Law Society of Scotland

Consultation Response

Closing in on promoters of marketed tax avoidance

June 2025

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Tax law sub-committee welcomes the opportunity to consider and respond to the HMRC consultation *Closing in on promoters of marketed tax avoidance.*[1] The sub-committee has the following comments to put forward for consideration.

General comments

Balance (and only Proportionate Changes) Required

As the professional body for Scottish solicitors, we have a statutory duty to work in the public interest, a responsibility we are committed to maintaining through a stringent, proactive and effective regulatory regime.

We support strong action against the promoters of tax avoidance schemes. We are aware from our work that our members deal with a number of queries from clients enquiring why we are not advising them on the apparent vast savings that can be made, at least according to the bad actor tax "advisers" promoting avoidance schemes. Ultimately these schemes often result in those taxpayers having paid irrecoverable fees to the bad actors and an expensive mess for the taxpayer and more reputable advisers to sort out. This situation has become exacerbated over recent years with more vulnerable and lower paid groups being targeted by providers. We commend HMRC for attempting to take action to limit the damage here.

However, as we have noted in previous calls for evidence, we consider that any changes designed to assist HMRC in tackling promoters of tax avoidance should be framed as narrowly as possible so as not to cause extra compliance or regulatory costs (in terms of time and financial costs in complying with further legislation) for the majority of tax advisers who have no part in promoting or advising on such schemes.[2]

Looking in particular at Scottish solicitors who advise on tax, as we have highlighted in previous responses, they are already robustly regulated under the

[1] Closing in on promoters of marketed tax avoidance - GOV.UK

[2] Law Society of Scotland response: Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance, see- Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

provisions of the Solicitor (Scotland) Act 1980 (the 1980 Act).[3] Scottish solicitors are also bound by the Law Society of Scotland's rules and guidance which, among other things, require solicitors to: (a) always act in an honest and non-deceitful manner so that their trustworthiness is beyond question (rule B1.2) and: (ii) always act in the best interests of their clients in giving independent and impartial advice (rule B1.4). In addition, the Regulation of Legal Services (Scotland) Act 2025, recently passed into law by the Scottish Parliament, will further strengthen and enhance the Scottish solicitor regulatory regime. This will introduce greater investigatory and enforcement powers for Scottish legal sector regulators.

We urge the government to focus on the known and persistent promoters of tax avoidance who sell mass marketed schemes, both in terms of narrowly drawing proposals for changes and/ or further powers for HMRC (to achieve the greatest mass of results without imposing undue and unwarranted regulation or costs on all tax advisers) and in terms of HMRC taking robust and effective action to counter this group of known persons. We are aware of a general perception that HMRC action to date has been ineffective, due to being too slow and at times marred by avoidable errors. We are therefore pleased to hear that the government wants to "make a step change" in tackling these promoters and we urge it to stay on target and not use a drag-net approach that will sweep up all advisers in further regulation, costs and worry of being caught up due to the unnecessary width of regulation rather than because their actions are promoting or supporting the tax avoidance industry. Further, a more targeted focus would likely deliver results for HMRC more quickly as it would garner more support from the bulk of the tax adviser community and allow legislation to be drafted and progress to being enacted with less opposition or change being required to it.

Legal Professional privilege

We consider it appropriate that any proposals which seek to change the position in relation to Legal Professional Privilege (LPP) (or, in Scotland, "confidentiality of communications") must be justified, proportionate and– if made at all - targeted as narrowly as possible.

LPP is an essential right in a democratic society (see our section 6 responses for more detail). Therefore, it is vital that any new or extension of existing HMRC powers must recognise and co-exist with legal professional privilege and our members' duty of client confidentiality. Rule B1.6 of the Law Society of Scotland's rules requires maintenance of client confidentiality. This duty is stated to be such that only the client, Acts of the legislature, subordinate legislation or the court can waive or override the duty of confidentiality, but it is stated that it does not apply to information about any crime a client indicates they will commit. As an example of this co-existence, we note, for example, that HMRC's existing file access powers (e.g. under schedule 38 of Finance Act 2012) cannot compel solicitors to

[3] Law Society of Scotland response: Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance, see- Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

disclose information to HMRC which is subject to privilege and we consider it appropriate this remains in place.

In terms of the DOTAS rules, specifically regulation 6 (which prevents legal professionals giving advice being promoters) and the right for solicitors not to disclose anything subject to LPP, we believe that these protections should remain in place. The extra administrative and resource burden that would be placed on all legal professionals far outweighs any obvious benefit to HMRC. This is a complex area where legal professionals have a web of obligations and, in our view, the weighing of this matter and the decision made on it which has already occurred should be respected. We note that it may be possible to target some "mis-selling" type activity through existing regulation to which solicitors are subject e.g. rule B3 of the Law Society of Scotland's rules requires advertisements and promotional material issued to not contain any inaccuracy or misleading statement. This may be a route by which HMRC could target some instances of mis-selling i.e. by raising concerns, or raising a complaint, with the regulatory body.

