participation and the position presented by them, as well as any possible explanations concerning problematic issues, will assist the Panel members in making correct decisions. Taxpayers (or their representatives) are not a party to a dispute. The guidance guarantees the taxpayer the right to orally present their position at the meeting<sup>55</sup>. It appears that granting the taxpayer the right to participate in the Panel meeting gives him the feeling of participation in the settlement of his case and prevents the impression of the taxpayer's future being decided by an authority not being a court, within the procedure which is not open to an interested party. It is important that taxpayers not only have the chance to passively follow the discussion,

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<sup>50</sup> PS LA 2005/24 [28].

<sup>51</sup> PS LA 2005/24 [30].

<sup>52</sup> PS LA 2005/24 [31].

<sup>53</sup> PS LA 2005/24 [35].

<sup>54</sup> PS LA 2005/24 [38].

<sup>55</sup> PS LA 2005/38: "The Chair will set the time for this address as appropriate in each case, but it is expected that in most cases it would be no more than one hour".

but that they are also given the right to speak for themselves and present their case before such an authority.

The Panel meetings were to be held once a month, but as the number of cases referred to the Panel for its opinion was increasing<sup>56</sup>, the second panel seated in Sydney was established in 2012 in addition to the existing panel operating in Melbourne<sup>57</sup>.

Initially also in France each case falling within the scope of tax law abuse had to be referred to the consultative committee for its opinion<sup>58</sup>. However, as early as in 1963, obtaining an opinion from the committee ceased being obligatory and the decision as to whether such an opinion should be given was made by the tax authority. In 1987, also taxpayers were granted the right to apply to the committee for its opinion<sup>59</sup>, but the act of referring the case within the scope of the GAAR application to the consultative committee needs to be requested: it is not an obligatory element of the procedure as in other countries where such committees operate<sup>60</sup>. Both taxpayers and tax authorities are entitled to request the Committee's opinion. However, there is a kind of procedural inequality, as taxpayers may apply for referral of the case to the Committee within 30 days of being served the information about the initiation of proceedings, while there are no time-limits for tax authorities<sup>61</sup>. The tax authority is obliged to inform taxpayers about their right to apply for the Committee's opinion – if such instructions are missing, the proceedings are considered as defective<sup>62</sup>.

The Committee's opinions, though they are not binding upon the tax authority, significantly influence the course of the proceedings as they

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<sup>56</sup> 31 cases were referred to the Panel in 2012, see: O'Connell, *supra* note 42.

<sup>57</sup> *Ibidem*.

<sup>58</sup> Michaud, *supra* note 33, p. 7; Olesińska, *supra* note 6, pp. 150-151.

<sup>59</sup> Michaud, *supra* note 33, p. 7.

<sup>60</sup> de Monès, Durant, Mandelbaum, *supra* note 34, p. 89.

<sup>61</sup> R. Foissac, *Quelques réflexions sur le fonctionnement du Comité de l'abus de droit fiscal*, Option Finance 11.02.2013, available online: <http://www.cms-bfl.com/NewsMedia/PublicationDetail/Pages/default.aspx?PublicationGuid=0ec37a6f-de89-48fe-91c2-5b1a14039afe> [last accessed: 15.12.2013].

<sup>62</sup> D. Gutmann, *L'abus de droit: perspective générale et encadrement procédural*, Droit & Patrimoine 2011, no. 205, p. 58, available online: [http://www.althemis.fr/althemis\\_images/divers/Abus%20de%20droit.Althemis%20Droit%20et%20Pat%202011.pdf](http://www.althemis.fr/althemis_images/divers/Abus%20de%20droit.Althemis%20Droit%20et%20Pat%202011.pdf) [last accessed: 15.12.2013].



