Appendix

SPECIFIC ISSUES

In this appendix to our response, we address some of the 15 specific questions set out in the discussion document.

1. How far do the descriptions of enablers of offshore tax evasion also represent those who enable tax avoidance? What changes to these definitions would be needed to tailor them to tax avoidance?

The framework for tax evasion is very broad, and is entirely inappropriate in respect of tax avoidance. Tax evasion is a criminal activity. It is worth noting here that those knowingly involved in handling or concealing funds derived from any criminal activity, such as providing financial assistance to tax evaders, would often be captured by the provisions of the Proceeds of Crime Act 2002 or the UK's Money Laundering Regulations 2007. Penalties should not be seen as an alternative to anti-money laundering reporting and appropriate investigation by the National Crime Agency.

The interaction between the definition of enablers of tax avoidance, and the application scope of the existing DOTAS and POTAS legislation needs to be carefully considered. We note that those who provide planning and bespoke advice are likely to be within scope of the DOTAS measures. Similarly, those who act as a 'middleman', as well as some of those who deliver and maintain infrastructure, are already within scope of the POTAS measures.

We would urge the government to diligently evaluate the combined impact of the existing DOTAS and POTAS legislation and compare the further benefits anticipated from the sanctions proposed in the current consultation on targeted behaviour with the likely costs and risks. The DOTAS measures aimed to help HMRC to identify and target tax avoidance through mandating disclosure; the current proposals seek to penalise the disclosed tax avoidance schemes. In our view, the two measures, acting together, are likely to have the effect of discouraging the intended targets of tax avoidance legislation from disclosing information to HMRC, thus driving unethical behaviours 'underground' rather than effectively combatting them.

2. Are there other classes or groups of person who should be included in, or specifically excluded from, the definition of enabler?

The role of most tax agents is more than simply compliance. Clients expect tax planning advice that assists them in arranging their affairs in the most tax efficient way. This might affect, for example, investment decisions, including which assets to invest in and where to invest. It is not possible to always know the motives of those providing the advice or making the final decision. In part, this is because each of those parties is privy to information that is not available to the other.

The case studies provided show how the proposals would spread the net very widely. This would mean that, generally, penalties to be recovered would be difficult to apportion or would be disproportionately high, and yet the complications involved in recovering the correct penalties would mean that the administrative costs would also be excessive. In addition, case study 2.1 suggests that both the company and the person setting it up would be liable to sanctions, which seems somewhat illogical.

The consultation document includes terms such as 'design', 'market', 'facilitate' and 'promote', which suggests a 'scattergun approach' to seeking penalties. We agree that those liable for sanctions should be those who benefit from a particular scheme, and who knew (or should have known) that the purpose of the scheme was to avoid tax. However, we believe it will be very difficult to demonstrate whether an 'enabler' has benefitted from their role in a particular scheme.

Therefore, we strongly recommend that the definition of an 'enabler of tax avoidance' starts with a focus on a relatively narrow, and well-defined population. We believe that the descriptions of promoters, introducers and intermediaries in the DOTAS and POTAS legislation are more appropriate.

We believe that it would be disproportionate and unjust to bring within the net 'all of those in the supply chain who enable or facilitate tax avoidance'[1] and put the onus on those accused to appeal against penalties[2]. Instead, it is crucial that any exclusions and safeguards are clearly enshrined in legislation. This is necessary to ensure that, for example, a person who cannot be responsible for the tax avoidance schemes promoted, because his or her involvement is limited to interpreting the words used in relevant tax legislation, cannot be penalised.

3. The government welcomes views on whether this approach is the right scope for a penalty on those who enable tax avoidance which HMRC defeats.

Clearly, penalties in respect of schemes that are not defeated would be inappropriate. However, a penalty that is based solely on such an outcome is, to some extent, based on chance, and this would not be a reliable or desirable approach. It is the intent of those concerned that is important in determining whether or not a provision has been breached.

To mitigate the risk that the application of a penalty is based on chance outcomes, the avoidance enabler penalty should be based on a penalty being charged on the user of the avoidance scheme. This is because penalties on users would have been subject to a Tribunal decision, and some indication of intent would have been established as the Tribunal considered the applicability of general or targeted anti-abuse rules. This model would be more effective, and provide more certainty to taxpayers and their agents, than one that depends upon the eventual success or otherwise of a tax planning measure, or even the financial gain of an enabler.

---

[1] Paragraph 2.11 of the consultation document
[2] As described in paragraphs 2.28 to 2.30 of the consultation document

Further, the defeat of a scheme should be on a specific point of law, rather than for failure to properly implement the proposed structure.

4. The government welcomes views on whether a tax-geared penalty is an appropriate approach.

Paragraph 2.23 sets out a narrow view of proportionality, with undue focus on the financial award obtained by the enabler. ACCA does not support the use of penalties, especially as they can prove counter-productive when combined with HMRC's current reliance upon disclosure from taxpayers and their agents in identifying enablers of tax avoidance. Instead, sanctions should be sought, following a fair and transparent process.