We understand the rationale behind the proposal to introduce a deemed waiver of LPP where a counsel opinion has been publicly referred to in marketing an avoidance scheme. However, we stress that this would only be appropriate if it were designed with precision and the intent to target it narrowly e.g. only mass-market schemes and only where the opinion has been used in marketing. It is imperative that these restrictions (and other safeguards) are clearly outlined in legislation and not simply left to HMRC discretion. For example, a clear definition of a "mass-market scheme". We consider this important as it will limit the impact on existing rights and ensure that HMRC remain focused on the identified problem whilst preventing "mission creep" into other situations which have not been consulted on (but may provide softer targets for HMRC).

2. Introduction

The government intends to further close in on promoters of tax avoidance

Question 1: What other ideas, in addition to the ones in this document, should the government consider to deliver its intent of closing in on promoters of marketed avoidance?

As per our general comments, we urge a clear and narrow focus be given towards the known persistent and determined group of promoters of tax avoidance. HMRC has numerous means through which this can be achieved and could give further consideration to some of the proposals set out below;

- Focusing on these, known, types of promoters and schemes whilst avoiding drawing wide rules for possible future use in other situations.

- Addressing the perceived unfairness and source of public discontent that promoters retain the fees charged for these tax avoidance schemes while

HMRC pursues the individual taxpayers for the tax. Penalties (or a joint liability for the tax could be imposed) tied to at least the fees received, for example, and consideration given to a lowering of the tax due/ penalties due by the taxpayers in such cases where amounts are so recovered. We suggest that consideration could be given to creating an obligation to pursue promoters (and their directors and shareholders) in the first instance and postpone (and raise and put on hold) action against individual taxpayers pending the outcome of action against promoters.

- Taking legal action sooner rather than later to tackle these repeat promoters and putting in place systems to ensure that action taken is robust and error free. We would suggest consideration should be given towards having specialists working on taking action against promoters and having at least two persons responsible for any single matter to attempt to minimise oversights and errors;

- Considering the use of other existing powers to attempt to recover the historic profits of tax avoidance promoters;

- Having HMRC fully resource teams to tackle these promoters in a robust way - both online and in-person visits. In terms of schemes being promoted from overseas consider international collaboration;

- Monitor and act swiftly on information in the public domain e.g. published by think tanks or provided by organisations assisting taxpayers with their tax affairs such as Tax Aid. Please see our answer to Q.61;

- Publicising widely the legal action taken by HMRC to ensure that it is seen both by other promoters and the public at large. Ensuring this publication is not only on HMRC pages and appears when tax schemes are searched for on Google etc;

- Acting consistently with HMRC's acknowledgment that most regulated professionals providing tax advice are not the problem – and so, putting additional layers of regulation on them will not solve the promoter problem; it may in fact disincentivise "good actors" from staying in the tax advice market. It is essential that proposed changes do not punish that vast majority of law-abiding and good actor advisors for the actions of a few. We would include within that notion of "punishment" a disproportionately imposed bureaucratic or administrative burden, particularly for those who are already regulated by at least one other professional body;[4]

- Where a regulated professional is part of the problem, being very specific about that – i.e. we understand from the consultation that HMRC believe

[4] Law Society of Scotland response: Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance, see- Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

that that the problem predominantly is with barristers.[5] We do not have barristers in Scotland but if this is the case, focusing on KCs providing opinions and tackling through the appropriate measures, rather than drafting widely to cover "all legal professionals" and rather than attempting to have (other) regulatory bodies enforce tax conduct codes or similar (beyond what they already do) may be appropriate. It is worth noting also that the issue is not unknown to the Bar Standards Board (see the note linked below from 2014 which notes the current system has the result that "risk rolls downhill and falls on the guy at the bottom" rather than on the KC involved).[6] As noted above in respect of promoters, a more radical suggestion would be for consideration to be given to imposing penalties (or a joint liability for the tax could be imposed) tied to at least the fees received, and perhaps additionally to a lowering of the tax due/ penalties due by the taxpayers in such cases, with an obligation to pursue KCs alongside promoters (and their directors and shareholders) in the first instance. As noted throughout this document it would be crucial that this was limited to the most egregious of mass-marketed avoidance schemes and where the KC's opinion was so unreasonable no reasonable counsel would have given it (and this would likely require an arbiter such as the GAAR panel rather than being left to HMRC);

- As an alternative to the deemed waiver of LPP, consider measures to either (i) prohibit reference to a KC (or other counsel) opinion in publicising of schemes by promoters or (ii) require that if a reference is made to such a KC opinion the promoter must provide the instructions (i.e. the queries put) to the KC "on demand" to clients;

- Consider making it a legal requirement for promoters to include a form of "health warning" on their promotional material (e.g. like the warnings on cigarette packets). This would be text required to be included such as: "you should be aware that: tax planning schemes can be required to be disclosed to HMRC, HMRC may not agree with the analysis in this promotional material, HMRC is entitled to seek recovery of tax from you (plus interest and penalties) if it successfully disagrees with the analysis in this promotional material, and the promoter does not hold insurance cover which will protect you if this should occur, such tax will be payable in addition to your fees paid to the promoter (which will not be refundable if tax is also required)." ;

- Consider a ban on the advertising of, or the giving of, tax advice or "tax solutions" or "products" other than by regulated professionals (by which we mean regulated in any way e.g. as a solicitor, a chartered accountant (ICAS

[5] Closing in on promoters of marketed tax avoidance - GOV.UK
[6] Weak transmission mechanisms – and Boys Who Won't Say No. – Waiting for Godot

or ICAEW) or chartered tax adviser (member of CIOT), not necessarily specifically as a tax adviser and not requiring any new regulatory system);

- Run an education program for those likely to be agents/ involved in creating the promoter to end client chain, with the idea being that by targeting these people it acts as a way to have their potential clients warned too;

- Consider legislating to make it illegal for a company/ other entity to require or permit an individual or a PSC to perform services for it other than as a direct employee subject to PAYE unless the circumstances fall within a "white list" of example circumstances published by HMRC or unless clearance is given by HMRC to the arrangement. This idea essentially reverses the proposal of creating a new DOTAS hallmark for disguised remuneration schemes to attempt to define what is not acceptable (as promoters are highly likely to ignore this and not disclose the scheme anyway irrespective of any changes to the definitions).