modify the distribution of the burden of proof. After the Committee issues its opinion, the burden of proof in further proceedings remains with the party for whom the opinion is unfavourable<sup>63</sup>. If the opinion does not favour taxpayers, they carry the burden of rebutting the charges of law abuse in further proceedings. Thus, a negative opinion issued by the Committee causes negative procedural effects for taxpayers, as the burden of proof is passed to them. If the opinion is not provided at all (because it was requested neither by the tax authority nor the taxpayer), then the burden of proof remains – pursuant to the general principles – with the tax authority that brought charge of the law abuse. Therefore, the opinion of the Committee is definitely more often requested by the tax authority than by taxpayers. The tax authority applying for the opinion cannot make its situation worse and does not face any risk connected therewith, as the negative opinion issued by the Committee has the same effects for the procedural position of the tax authority as the lack of it. It is so because the burden of proof of the law abuse rests on the tax authority owing to the nature of the case<sup>64</sup>, and thus any possible negative opinion given by the Committee that such a charge is groundless does not impose any additional procedural duties on the tax authority.

This solution, shifting the burden of proof onto taxpayers when the committee issues an opinion unfavourable for them, is often critically assessed. Attention is drawn to the fact that the Committee – which is not a court, but an authority affiliated with the tax administration being the party to the dispute – may cause the other party, that is a taxpayer, to have to produce evidence supporting their position. In this way, the state shifts the burden of proof onto the taxpayer already early in the administration proceedings<sup>65</sup>.

The meetings of the French Committee dealing with the abuses of the law are not open to the public. Only the taxpayer and the tax administration representatives may attend them<sup>66</sup>. The Committee's

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<sup>63</sup> L'article L 64.3 LPF: *Si l'administration ne s'est pas conformée à l'avis du comité, elle doit apporter la preuve du bien-fondé de la rectification.*

<sup>64</sup> de Monès, Durant, Mandelbaum, supra note 34, p. 89.

<sup>65</sup> Foissac, supra note 61.

<sup>66</sup> L'article 1653 CGI: *Lorsque le comité de l'abus de droit fiscal est saisi, le contribuable et l'administration sont invités par le président à présenter leurs observations.*

opinions – after removing the data identifying a given taxpayer – are afterwards published in a bulletin released once a year (*Bulletin Officiel*)<sup>67</sup>. Pursuant to the rule that was accepted some time ago, each meeting of the Committee is immediately followed by the Internet publication of a report including a short description of a case and issued opinions<sup>68</sup>.

In Canada, the consultative committee – as a rule – gives its opinion on all cases concerning the application of a tax avoidance clause. When a tax authority considers that the application of this clause is necessary, it is obliged to consult about the case at a higher level; if the higher authority approves of this position, it is also obliged to consult about it with the superiors in Ottawa (CRA<sup>69</sup> Headquarters). The Aggressive Tax Planning Division of CRA seeks to ensure the consistent application of the GAAR. It performs its own analysis in consultation with other CRA Divisions, the Department of Finance, and the Department of Justice. Once its analysis is complete, the Aggressive Tax Planning Division determines whether the matter should be referred to the GAAR Committee. If the Aggressive Tax Planning Division's view is that the GAAR may apply, the file is referred to the GAAR Committee. If the Aggressive Tax Planning Division's view is that the GAAR does not apply, it will communicate that view to the auditor without referral to the GAAR Committee<sup>70</sup>. If the Aggressive Tax Planning Division of CRA decides that the GAAR does not apply, the case need not be referred to the GAAR committee. If, on the other hand, headquarters agrees with the Tax Service Office's (TSO's) recommendation to reassess the taxpayer using the GAAR, input will be sought from the GAAR committee before proceeding with any GAAR reassessment<sup>71</sup>.

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<sup>67</sup> Article L 64 LPF.

<sup>68</sup>[http://www.impots.gouv.fr/portal/dgi/public/popup.jsessionid=XC1HI25WRFAZBQFIEIPSFY?espld=&typePage=cpr02&docOid=documentstandard\\_6518&temNvlPopUp=true](http://www.impots.gouv.fr/portal/dgi/public/popup.jsessionid=XC1HI25WRFAZBQFIEIPSFY?espld=&typePage=cpr02&docOid=documentstandard_6518&temNvlPopUp=true) [last accessed: 15.12.2013].

