

Targeting the enablers of ineffective tax avoidance: supplementary paper on questions of principle and legal analysis

Executive Summary

This technical note is a follow up to a previous APPG [policy paper](#) that looked to resolve evidential issues in prosecuting the enablers of ineffective, aggressive tax avoidance schemes for criminal offences connected to those schemes.

Criminal prosecutions of promoters and enablers of abusive tax schemes require proof of **dishonesty**. In the context of egregious tax avoidance, it is too easy for the promoters and enablers of these schemes to fend off allegations of dishonesty by claiming it was **within the range of reasonable expert opinion** to believe that the scheme they were promoting would work. To get around this evidential issue, we proposed applying the “**double reasonableness test**” in the General Anti-Abuse Rule to determine whether a tax scheme was within the range of reasonable expert opinion. If it was not then it is clear that the scheme was being promoted dishonestly.

Concerns of **legal principle and fundamental justice** were raised by Rt Hon Jesse Norman MP in his then capacity as Financial Secretary to the Treasury. In this response, we refute these concerns. Justin Rouse QC, a senior barrister specialising in criminal law, has advised us that the hypothetical scenarios in which the measure might result in some kind of **unjust prosecution** were “**inherently unlikely**”, and that the **practical effect** of the measure will “simply be to **enable prosecutions of dishonest advisers** that would otherwise be very difficult for evidential reasons”.

We therefore remain convinced that this measure is sound and will help to bear down on aggressive tax avoidance by creating a credible deterrent for the enablers that devise and promote these schemes. The APPG on Anti-Corruption & Responsible Tax will continue to pursue its implementation at every opportunity.

Introduction

In 2020 we published our paper ‘Ineffective tax avoidance: targeting the enablers’,¹ in which we advocated for a statutory intervention into the common law offence of cheating the public revenue. In broad summary the proposal was that, where the ‘double reasonableness test’ in the General Anti Abuse Rule (‘GAAR’) is satisfied, there would be no need for the prosecution to independently demonstrate that the defendant had been dishonest. We subsequently tabled an amendment which would implement the proposal, and the legislation so tabled is reproduced as an appendix to this follow-up paper.

¹ <https://anticorruption-responsibletax.org/s/targeting-the-enablers-of-tax-avoidance.pdf>

In the House of Commons and in wider debate a number of important concerns have been raised in relation to the proposal. What about the principle of innocent until proven guilty? Would this measure risk criminalising the innocent? Does this measure create a strict liability offence i.e. one without a 'mens rea' or mental element? Does this measure water down the requirement to prove guilt beyond reasonable doubt? What about rule of law, human rights, the right to a fair trial and so on?

In this paper we address those concerns.² Prior to drafting this paper we obtained advice of Justin Rouse QC, a senior barrister specialising in criminal law, and his advice is reflected in the analysis below. A specific technical issue was raised and addressed by counsel, and the point is noted in the section to which it is relevant (i.e. the section headed 'Presumption of innocence and burden of proof'). Broadly, however, counsel confirmed that the proposed legislation may be enacted without substantial concerns of the kind suggested above. In his opinion counsel offered the foregoing summary of the practical effect of the draft legislation.

“Realistically, the only widening of the scope of the offence is in respect of an honest adviser unwittingly getting involved in a GAARable scheme out of gross incompetence and thereafter being unable to make out the defence [*i.e. the additional defence for good faith error in subsection (3) in the draft legislation*]. Assuming such advisers are vanishingly rare and should not even be in practice, that scenario is inherently unlikely, so the effect will (subject to the potential reading down of the defence burden [*i.e. the technical issue mentioned above and discussed below*]) simply be to enable prosecutions of dishonest advisers that would otherwise be very difficult for evidential reasons.”

This is a technical paper and it should be read only as an adjunct to our previous paper. It does not contain the arguments in favour of the measure; for those, please see the original paper. The discussion in this paper is organised under four heads i.e. (i) Deterrence, (ii) 'Mens rea' and strict liability, (iii) Presumption of innocence and burden of proof, and (iv) Right to a fair trial.