Supporting those caught up in tax avoidance schemes

Question 2: Is there more HMRC can do to support those who use tax avoidance schemes?

We refer to our points made under question 1 regarding giving consideration to joint liability for tax being put on promoters which are used to market the schemes, and pausing of recoveries against taxpayers while that is being pursued.

We also refer to our comments on ensuring published information on what HMRC considers tax avoidance schemes (both defeated ones and by reference to generic descriptions) is available on, or linked to by, sites/ sources other than its current location on the HMRC website.

3. Expanding and strengthening the DOTAS regime

A hallmark for disguised remuneration

Question 3: Do you think there are features of disguised remuneration schemes that could feature in a new DOTAS hallmark that makes it clearer that disclosure is required and reduces the burden on HMRC of sanctioning non-compliance?

We have no comments.

Question 4: For the purposes of this DOTAS hallmark, should consideration be given to any specific exclusions, for example reimbursement of certain employment related expenses?

We have no comments.

Question 5: Are there other areas or arrangements where a new DOTAS hallmark would help the government tackle marketed tax avoidance?

We have no comments.

A criminal offence for failure to notify arrangements to HMRC under DOTAS

Question 6: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a stronger deterrent?

We consider that this approach will provide a deterrent but that it is important that any criminal offences be limited to 'mass marketed tax avoidance schemes' and subject to many other safeguards. See our answer to question 7 for further details.

Question 7: Should the criminal offence be restricted to schemes where there is a promoter acting?

Yes, we consider it appropriate that these offences be restricted to schemes where there is a promoter acting.

In general, we consider it important to limit criminal offences to "mass marketed tax avoidance schemes". These schemes cause the most harm and those involved in promoting them know (or at least ought to know) that they are clearly an inappropriate application of a concept or template to a mass of cases without consideration of the individual facts of each taxpayer.

We would suggest that consideration be given towards creation of additional requirements for the offence, such as where the scheme has a particular hallmark, and the person is a repeat promoter. Furthermore, we would suggest consideration towards tying the offence to the level or basis of the fee received. This is in line with our overall view that the proposals must be balanced and address the real source of the harm from marketed tax avoidance whilst avoiding impacting tax advisers giving day-to-day advice.

We are aware that some within HMRC may be of the view that it is unfair to treat mass-marketed tax avoidance differently to individual (or bespoke) advice cases. However, this consultation concerns mass-marketed schemes and therefore we consider it appropriate that any legislation drafted following this consultation deals only with these mass marketed schemes. This is due to a number of reasons

(i) The risk of widespread inappropriate application of tax law due to a "mass market" approach;

(ii) The level of tax loss;

(iii) The risk of harm to vulnerable and low paid groups is higher with these types of advisers. Focussing on the mass market schemes is likely to provide the best return to HMRC and be a proportionate response that minimises extra regulation and risk (especially of a criminal offence) for tax advisers who provide more day-to-day tax advice to individual clients.

Without restricting the legislation to mass marketed schemes, we would not consider it a proportionate response to the issue, and we do not think it is appropriate (especially in the context of a criminal offence) to rely simply on a statement by HMRC that they will only take action where "appropriate"; there is always a risk of "mission creep" or individuals within HMRC taking different views – to the detriment of the legitimate tax advice industry (and so ultimately to the ability of individuals to obtain legal advice on tax).

Question 8: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects? What reasons should be excluded from reasonable excuse?

With narrow targeting of the offence, the exclusions have less of a job to do. We would encourage this rather than the reverse. i.e. precise drafting of the constituent elements of the offence.

Updating the DOTAS civil penalty regime

Question 9: Do you agree that moving the issuing of DOTAS penalties from the Tax Tribunal to HMRC (appealable to the Tax Tribunal) is appropriate?

We have no comments.

Question 10: Are there any other changes to DOTAS penalties HMRC should consider?

We have no comments

4. Universal Stop Notices (USNs) and Promoter Action Notices (PANs)

Promoter Action Notice (PAN)

Question 11: Do you agree that the USN and PAN proposals would help to deter and tackle tax avoidance and that the deterrent effect would be proportionate to the costs of compliance?

We strongly support any action to tackle promoters of marketed tax avoidance. It is, however, essential that any enhanced powers must be clearly defined, and exercised consistently, proportionally, and responsibly.

Giving HMRC further powers could help strengthen the tax system and protect 'good actors' legitimately providing high quality tax advice to their clients. Appropriate safeguards and protections are essential to ensure the powers are targeted and applied to 'bad actors' without unintended penal consequences/collateral damage for other service providers.