<sup>69</sup> Canadian Revenue Agency. About the Canadian GAAR Committee see: Olesińska, supra note 6, pp. 210–212.

<sup>70</sup> See: *The GAAR Process*, available online: <http://www.canadiantaxlitigation.com/tag/gaar> [last accessed: 15.12.2013].

<sup>71</sup> J. Golombek, *Beware the GAAR*, FORUM Magazine 01.03.2005, available online: [http://www.jamiegolombek.com/articleDetail.php?article\\_id=835](http://www.jamiegolombek.com/articleDetail.php?article_id=835) [last accessed: 15.12.2013].

When the case finally reaches the central level and is given a preliminary approval as to the grounds for application of the GAAR – the opinion of the GAAR Committee operating within its structures is requested in each case. It means that the Committee deals only with those cases which have been earlier examined at several levels and positively verified in terms of application of the GAAR<sup>72</sup>.

The GAAR Committee meets periodically to consider the referrals. The Committee members consider the file beforehand, and the meetings allow the committee members to discuss and develop a view on the matter. The ultimate opinion as to whether the application of the GAAR has been justified is formulated – on the GAAR’s own behalf – and submitted to a taxpayer by the central tax administration authority (the Canada Revenue Agency – CRA) and not by the Committee operating within it (which formally is just an advisory body). Although the opinion of the GAAR Committee on whether the GAAR application is justified is not binding upon the CRA, only the cases which were issued a positive opinion by the Committee are further worked on in practice. Yet, although it may happen that auditors do not apply the clause in spite of the positive recommendation by the Committee, it is “highly unlikely” the auditor would apply the GAAR where its application was not recommended by the committee<sup>73</sup>.

Such a manner of proceeding guarantees that – firstly – the practice of the rule application is consistent, and – secondly – that the decision concerning the clause application is not a hasty one (when we think of the number of authorities that examine the case one after another). The procedure is a multi-level one – the case is examined by more and more specialised services<sup>74</sup>. The Committee’s meetings are held regularly<sup>75</sup> and its members receive in advance written materials showing both the positions of the tax authority and a taxpayer.

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<sup>72</sup> Olesińska, *supra* note 6, p. 211.

<sup>73</sup> Golombek, *supra* note 71; Innes, Boyle, Nitikman, *supra* note 32, p. 91.

<sup>74</sup> Olesińska, *supra* note 6, p. 212.

<sup>75</sup> The GAAR committee is scheduled to meet every other week, assuming there is a full agenda, which typically consists of three or four GAAR cases to be reviewed. See Golombek, *supra* note 71.

In Great Britain, if a tax officer considers that there is a matter related to the GAAR, he must give a taxpayer a written notice to that effect. If a notice is given to the taxpayer, he has 45 days to send – in response to the notice – written representations to the designated officer (with the extension of this time limit possible)<sup>76</sup>.

If no representations are made by the taxpayer, the designated officer must refer the matter to the Advisory Panel. If representations are made by the taxpayer, the designated officer must consider them and, if he is still considering the application of the GAAR, refer the matter to the Advisory Panel<sup>77</sup>. The HMRC officer must provide the taxpayer with a notice which: specifies that the matter is being referred; contains a copy of any comments made by the officer on any representations made by the taxpayer; and informs the taxpayer that he has a further chance to make representations to the Advisory Panel.

The taxpayer may send the panel written representations about the proposed counteraction or about any comments which have been provided to the panel by the designated officer. The taxpayer has 21 days to do this<sup>78</sup>.

Each case related to the GAAR is to be presented to a 3-person sub-panel of the Advisory Panel, all of whom are independent of HMRC and at least one of whom is likely to have special expertise in relation to the tax provisions concerned and knowledge of normal courses of action taken by taxpayers in relation to those provisions<sup>79</sup>.

The Chair of the Panel selects three panel members with expertise relevant to the particular tax arrangements to form a sub-panel to provide the opinion.

The sub-panel considers each case on the basis of written summaries of HMRC's views and (where given) the taxpayer's response<sup>80</sup>.