Deterrence

The starting point for addressing the questions of principle raised in relation to the proposed measure is to note that they are to a substantial (if not overwhelming) extent, theoretical. This is because the purpose of the measure is to deter tax advisers who would otherwise be giving advice so unreasonably aggressive that no reasonable tax adviser could consider the course of conduct reasonable (this being the GAAR double reasonableness test). With the knowledge that this measure is on the statute books, it is to be hoped that advisers only give advice which is within the (still broad) spectrum of advice between conservative and *reasonably* aggressive.

It is of course theoretically possible that an adviser could unwittingly give unreasonably aggressive tax advice by accident, or out of sheer incompetence. It is with such scenarios in mind that the questions of principle are here addressed.

²We would note that concerns of a procedural nature have also been raised – specifically how would this measure interface with the procedure of the GAAR panel? That concern is validly raised and we agree that it would need to be considered in any practical implementation of the measure. This paper, however, addresses the questions of principle and of legal analysis.

'Mens rea' and strict liability

Generally speaking, criminal offences are defined so as to have a 'mens rea' or 'mental element'. This means that it is not sufficient for the prosecution to show that a defendant did an act or omission: instead it is also necessary to demonstrate that the defendant had a culpable state of mind. Offences without such an element are referred to as 'strict liability' offences and (rightly) they are considered to present greater threat to principles of justice.

On the face of it, it may be supposed that the measure we propose turns cheating the public revenue into a strict liability offence; that substituting a GAAR determination for the dishonesty element strips the offence of its mental element.

This is not the case. Where our measure applies, it would still be necessary for the prosecution to show to the jury the existence of a mental element, and show it to the criminal standard. That mental element would not be dishonesty but knowledge; specifically knowledge of the aspects of the course of conduct being promoted by the adviser that have the consequence that it would fall foul of the double reasonableness test (see subsection 2 in the appended legislative implementation). If the defendant does not know that the course of conduct has the features that mark it out as one that no reasonable tax adviser would consider reasonable, the prosecution will fail.

It is perfectly common for the mental element in a criminal offence to be knowledge (as it is here), or intention, or recklessness, or some other mental element aside from dishonesty. No principle of justice is abrogated by our proposal from this perspective.

We recognise, however, that this will not save from prosecution the hypothetical innocent tax adviser, caught up in an ultra-aggressive scheme, the features of which they are aware of, but which they nonetheless (for whatever non-culpable reason) do not recognise for what it is. It is for that reason that, unrealistic though this scenario is, our proposal includes a 'safety valve' in the form of a 'good faith' defence (see subsection 3 in the appended legislative implementation). If the defendant can show they believed in good faith that the course of conduct was reasonable in the circumstances, the prosecution will fail.

Presumption of innocence and burden of proof

The burden of proof in relation to the principal elements of the offence, including the mental element of knowledge, remains with the prosecution. They must show beyond reasonable doubt that all the elements of the offence are made out in the ordinary way. The presumption of innocence is therefore upheld.

But the 'good faith' defence introduced by our measure is something that the defendant must prove if they seek to rely on it. To that limited extent, therefore, there would exist what is known as a 'reverse burden' in the definition of the offence of cheating the public revenue as modified by our proposal.

That reverse burden would not be introduced into the principal elements of the offence, however; it would only exist in relation to this additional supplementary defence that did not exist before. As explained, in order for the defence to even be needed, the prosecution would have to show beyond reasonable doubt that the offence had otherwise been committed. If not, the case will not

proceed beyond the close of the prosecution case. Further, it should be understood that the reverse burden on the defendant would only be (at most, as to which see below) the civil standard of proof – they would not be required to prove their defence beyond reasonable doubt.