We understand and are in general agreement with the purpose of the proposed USN to enable HMRC to act more quickly, comprehensively and effectively to shut down promoters of tax avoidance. Strong targeted direct action is required.

The definition of 'arrangements same or similar to those described in the USN' would need to be carefully considered and clearly defined to ensure that legitimate arrangements, for example, involving the same tax relief, are not caught under the USN. As noted elsewhere, a limitation to mass-market schemes is also crucial to achieve balance in these proposals by avoiding the risk of tax advisers working on day-to-day advice being inadvertently caught by a USN, in particular if criminal sanctions are involved.

We note that '*the Government does not envisage that PANs would apply to legal services*' as facilitating the promotion of tax avoidance schemes. We support this position. We consider that it would be impossible in practice for every legal instruction to be interrogated to such a level to enable members of the legal profession to take this decision. This is especially the case, for example, for smaller firms without any in-house tax specialism and for execution only work.

Question 12: Do you have any concerns or foresee any practical difficulties with the USN or PAN proposals outlined above?

We have concerns over the proposals for these enhanced powers being exercise in a disproportionate manner that could result in 'good actors' being unfairly prejudiced in terms of additional administration, costs and potentially penalties.

It is essential that there are clear and strong safeguards to help prevent unintended consequences and ensure the USN and PAN proposals are properly targeted.

As highlighted in question 11, there must be careful consideration given to what will be treated as 'similar arrangements' to ensure that the USN is clearly targeting a particular arrangement without other legitimate arrangements being caught.

A clear and consistently applied definition of 'connection to the promotion to avoidance' is also essential to avoid innocent product and service providers being potentially caught and unfairly prejudiced.

Question: 13: Do you have any alternative suggestions around how businesses would be able to tackle the issue of promoters using their products and/or services?

We would highlight the importance of clear consistent and regular communication by HMRC to business sectors used by tax avoidance promoters covering both 'red flags' and available support.

Question 14: Do you consider that the first contact letter mentioned above would support legitimate businesses to engage with HMRC?

A first contact letter as outlined could in practice support legitimate businesses. The content and tone of any letter would require to be carefully considered to ensure that legitimate businesses were clearly informed at the outset of the position and their role in working with HMRC rather than, for example, being treated by HMRC as part of the problem rather than the solution. Proper clear communication of the support, safeguards and protections being provided by HMRC must be given at the outset and throughout the process to avoid legitimate businesses being treated as a part of the targeted promoter's operations.

Scope

Question 15: Do you think that the USN is appropriately targeted? If not, could you indicate where you see the issues are and how these could be resolved?

As noted in our answers to previous questions, a limitation to mass-market schemes is also crucial to achieve balance in these proposals.

We would highlight that '*Same or similar arrangements*' needs to be sufficiently tightly defined and applied in practice to avoid promoters of legitimate arrangements being caught by a USN.

We are in broad agreement with the proposed escalating of financial penalties for individuals who are serial offenders and/or have 'influence or control over a number of entities that each breach the USN'.

There needs to wide, regular and effective communication of USNs in order to help ensure they work in practice and for them to possibly act as a deterrent to other active promoters of tax avoidance and/or potential future promoters of tax avoidance.

Question 16: How reasonable do you think it is for those involved in promoting or enabling tax avoidance to be expected to be aware of a universal stop notice published on GOV.UK and what more could HMRC do to ensure that all those affected by a USN are aware?

We would highlight that HMRC's promotion and communication of USNs and its enhanced powers beyond its own website will be vitally important in raising awareness both with promoters and enablers of tax avoidance. There needs to be clear and regular communications specific to particular businesses and business sectors most vulnerable to becoming unintentionally involved in providing services enabling the promotion of business services.

Question 17: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects?

We have no comments other than to highlight that with narrow targeting of when a USN can be issued and how it can be notified, the exclusions will not need to be relied on as heavily.

Question 18: How should the government approach defining whether a service or product provided to a suspected promoter is connected to the promotion of avoidance?

It is essential that the definition of 'connected' in this context is clearly and tightly defined with specific exclusions (including legal services) to avoid unintended consequences, including 'innocent' service providers being unfairly prejudiced. It may be unrealistic to aim to encompass all types of providers here; We would suggest consideration should be given toward narrowing the focus to the key issue– those that enable the tax avoidance to be marketed and promoted (e.g. advertisers, conference organisers etc). We agree with HMRC that 'robust safeguards' are required here.

Question 19: Should the government exclude categories of products or services from the scope of the PAN, and if so, what would those be and why?

We note and agree with the UK government's plans for PANs to not apply to the provision of legal services. Please refer to our answer to question 18 for our key focus suggestion. We would reiterate our strong preference for legislation to include provisions specifically relevant to the issue within scope of this

consultation rather than being broadly drafted and then attempting to provide a "defence" or exception for cases that realistically ought never to have been in scope in the first place.

Question 20: Do you consider that a business would be able to comply with the obligations in a PAN? If not, please explain where you see the difficulties and challenges and what could be done to overcome these.

We would highlight that professional service providers will be subject to their own professional standards to uphold and apply when providing services to their clients. This will extend to risk, compliance and anti-money laundering practice requirements. It is important that businesses are not penalised by HMRC for following the professional standards that apply to their particular sector area without first of all being given formal clearance to do otherwise.