When selecting panel members to form a sub-panel, the Chair takes into account the potential conflicts of interest that might prevent a panel member from taking a fair and objective view. The Chair may recommend

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<sup>76</sup> E3.3.3.

<sup>77</sup> E3.4.1.-2.

<sup>78</sup> E3.5.1.

<sup>79</sup> C6.5.4.

<sup>80</sup> C6.5.5.

to the Commissioners additional persons for appointment to the panel to consider a specific case, in order to ensure that the sub-panel has the appropriate expertise<sup>81</sup>.

The sub-panel can invite HMRC or the taxpayer to provide further information within a specified period, although there is no statutory obligation on the taxpayer or the designated officer to supply this information<sup>82</sup>. The Advisory Panel does not perform a judicial function and the Advisory Panel process does not involve formal hearings where cases will be presented and heard. The opinions are not binding on HMRC or the taxpayer.

The sub-panel is expected to deliver its opinion within 60 days, although there is no prescribed time limit within which the sub-panel must produce its opinion<sup>83</sup>. The copy of the opinion must be given to the designated officer and the taxpayer. It is expected that the opinion will state whether or not the entering into and carrying out of the tax arrangements was a reasonable course of action, that is whether GAAR may apply. If the sub-panel has not been provided with sufficient information to reach a view on whether the tax arrangements are a reasonable course of action, it is possible for the sub-panel to give an opinion that it is not possible to reach a view on that matter<sup>84</sup>.

Each opinion must contain justification of the position taken<sup>85</sup>. The sub-panel can produce one joint reasoned opinion, or, if the three members cannot agree, it can provide two or three different reasoned opinions<sup>86</sup>.

If the panel is unanimous in its opinion that the arrangement is not a reasonable course of action, the designated officer is likely to proceed under the GAAR. If the panel, or any member of it, considers

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<sup>81</sup> Any individual appointed for this purpose is formally appointed to the panel by the Commissioners, and the appointment will end when the sub-panel has delivered its opinions on that case and the summary has been approved. See *General Anti-Abuse Rule (GAAR) Advisory Panel: Terms of Reference*, p. 1, available online: <http://www.hmrc.gov.uk/gaar/gaar-tor.pdf> [last accessed: 15.12.2013].

<sup>82</sup> E3.6.2.

<sup>83</sup> E3.6.6.

<sup>84</sup> E4.2.6.

<sup>85</sup> E3.6.4.

<sup>86</sup> E4.2.2. HMRC'S GAAR Guidance, *supra* note 25, p. 11.

that the arrangement is a reasonable course of action, then HMRC would need cogent reasons for continuing the process of counteracting the tax advantage<sup>87</sup>. Nonetheless, HMRC remains free to proceed if it considers that there are cogent reasons for doing so, because the Advisory Panel is not exercising any sort of judicial role and its opinions are not binding on HMRC or a taxpayer<sup>88</sup>.

## VI. CONCLUSIONS

There are no published studies presenting and assessing the actual usefulness of the committees to the administration or to taxpayers. Tax advisers representing taxpayers differ in opinion as to whether it is beneficial to request the committee for an opinion in a given case when it is not obligatory, and in circumstances when the submission of cases to the committee for its opinion is a rule – whether it is useful to get involved in this step of procedure or rather to consider it as a loss of time and effort<sup>89</sup>. The fact that the opinions issued by consultative committees are not binding and that such bodies are only partially independent of the tax administration might lead to the opinion that this element of the proceedings has minor significance for the course of the dispute and the way it is finally resolved. However, it seems that this conclusion is not justified in the case of the British panel as it is independent of the administration and it is not made up of any HMRC representatives. Yet, it is difficult to discuss the actual function of the British committee as the GAAR has been effective in the United Kingdom for a short time only (since July 2013). In the countries in which the committees have been functioning for a long period of time, the statistics show that these bodies have recommended application of GAAR in the majority of the cases

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<sup>87</sup> According to HMRC GAAR Guidance, such reasons could, for example, include the belief that a member or members of the panel had taken a mistaken view of the facts, or a wrong interpretation of the non-GAAR statutory provisions, or had reached an erroneous view of established practice. See C7.2.

