

Simon Thomas AM  
Chair  
Finance Committee  
National Assembly for Wales

16 September 2016

Dear Simon

### **Land Transaction Tax and Anti-Avoidance (Wales) Bill**

Further to my statement on the legislative competence in respect of the Land Transaction Tax and Anti-Avoidance (Wales) Bill, published on 12 September, I am writing to draw your attention to the human rights and consent issues I took into account in reaching my view.

In accordance with section 110(3) of the Government of Wales Act 2006 (GoWA) and Standing Orders 26.4, I have stated my view that the Land Transaction Tax and Anti-Avoidance (Wales) Bill is within the legislative competence of the Assembly.

However, the Bill raises an issue relevant to competence which I consider it appropriate to bring to the attention of your Committee, so that its members can decide whether or not to probe this issue further as part of the scrutiny process.

### **Human Rights**

In order to be within the Assembly's legislative competence, each provision of a Bill must satisfy the criteria set out in section 108 of the Government of Wales Act 2006 (GoWA). One of the criteria set out in section 108 is that the provisions of a Bill must be compliant with rights set out in the Human Rights Act 1998 and taken from the European Convention on Human Rights ("the ECHR/the Convention"). Article 1 of Protocol 1 to the Convention is one such right. In my view, the general anti-avoidance provisions (GAAR) of the Bill (set out in section 65) merit in-depth scrutiny in the light of the requirements of Article 1 of Protocol 1.

Croesewir gohebiaeth yn Gymraeg neu Saesneg / We welcome correspondence in Welsh or English



## Article 1 of Protocol 1

Article 1 of Protocol 1 (A1P1) to the Convention protects the enjoyment of possessions. Taxation deprives a person of a possession: the amount of money due by way of tax. However, A1P1 expressly provides that it does not -

*“ in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.*

The tax must be lawful for the exception to apply. The fact that the tax is provided for in legislation – such as the Bill - will not be enough. To be lawful, in Convention terms, the legislation must be drafted with sufficient precision to allow the citizen to assess, with reasonable certainty (taking advice if necessary), what s/he has to do to comply with it; what the consequences of non-compliance will be; and whether his or her rights have been breached. The Supreme Court has recently ruled that certain provisions of an Act of the Scottish Parliament were outside the legislative competence of that Parliament on the basis that they were not drafted with this requisite precision (*The Christian Institute and others v The Lord Advocate (Scotland)*, Trinity Term [2016] UKSC 51).

## The General Anti-Abuse Rule (GAAR)

The GAAR contained in section 65 of the Bill seeks to address tax avoidance in devolved taxes.

The GAAR will apply to artificial tax avoidance arrangements. These are arrangements where:

- the main purpose (or one of the main purposes) is to obtain a tax advantage, and
- entering into or carrying out the arrangement was not “a reasonable course of action”, having regard to the relevant tax legislation.

The Bill lays down the following guidelines for assessing whether a course of action was “reasonable”, and therefore whether a tax arrangement was “artificial”. They are:

- whether there is a genuine economic or commercial substance to the arrangement, and
- whether it is reasonable to assume that the arrangement results in an amount of tax chargeable that was less than would have been anticipated by the relevant legislation.

These guidelines provide some clarity to taxpayers as to how the GAAR will be applied. They are not, however, mandatory or exhaustive.

The Bill also provides that an arrangement will not count as artificial if it is in accordance with ‘generally prevailing practice’ accepted by the Welsh Revenue Authority (WRA). This, clearly, seeks to be fair to taxpayers.



In any proceedings relating to the GAAR, the onus of proving that an arrangement is artificial will lie on the WRA.

The Finance Act 2003 currently provides for a General Anti-Abuse Rule (the UK GAAR), which became law in 2013. It covers, among other taxes, Stamp Duty Land Tax, which Land Transaction Tax (LTT) will replace in Wales. The UK GAAR applies to tax arrangements which are considered to be 'abusive'. It does not apply to transactions involving UK Landfill Tax.

The Revenue Scotland and Tax Powers Act 2014 makes provision for a Scottish GAAR (which became law in 2015). It applies to transactions involving land and buildings in Scotland, and to transactions involving Scottish Landfill Tax. The Scottish GAAR applies to tax arrangements which are considered to be 'artificial'.

Both the UK GAAR and the Scottish GAAR are intended to provide tax authorities with the means to challenge taxpayers' attempts to arrange their affairs so as to pay less tax than the relevant legislation intended. They seek to provide a level of protection for State finances across the taxes to which the relevant GAAR applies.

The GAAR introduced by the Bill is similar to the Scottish GAAR, in that both apply to arrangements which lead to a tax advantage which is considered to be 'artificial'. In contrast, the UK GAAR uses the concept of 'abusive' arrangements.

Neither the UK GAAR nor the Scottish GAAR has been challenged in the courts.

#### AIP1 and the GAAR

The Committee may wish to probe whether the concept of a 'reasonable' course of action is sufficiently precise for a taxpayer to regulate his or her conduct. The Committee may wish to explore how easy it will be to assess what is 'genuine', and what it is 'reasonable to assume' about the level of tax anticipated to be paid.

The Convention requirement for clarity of legal drafting is also relevant to new sections 81E-81H, which the Bill inserts into the Tax Collection and Management (Wales) Act 2016, and which relate to what the WRA may do in taking counteraction against artificial tax avoidance. The WRA's power to make 'such adjustments as it considers just and reasonable to counteract a tax advantage' appears to allow the WRA considerable discretion and to lack precision. Although complete precision would, in practice, be difficult to achieve in this context.

A strong argument in favour of the GAAR's compatibility with the Convention is that the taxpayer can challenge, in an independent and impartial tribunal, any WRA ruling of artificiality, and the validity of any counteraction taken. It is also extremely important in Human Rights terms, and positive, that the burden of proof of artificiality will lie on the WRA in such proceedings.



## Queen's/Duke of Cornwall's Consent

Section 104 of GoWA provides that no Bill may be passed without the consent of Her Majesty or the Duke of Cornwall where that consent is required by virtue of Standing Order 26.67.

Consent is required where a Bill affects prerogative, private or hereditary revenue of the Queen or the Duke of Cornwall. (This is a separate matter from the question of whether a Bill affects the Crown as an institution). The need for consent from Her Majesty or the Duke of Cornwall is not a matter of legislative competence, and so a Bill could not be referred to the Supreme Court for lack of that consent; however, the Bill cannot be passed until any required consent has been signified.

Whether consent is needed for this Bill depends on whether Her Majesty's or the Duke of Cornwall's private, prerogative or hereditary revenue could be affected by a land transaction as defined in the Bill. The committee may wish to explore with the Cabinet Secretary whether the Welsh Government will be seeking such consents.

This is a short summary of the issues. If you would like further information and advice on these, or any of the other competence tests I applied to the Bill, the officials supporting your work will be pleased to assist.

I am copying this letter to the Chair of the Constitutional and Legislative Affairs Committee, the First Minister and the Member in Charge of the Bill.

Yours sincerely



Elin Jones AM  
Presiding Officer