We would further highlight that HMRC should discuss this with the appropriate stakeholders and representative bodies prior to any legislation coming into force to ensure that businesses are provided with clear direction by their representative bodies which dovetails with the implementation of PANs by HMRC.

Question 21: What level and type of information do you consider would a business need to comply with a PAN?

We consider the items listed below as appropriate for aiding businesses to comply with a PAN.

- Details of the promoter being targeted by the PAN and to any connected parties.
- The effective date of the PAN.
- What services or products are being covered by the PAN.
- What communication, if any, should be made directly to the promoters covered by the PAN.
- Their legal position on not providing the service or product to the promoter under any contract.
- Their legal position on any unpaid invoices or work carried out to date on behalf of the promoter.
- How to appeal against a PAN.

Safeguards and protections

Question 22: Are the safeguards for USNs and PANs likely to be effective? If not, please state what could be done to enhance them.

We refer to our answers for questions 17-21.

Question 23: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution? If not, what additional safeguards could be introduced?

We refer to our answers for questions 17-21.

Question 24: Are there any other safeguards that HMRC should consider to ensure the proposed power is only used in appropriate cases?

We refer to our answers for questions 17-21.

Additional sanctions

Question 25: Do you consider the proposed sanctions for a USN are proportionate? If not, what sanctions should be applied in these circumstances?

As we have highlighted in responses to previous consultations, enhanced HMRC powers must be exercised proportionally and responsibly.[7] This extends to sanctions to be imposed. Furthermore, as we have said previously, there will likely always be a small number of promoters selling aggressive tax avoidance schemes who simply cannot be stopped in any other way apart from direct action against them.[8]

We would appreciate further detail regarding the government's plans for 'strong internal governance for both USN and PAN cases' and the highlighted need for HMRC to also have a 'robust governance structure' in place prior to taking action.

We agree that the opening of criminal investigations, especially for a potential breach of a PAN by a provider of products or services, should only be considered in the clearest and most serious of cases or if 'civil investigations are ineffective'.

[7] Law Society of Scotland response: Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance, see- Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance
[8] Law Society of Scotland response: Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance, see- Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

Question 26: Do you have any suggestions regarding the basis for determining a financial penalty for a USN? What scale of penalty would you consider proportionate?

We think it appropriate that any financial penalty should be based on a percentage of the revenue generated or tax lost, whichever is higher, as a result of the promotion of the tax avoidance arrangement.

Question 27: Do you agree that failure to comply with a USN should be a criminal offence? If not, what sanction should there be and how would this deter those that are currently promoting tax avoidance schemes?

Provided there is the proper application of safeguards and protections, we agree that a clear breach of a USN without reasonable care or excuse should ultimately be treated as a criminal offence.

Question 28: In addition to publication, financial penalties and criminal offences, are there any other sanctions or restrictions that could be applied to promoters/enablers including those who have control or significant influence over them?

We would suggest that consideration should be given to a ban on such persons acting as a director of any UK company and consideration also given toward a ban on UK companies transferring funds to named foreign promoters and compulsory wind up orders.

Sanctions for not complying with a PAN

Question 29: Which sanctions do you consider to be proportionate for non-compliance with a PAN? If penalties were applied, what scale would you consider proportionate?

We refer to our answer to question 25 and 26. Furthermore, we would highlight that it is important that HMRC use a sliding scale model that takes into account relevant factors including whether the person involved is a first or serial offender, what connection they have with the promoter, etc. We reiterate our comments regarding the utility of a financial penalty based on a percentage of the revenue generated from providing product or service.

Question 30: Under which circumstances do you consider that these sanctions should be applied?

We think that it appropriate that these sanctions are applied where non-compliance with a PAN continues despite and in clear contravention of HMRC

notices to that effect and in the absence of any reasonable excuse. This of course should take into account available safeguards and protections.

Question 31: Where a business fails to comply with a PAN, do you consider they should be named publicly as a consequence?

We consider it appropriate that HMRC should be given this power to act as clear deterrent to providers of products and services to promoters of tax avoidance to end their engagement with them.

However this should only apply if the promoter of the avoidance schemes has also been named following the protocol set down in the consultation. The provider of products and services to promoters of tax avoidance in these circumstances should also be given the opportunity to make representations about any suspected failure.

We would stress that this sanction should only be considered where there is a clear compliance breach which the provider has failed to rectify despite being given the opportunity to do so and where there is a clear connection to the promoter(s) of tax avoidance arrangements. This should only apply in a very limited number of cases.

Question 32: Are there any circumstances where you consider a failure to comply with a PAN should be a criminal offence?

We would consider the following circumstances as appropriate grounds to classify failure to comply with a PAN as a criminal offence;

- Limited to the circumstances where there is a history of non-compliance by the provider;

- Or a direct connection with the promoter of the tax avoidance and/or for the person under question to be in receipt of a percentage of the promoter's revenue from the promotion of the tax avoidance arrangement.

5. Stronger information powers to effectively investigate those who own and control promoter organisations

Connected Parties Information Notice

Relevant person

Question 33: Do you have any views on who should or should not be covered by the CPIN proposal?