It is common for elements of good faith/good reason to rest upon a defendant in English criminal law. This is because it is quintessentially an element of a defendant's state of mind – something which it is difficult for the prosecution to *disprove*. This phenomenon of a reverse burden of proof in relation to a defence is therefore absolutely not, in and of itself, contrary to principle. To offer a dramatic example, the defence of 'diminished responsibility' in respect of a murder charge is one where the burden of proof rests on the defence. A novel reverse burden will, however, potentially offer a route by which the defendant can challenge the prosecution by challenging the burden of proof which the defence imposes on them on e.g. human rights grounds.

The advice we have received is that, while it is likely that a court would allow the reverse burden in these circumstances, it is theoretically possible that the defence could be 'read down' so as to constitute a mere 'evidential' burden. All the defendant would have to do in these circumstances is provide evidence going to the existence of the defence, and the burden would then fall back on the prosecution to refute it beyond reasonable doubt. In other words, in the hands of criminal judges, the 'safety valve' in our measure may in fact offer even more safety to the hypothetical innocent than it appears as the measure is drafted. Certainly if the burden is indeed 'read down' all question of contravention of principles of justice would be eradicated. The offence would be harder to prove, from the perspective of not being susceptible to a defence with a reverse burden, than a murder charge.

Right to a fair trial

The advice we have received is that, to the extent issues of broad legal principle are raised by our proposal, those issues would be addressed in proceedings by reference to the aforementioned question whether the 'reverse burden' is to be 'read down' into a mere 'evidential' burden. This means that, in the event the measure is implemented and a prosecution is brought under it, litigation on that specific issue could be expected which would only be resolved on appeal where the courts would consider the impact of legal burden on the right to a fair trial (Art. 6 ECHR). We have received advice that both our domestic courts and the European Court of Human Rights afford a wide 'margin of appreciation' to states/authorities in the organisation of their own criminal law, including legal/evidential burdens. One of the factors which the courts will consider is the public interest. For the reasons given above, we believe that the public interest in this measure is strong.

In any event, however, the prospect of potential appeal on this issue has two major strategic consequences for both tax advisers and those who would prosecute them under this measure:

First, we do not believe that the possibility of a tax adviser fighting and winning that battle in the Court of Appeal and/or the Supreme Court is enough to mitigate the deterrent effect of this measure. The risk of losing and facing prison would continue to dominate in the mind of an adviser considering giving unreasonably aggressive advice.

Secondly, on the part of the prosecution, the risk of fighting and losing that battle (and thereby watering down the offence) means that it would be a strategic error to prosecute in a case where there is even a possibility that the defendant could rely on the 'good faith' defence. Much better to keep their powder dry on that issue and only prosecute where the defendant was very obviously

acting in full, expert knowledge that the tax avoidance scheme in question was an egregiously aggressive one.

For both of these strategic reasons, we believe that the questions of principle (while important) are wholly theoretical. Advisers are not going to be committing this offence, and in the (highly implausible) circumstances where it looks like it might have been committed by accident, our prosecuting authorities will not go near it. But for the reasons set out in this paper (and based on the advice we have received), we nonetheless believe that those questions of principle are to be resolved in favour of the measure rather than against it.

Appendix: draft legislation

280A Finance Act 2014

(1) In any proceedings for the offence of cheating the public revenue, where —

(a) the person charged acted as a promoter in relation to relevant arrangements within the meaning of section 235, or the person charged gave in the course of business affirmative advice on the viability of relevant arrangements within the meaning of section 234, and

(b) the relevant arrangements were abusive tax arrangements within the meaning of subparagraph 3(2) of Schedule 16 of Finance (No. 2) Act 2017,

subsection (2) shall apply, subject to subsection (3).

(2) If, at any time that the person charged acted so as to fall within subsection (1)(a), that person was aware of the course of action or intended course of action having the consequence that the relevant arrangements were abusive tax arrangements within the meaning of subparagraph 3(2) of Schedule 16 of Finance (No. 2) Act 2017, the actions of that person in respect of the relevant arrangements shall be deemed to have been dishonest.

(3) Subsection (2) shall not apply if the person charged proves that they held in good faith the belief that the course of action or intended course of action was reasonable in the circumstances.