# ‘Enablers of Tax Avoidance’ – HMRC consultation

**Management of taxes**

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The CIOT has responded to HMRC’s proposals to introduce sanctions against those who enable tax avoidance arrangements that are later defeated.

In the October edition of Technical Newsdesk we set out the details of HMRC’s proposals to tackle ‘enablers of tax avoidance’ contained in their discussion document ‘Strengthening Tax Avoidance Sanctions and Deterrents’.

HMRC were seeking views on the following specific proposals:

1. Financial sanctions for those who design, market or facilitate the use of tax avoidance arrangements which are defeated by HMRC, with the aim of deterring ‘enablers of tax avoidance’. The focus of the proposals is on those who benefit financially from enabling others to implement tax avoidance arrangements;
2. Changing the way the penalty regime works for those whose tax returns are found to be inaccurate as a result of using such arrangements by defining what does not constitute the taking of ‘reasonable care’ and placing the requirement to prove ‘reasonable care’ onto the taxpayer;
3. Defining what is meant by ‘defeated tax avoidance arrangements’. HMRC are proposing that a wide definition of ‘arrangements’ is adopted for these proposals, as is already used in other parts of tax legislation;
4. Seeking further ways to discourage avoidance and shrink the avoidance market.

In its response to the proposals, the CIOT says that it supports the government’s ambition to tackle and alter the behaviour of the ‘shrinking but persistent minority’ of promoters and advisers identified by the government who continue to market tax avoidance schemes. However, it is our view that the proposals are far too widely

drawn in that they potentially apply to those working on commercial transactions which are not in any sense tax avoidance schemes. It is of paramount importance that the proposals, if introduced, are aimed at the right targets. Key to this is that the relevant definitions are extremely clear and impact only those targets.

The challenge for the government is therefore to frame legislation which will achieve their objective of preventing those who devise and market avoidance schemes from profiting from that activity, while maintaining the right of taxpayers to obtain full and expert advice on complicated and often unclear areas of law, enabling them to sensibly plan their tax affairs within the law and not lay themselves open to large, unintended tax bills.

Since the proposals impose a significant financial penalty, they will deter some from providing advice at all and (by extending to those who have not devised or actively marketed tax avoidance) risk making the UK a much less attractive place for commercial transactions and other activities. Given that the UK is the European base for many investments, this would be very damaging to the UK economy. At a time when the Brexit decision is already causing some overseas investors to re-evaluate the UK as a place to invest and do business, it is important that overreaching counter tax avoidance measures do not create disincentives and further uncertainty.

We regret that no consideration has apparently been given to the significant work HMRC and seven accounting and tax professional bodies, including CIOT, have recently been engaged in to cut down the supply of tax avoidance schemes through amending our professional standard rules. We also question whether there is enough current avoidance behaviour to warrant such a draconian and broad new measure, when targeted action could be taken against the ‘shrinking but persistent minority’ referred to in the consultation paper by invoking existing legislative measures.

It is also unclear from the consultation paper whether the proposals only cover arrangements entered into after enactment of any new legislation or whether they will also apply to an arrangement entered into many years ago but with a ‘relevant defeat’ after enactment. Following our raising the timing of these measures with HMRC, HMRC have written to us and other stakeholders, saying that: ‘The policy is intended to change future behaviour. The date at which any legislation would take effect will be decided by Ministers in due course within the usual tax policy making and legislative process’. We conclude from this that HMRC will recommend to Ministers that the legislation should apply only to ‘enabling’ that takes place after

the date that legislation is enacted. This is crucial.

With reference to the penalty model being proposed, we do not agree that a tax-geared penalty is the right approach. It could result in a very significant and disproportionate financial penalty being imposed on an adviser. The penalty should be high enough to make advisers take due care to analyse the law accurately but it should not be so draconian to deter them from giving advice at all. In our view, the size of the penalty should be limited to the amount of net fees or commission received by the enabler in respect of the advice given. We also think there should be a warning stage before the imposition of a penalty, similar to how the 'conduct notice' works under the Promoter of Tax Avoidance Schemes (POTAS) regime.

One suggestion for targeting these penalties properly at objectionable behaviour is to require a more positive link within the definition of 'enabler' between the financial benefit and the tax avoidance, focusing on key indicators such as contingent and/or premium fees, confidentiality agreements and marketing methods. The mere fact that someone financially benefits (for example a company formation agent earning a normal fee) should not be enough to be caught nor should it be necessary for them to prove ignorance of the arrangements to escape.

A further suggestion for narrowing the focus of these measures to the 'persistent minority' is to provide a defence against the imposition of an enabling penalty for professional advisers. This would include an adviser who is a member of a regulated body or a body with professional rules that acceptably address the issue of tax avoidance, such as Professional Conduct in Relation to Taxation (PCRT), and which have transparent disciplinary procedures for members who do not comply with professional rules and standards.

In considering how to target the rules at objectionable avoidance arrangements, we would encourage HMRC to incorporate a clearly-defined 'advice exclusion' exemption along similar lines to the Australian model.

The proposals, as drafted, mean that a long time will have elapsed between the provision of services and the point that an enabling penalty can apply, since it is proposed that the trigger will be the defeat of the arrangements in question. This may lead the 'persistent minority' to see little downside in continuing their behaviour in the short to medium term. We question whether the definition of enabler should instead be focusing more on the adviser's behaviour rather than the

outcome of the arrangements they have devised or marketed.

Regarding taxpayer penalties, we do not favour introducing legislation that describes what does not constitute reasonable care. Whether or not reasonable care has been taken is a question that should be left to the tax tribunals to decide as it will vary on a case by case basis. We also disagree with the proposal that the onus of proof should be put on the taxpayer to demonstrate reasonable care. This would be a significant change which in our view is not justified.

We also consider the human rights aspects of the proposals in our response.

In summary, we acknowledge that there are limited financial penalties at present for those who devise and actively market tax avoidance schemes. However, to ensure that any new measure is properly targeted, in our view, the following changes need to be made to the proposals:

1. The breadth of ‘tax avoidance’ for the purpose of the rules needs to be cut down to apply only to arrangements caught by the General Anti-Abuse Rule (GAAR) and the Disclosure of Tax Avoidance Scheme (DOTAS) rules. Targeted Anti-Avoidance Rules (TAARs) and unallowable purpose rules should not be included.
2. The definition of ‘enabler’ needs to be limited to those who devise and play an active role in the promotion of tax avoidance schemes.
3. There should also be a reasonable care defence available to the professional adviser and compliance with PCRT should form a key part of the defence.
4. There should be a warning before a penalty is imposed.
5. The penalty should be related to net fees, as anything else would be disproportionate.

The CIOT’s response can be found on the CIOT website.