Whilst we understand the rationale of giving HMRC these powers and extending them over as wide a range of individuals as possible, we would highlight that this must be balanced against intrusive and expensive demands against those whose involvement in targeted schemes is only minor or peripheral and/or which is restricted to implementation only of steps at the direction of others. Given this, we consider it appropriate that within the legislation, a wide category of targeted individuals should be accompanied by a need to supply only what is in their direct possession and which it is reasonable for them to provide.

With particular reference to our members, information on their involvement may well be correctly restricted by our Practise Rule B1.6 and legal professional privilege. We consider it vital that this must remain subject to LPP and this practice rule and refer to our answers in section 6 for further detail.

Civil penalties

Question 34: Do you agree that a criminal offence should be a potential consequence for failure to comply with a CPIN or providing false or misleading information?

We understand that rationale behind the proposal for a criminal sanction. However, we consider it necessary that “failure to comply” should be accompanied by a reasonable excuse provision. This may or may not involve LPP. Reasonable excuse is less relevant in cases of providing false or misleading information and of destroying information.

Question 35: Do you have any views on how to set civil penalties at a level which would encourage compliance from parties connected to the promotion of marketed tax avoidance schemes?

These could be linked to the level of tax lost, although proportionate to the size of the offender’s role in the relevant scheme.

Question 36: Do you have any suggestions for alternative or additional proportionate potential consequences for non-compliance with a CPIN?

We have no comments.

Safeguards and protections

Question 37: Do you agree that these safeguards provide the right level of protection for recipients of the notice? If not, what additional safeguards could be introduced?

We have no specific comments regarding these safeguards. We presume that in relation to criminal sanctions in Scotland this will involve the Lord Advocate and/or Procurator Fiscal.

Question 38: Are the safeguards for this measure likely to be effective? If not, please state what could be done to enhance them.

We would suggest consideration be given towards the creation of some form of independent supervision to prevent or discourage HMRC from engaging in "fishing expeditions". We consider this suggested provision of particular relevance in relation to those with only peripheral involvement in such schemes

Promoter Financial Institution Notice (PFIN)

Other benefits for issuing a PFIN

Question 39: What are your views on extending obligations under information powers as indicated by the PFIN proposal?

Given the existing powers in relation to FINs and their intrusion into individual's financial affairs, it seems reasonable to extend these to promoters, although the use of the information obtained should be restricted to its relevance to targeted schemes.

Scope of the PFIN

Question 40: Are issues envisaged around defining FIs – for example, in relation to alternative 'payment platforms'? How might HMRC overcome such problems?

We have no comments.

Safeguards and protections

Question 41: Should this power be subject to any additional restrictions or safeguards? If so, please state the restrictions or safeguards.

We have no comments.

Question 42: Do you have any other ideas for options that could deliver both the objective of speeding up the process for obtaining promoters' financial information and providing appropriate safeguards?

We have no comments.

Question 43: Do you have any views on the requirement described above that aims to prevent the third party from notifying the promoter of the information request as described? Do you have any suggestions about any other ways that this aim could be achieved?

We consider that given the experience elsewhere, that this would not seem to be a particular problem; FIs will rightly be concerned at the reputational risk involved in failing to comply with such notices and resultant penalties.

6. Legal Professionals

Disclosure of avoidance scheme by legal professionals who promote tax avoidance schemes

Question 44: Should Regulation 6 be repealed?

No, we do not think that Regulation 6 should be repealed. If however it were, this should not be done without a clear distinction being made between (i) the advice which does and should remain subject to LPP which should be the case even if HMRC disagree with that advice, even to the extent of perceived unreasonableness in the conclusions reached (which is a matter for courts, not HMRC) and (ii) other activities which may be related to the actual promotion as opposed to the creation of relevant schemes.

We acknowledge there may be difficulties where the legal professional acts in a dual role of providing legal advice and marketing the scheme, carrying out work to execute it etc. The difficulty is outweighed by what would happen if all legal professionals (even those giving advice which is the subject of LPP) were potentially able to be promoters; they would all be making disclosures but saying they couldn't disclose the information subject to LPP.

Question 45: Are there any risks in making such a change? For example could the change bring into scope those that we might not wish to include?

Yes. Legal professionals such as solicitors carrying out day to day work, simply advising on tax without any involvement in promoting a tax avoidance scheme, should not have another layer of regulation imposed on them in the quest to capture a few, known, bad actors. Determining whether the advice they give could potentially relate to a tax avoidance scheme is, given the width of the DOTAS legislation, not something that these individuals should have to contend with– it will increase costs of providing advice and reduce the attractiveness of the role. Those bad actors who this is aimed at are highly unlikely to comply in any event.

Furthermore, we would highlight the potential for an increase in DOTAS submissions, which risks overwhelming HMRC, as "good actor" legal professionals err on the side of caution.

Question 46: Does the government's proposal to retain the statutory protection for LPP material in primary legislation provide an adequate safeguard?

We refer to our answer to question 45. Regulation 6 allows the "good actor" tax advice market to function given the web of solicitors' duties to clients and the complexity and width of the DOTAS legislation otherwise potentially (inadvertently) catching many transactions advised on by solicitors which are not intended (given the policy intent and need for HMRC to focus on egregious cases) to be caught or notified by solicitors and which they would struggle to do given their obligation to maintain confidentiality of communications with clients (LAP). Furthermore, we would highlight that the need for both LPP and regulation 6 has been discussed at length in the past and we consider the judgements concerning these issues made then should be respected.