<sup>88</sup> E 4.2.9.

<sup>89</sup> Pagone, *supra* note 20, p. 14.

referred to them. But, it is also impossible to state that they clearly favour the tax administration in their opinions<sup>90</sup>.

The number of cases referred to advisory committees for their opinion is considerable; in fact, in recent years we can observe a very rapid increase in the number of cases in all countries in which advisory committees operate. It is evident even in France where requesting the committee's opinion is not obligatory: the number of cases in France in 2012 increased more than twice in relation to the number of cases in 2011<sup>91</sup>, and according to the data available for 2013 – the number of cases and the frequency of the committee's meetings is still growing compared to the preceding years<sup>92</sup>. In Australia, the growth in the number of cases submitted to obtain opinions resulted in the appointment of the second advisory panel. It means that the consultative committees are surely not of marginal importance.

There are no legal grounds in any country for charging taxpayers fees for the opinions issued by consultative committees. Yet, despite the high costs of the consultative committees' operations (incurred as a consequence of their workload, that is the number of cases they examine), once they have been established, they are not dissolved and the legislator does not limit the scope of their competence. Furthermore, in countries which have recently introduced the GAAR (Great Britain) such advisory bodies

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<sup>90</sup> In France le Comité recommended applying the GAAR in 71% of cases examined in 2012; 55% in 2011. See: *Rapport Annuel 2012*, supra note 36, p. 4. Some statistics are available also in: Michaud, supra note 33, pp. 8-9. In Canada, according to statistics released by CRA in 2013, since the GAAR was introduced in 1988, 1,125 files have been referred to the GAAR Committee. Of those files, the GAAR Committee has recommended that the GAAR be applied in 865 files. See: <http://www.canadiantaxlitigation.com/tag/gaar> [last accessed: 15.12.2013]. See also P. Lynch, *CRA's GAAR Committee Batting 964 in 2012*, Canadian Tax Adviser 19.06.2012, available online: <http://www.kpmg.com/ca/en/issuesandinsights/articlespublications/canadiantaxadviser/pages/cra's%20gaar%20committee%20batting%20964%20in%202012.aspx> [last accessed: 15.12.2013]. In a period from 1.07.2007 to 30.06.2011, the Australian Panel advised application of the GAAR in 64% of cases, called for further information in 17% of cases, whereas it decided not to apply the GAAR only in 19% of the cases referred to it – see: A. Korde, *GAAR – Are Safeguards Adequate?*, June 2012, available online: <http://www.bcasonline.org/articles/artin.asp?1049> [last accessed: 15.12.2013].

<sup>91</sup> Comité de l'abus de droit fiscal. *Rapport Annuel 2012*, supra note 36, pp. 4 and 6.

<sup>92</sup> 15 meetings in 2009, 18 in 2010, 21 in 2011 and 52 in 2012. For further information see: [http://www.impots.gouv.fr/portal/dgi/public/popup.jsessionid=XC1HI25WRFAZBQFIEI PSFEY?espId=&typePage=cpr02&docOid=documentstandard\\_6518&temNvlPopUp=true](http://www.impots.gouv.fr/portal/dgi/public/popup.jsessionid=XC1HI25WRFAZBQFIEI PSFEY?espId=&typePage=cpr02&docOid=documentstandard_6518&temNvlPopUp=true)

have been established and given considerable autonomy *vis-a-vis* the tax administration. It shows that the consultative committees have proved their usefulness in the area of the application of GAARs and gained a permanent place in legal systems<sup>93</sup>.

For all these reasons it seems strongly recommended, if not necessary, to establish such a consultative body while introducing the GAAR to the Polish tax system – and before we see it happening, it is useful to study and consider the role of the committees from comparative perspective.

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<sup>93</sup> Even in France, where requesting the committee's opinion is not obligatory, it has been emphasised that the committee plays a significant role, see Gutmann, *supra* note 62, p. 58.