Publishing the names of legal professionals who design tax avoidance schemes

Question 47: Should the rules on publishing be changed to allow HMRC to publish the names of legal professionals that design tax avoidance schemes, even when most of or all their activity is subject to legal professional privilege?

We question the utility of having such a list published – most taxpayers would have no reason to be searching for a particular legal professional (as they would be dealing with the scheme promoter/ introducer), and some persons may use it as a short cut to find an advisor in tune with their attitude to tax.

We would highlight that it may be inappropriate for measures such as the publishing of the names of legal professionals to be based on the judgment of HMRC (i.e. that something is an abusive tax avoidance scheme which should be targeted). It is entirely plausible that an application of tax rules which HMRC

considers to be a tax avoidance scheme is ultimately found by the courts to be acceptable; the professional reputation of legal professionals should therefore not be open to attack (potentially on a defamatory/libellous basis) before an independent and final determination of the character of the circumstances has been achieved.

Question 48: Could there be any unintended consequences from making this change?

We have no comments.

Question 49: If the government does change the rules, as per question 47, how should HMRC utilise this information to assist taxpayers and representative bodies?

We have no comments.

Safeguards

Question 50: How should we deal with the issue of representations against publishing the details of a legal professional who has designed a scheme when LPP applies?

This is a major difficulty and highlights the challenges of this proposal. The release of information covered by LPP is not in the gift of the legal professional (it is the client's right to have LPP maintained) and the consequential impact on the "safeguards" proposed by HMRC in relation to the publication of the names of legal professionals is another reason why we consider the proposed measures inappropriate.

We suggest consideration should be given towards publishing what is already in the public domain i.e. that promoters A,B,C have received opinions from counsel D,E,F.

An LPP waiver in respect of promoters who utilise legal opinions to market schemes

Question 51: Would you support the introduction of a deemed waiver of LPP?

We encourage the government to focus on this aspect of tackling legal professionals' involvement in avoidance schemes, rather than the repeal of regulation 6 or changing laws in order to publish names of legal professionals. This

approach would be in line with our overall view that these proposals need to be proportionate to and targeted very specifically at the exact, and only the major, problem/s. As noted elsewhere in our response, the government is aware of who the legal professionals causing the problems are, and to legislate more broadly to catch other classes of legal professionals and other situations seems disproportionate given the time and cost implications this will necessarily involve for these others. If the problem is largely driven by counsel giving opinions, then targeting that would involve least damage to the rest of the legal profession and the good actors in the tax advice market.

While we are naturally wary of undermining LPP, we cautiously support "deemed waiver" only on the basis that its scope is limited to cases where a promoter has used the existence of a counsel's opinion as a marketing tool in mass marketing an avoidance scheme. In essence, this would aim to prevent mis-selling by a promoter being able to tell half-truths, and the loss of LPP results from the promoter's own actions – in that they have themselves not kept the legal advice confidential. Given the promoter is not coming to this with "clean hands" (in that they are attempting to induce someone to act in a way they likely know may cause them tax issues) and the scale of societal harms being caused (the pulling into tax debt of vulnerable groups in society) we can, in this limited instance, see the case for questioning whether LPP's public policy purpose is served by allowing a promoter to put claims about the legal advice out there and then claim LPP to avoid disclosing the rest (or the instructions on which it was given). This is different, in our view, to the situation where a person obtains legal advice for their own purposes and does not attempt to use it to induce someone else into acting to their detriment. Importantly, control over the "deemed waiver" would be in the hands of the promoter – if they obtain the advice but do not use it as a marketing tool by referring to it there would be no abrogation of LPP. This limitation of LPP where a person has revealed some information to induce a person to believe a certain point is true can be seen in cases such as *Wylie v Wylie 1967 SLT* and *Great Atlantic Insurance Co v Home Insurance Co, [1981] 1 WLR 529*.[9] This therefore does not interfere with the ability to obtain legal advice and keep it privileged. Where promoters do refer to counsel advice as a marketing tool, a deemed waiver would serve to create transparency and may prevent people being pulled into schemes by being given only some of the information. If the information is published it may also enable legitimate tax advisors to explain to their clients their reasoning as to why the scheme fails. We would stress that if this deemed waiver proposal is taken forward it should be strictly defined in the terms we describe above.

As noted above, we cautiously support this proposal only on the limited and narrow basis set out above and only due to the specific circumstances involving mass market promoters. In particular, we are influenced by their own action in publicising the fact they have an opinion and implying it gives the green light to the scheme without also disclosing other relevant parts of that advice. We would

[9] Great Atlantic Insurance Company v Home Insurance Company - vLex United Kingdom

be strongly against any further statutory change to LPP beyond this and we would stress that;

1) The courts recognise that LPP can be overridden by clear express statutory provision. However, the consistent reluctance of the courts to accept the overriding of LPP, except where the client has expressly waived it, is a clear indication that express statutory overriding of LPP should take place only in the strongest of circumstances. See for example *R (Morgan Grenfell & Company Ltd) v Special Commissioner of Income Tax, [2002] UKHL 21*.[10]

2) The most significant statutory exception in the regulatory/criminal context is covert surveillance under the Regulation of Investigatory Powers Act 2000. However, even in this (serious criminal) context, authorisations can only be made where there are exceptional and compelling circumstances; otherwise, LPP has to be respected. We note that many will be of the opinion that while the activities of the promoters of marketed tax avoidance may well be viewed as egregious and abusive, they do not fall into the same category of serious criminal activity, and it would therefore be inappropriate to introduce statutory overrides to LPP (whether by means of deeming the client to have waived it or otherwise) in the context of tax avoidance (which is not the same as tax evasion); and

3) Any statutory override of LPP risks challenge under Article 8 of the European Convention of Human Rights. Any statutory override of LPP would need to satisfy the proportionality text under Article 8(2), demonstrating that it is necessary in a democratic society and pursues a legitimate aim. The courts have been reluctant to accept such justifications in the absence of compelling evidence, given the fundamental nature of LPP; and (as noted above), if the statutory overriding of LPP in the context of the Regulation of Investigatory Powers Act 2000 is felt to be needed to be kept limited, it may be seen by many as a step too far to justify it, in the Article 8 context, in relation to measures to counter tax avoidance.

We support HMRC sharing the information with legal regulators

If the deemed waiver proposal is not taken forward (or in addition) the suggestion at question 2 regarding “health warnings” being required for all promotion of schemes may assist in achieving the result of transparency of risks for those considering entering schemes.

Question 52: In which circumstances should LPP be waived?

We refer to our answer to question 51.

Question 53: Could a deemed waiver of LPP have any unintended consequences?

We refer to our answer to question 51.

[10] House of Lords - Regina v Special Commissioner and another, Ex P Morgan Grenfell & Co Ltd

Question 54: If you support a deemed waiver, do you consider that it should be a waiver for all purposes or only limited ones? If the latter, what purposes?

A deemed waiver should only be for the purposes of counteracting of identified schemes and illegality.

Question 55: Are there other things HMRC should do to address instances where promoters rely on dubious legal advice to market avoidance schemes, or use legal advice to market avoidance schemes to persons to whom the advice was not given?

We refer to our answer to question 51, regarding prohibition against referring to counsel having endorsed a scheme when promoters are marketing it.

Making clear HMRC's position on when LPP does not apply

Question 56: Is there any further action that HMRC should be taking to tackle those legal professionals that are involved in the promotion of tax avoidance?

On engagement with the legal sector, we suggest that consideration should be given towards limiting engagement towards the relevant legal regulators for the reasons discussed in our answer to question 51 concerning focussing narrowly on what we understand HMRC has identified as the main issue; counsel opinions.[11]

7. Future direction

Ensuring that promoters face significant consequences

Question 57: Are there any existing powers targeted at promoters which could be strengthened with the addition of new criminal offences for non-compliance?

As noted in our general comments, we understand there are existing powers HMRC could deploy against promoters. In order to make the situation clear to both HMRC and promoters regarding what the powers are, and in order to target proposals for new powers appropriately, we suggest consideration is given to enacting legislation specifically focussed on promoters of tax avoidance in the mass market. This could consolidate all existing powers (or at least provide a code that cross referred to other Acts where absolutely necessary) into clear, targeted legislation focussed on the repeat offenders targeted by this consultation. This would aid overall clarity, accessibility and transparency of law and avoid potentially catching unintended targets as can happen with numerous changes over time to various bits and pieces of legislation.

[11] Closing in on promoters of marketed tax avoidance - GOV.UK

Question 58: In what other situations would criminal sanctions be appropriate for undeterred promoters?

We have no comments.

Question 59: What in your view are the type of sanctions that would deliver the aim of significantly disrupting the lifestyles of controlling minds?

We consider that the suggestions listed in the consultation documents seem likely to do so, but we are unclear of how they are or will be made proportionate and well-targeted. As we have said in answers to previous consultations, we highlight the risk of unintentional consequences in the introductions of these measures.[12]

It may be that action to target (recover) the proceeds of tax avoidance schemes (confiscation of profits, freezing orders etc) would be most likely to have an impact and most welcomed by the public. Where that is not possible, we understand the rationale in restricting travel to/from the UK.

However we reiterate the risk of this being applied inappropriately and consider it essential that this power is well-designed and clearly drafted in legislation in order to ensure that it is proportionate and avoid unintended consequences.

Providing HMRC with the tools needed to act quickly and decisively

Question 60: What further changes could be made to DOTAS to capture a wider range of tax avoidance?

As noted elsewhere in our response, we are not convinced changes to DOTAS are the appropriate way forward.

Question 61: How can HMRC ensure that it obtains information from third parties in a timely fashion?

We refer to our answer to question 2 regarding the point of compulsory membership for all persons providing tax advice (or selling or promoting tax "solutions") of a regulated body (as a solicitor, accountant or ICAS, ICAEW etc) – this would then include persons acting as promoters and HMRC could obtain the information from the relevant regulator.

[12] Law Society of Scotland Response: Reform of Behavioural Penalties, see- Law Society of Scotland response- June 2025

Fully optimising advances in technology to ensure the maximum impact of HMRC's actions

Question 62: How best do you think HMRC can use advances in technology including AI to aid its work tackling marketed tax avoidance?

We refer to our answer to question 2 regarding acting on information published by think tanks or perhaps conducting similar "investigations" using publicly available information.

For further information, please contact:

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