However, if penalties were to be used, proportionality should be related to the seriousness of the wrongdoing which is being penalised. Paragraph 2.25 acknowledges that the proposed penalty regime may be disproportionate. The number of taxpayers who sought to benefit does not, in itself, reflect the seriousness of any wrongdoing by an enabler. The use of a cap would be an arbitrary measure to rectify an undesirable impact of a flawed regime.

5. How should the penalty regime apply where a scheme has been widely marketed? What safeguards might apply in these circumstances?

6. Views are welcome on whether Schedule 36 would provide an appropriate mechanism to identify enablers of tax avoidance or whether a stand-alone information power would be more appropriate.

In our opinion, Question 6 and the example given in paragraph 2.27 serve to illustrate the significant problems of imposing penalties based on the success or otherwise of 'aggressive' tax planning. The suggestion of a cap on penalties where a scheme has been widely marketed, as described in paragraphs 2.25 to 2.26, is no substitute for the key principles that are said to underpin HMRC's approach to penalties. We believe that the proposals, if implemented, would lead to breaches of the first and second principles as set out in paragraph 1.5 of the consultation document, and would likely threaten the other principles too.

As stated above, in our view, the preferable approach would be to shift the focus away from designing wide-scope penalties, to instead encourage disclosure from taxpayers, agents and other intermediaries by strengthening the existing DOTAS and POTAS regimes. Such disclosure would enable a more targeted approach to tackling tax avoidance. This would be both more effective for HMRC, and provide more certainty to taxpayers and their advisors.

7. Would safeguards similar to those in Schedule 24 to the Finance Act 2007 be appropriate?

As already stated, ACCA is opposed to the use of penalties. However, if either the use of penalties or sanctions was to be employed, there would need to be clear safeguards (or defences).

Apart from the question of fairness, in some cases, the number of enablers thought to be involved in a particular scheme would give rise to excessive costs in identifying all the relevant parties and administering the penalty system.

8. To what extent would the approach taken in DOTAS be appropriate to exclude those who unwittingly enable tax avoidance from this new penalty? And, what steps should an agent take to show that they had advised their client appropriately?

Before addressing this question, it is necessary to first establish whether the principles set out in HMRC's 2015 penalty discussion document, and referred to in paragraph 1.5 of the consultation document, have been met.

If it is possible for the penalty regime to be applied in accordance with HMRC's stated principles, the tests applied in DOTAS could provide suitable safeguards. However, as stated above, any exclusions and safeguards must be clearly drafted in legislation.

9. We welcome views on whether these safeguards are appropriate, and what, if any, other safeguards might be needed.

Please refer to our response to the various questions above.

10. To what extent would defining what does not constitute reasonable care enable HMRC to more effectively ensure that those engaging in tax avoidance schemes that it defeats, face appropriate financial penalties?

We believe that defining what does not constitute taking reasonable care is preferable to placing the requirement to prove reasonable care onto the taxpayer. In particular, the examples of exclusions set out in paragraph 3.22 should help to clarify HMRC's position to taxpayers.

However, we are concerned that HMRC will still face the difficulties identified in earlier discussions around avoidance and advice of how to define 'properly considered legal advice…taking that user's personal circumstances fully into account when formulating that advice'[3]. The question has previously been raised of the risk that advisory boutiques will simply develop on-line questionnaires which take individuals through a binary decision tree in order to decide whether a particular structure will work for that individual. HMRC's intended reliance on a software tool to definitively establish IR35 status clearly establishes the precedent that the most complex, fact-dependent, case-

[3] Paragraph 3.23 of the consultation document

law driven tax issues can be resolved by computer, taking the place of qualified professional advice at least in the context of a single-issue tax problem. Distinguishing a promoter's software from HMRC's with the aim of classing one as 'generic' and therefore inadmissible while the other would be binding on HMRC is likely to prove an interesting challenge for both the parliamentary draughtsman and the tribunals.

Moreover, defining exclusions to taking reasonable care in HMRC Manuals and in legislation is not sufficient. It would be important for this measure to be accompanied by public communication, for example, in the form of an awareness campaign with the support of professional bodies and firms, to ensure taxpayers are aware of the distinction between tailored professional advice and general marketing material.

Many taxpayers would be confused by the apparent contradiction between HMRC's message that tax need not be taxing and an insistence that tax is so complex that arranging it requires tailored advice from a 'disinterested party[4]'. The message that taxpayers need to understand enough about tax to know when they do and do not need advice is one which will need careful targeting and presentation if it is not to confuse and disorientate an already nervous taxpaying public faced with the shift to reporting affairs under 'Making Tax Digital'.

11. We welcome views on the extent to which placing the burden on the taxpayer to demonstrate they have taken reasonable care would ensure that appropriate penalties are charged in cases of avoidance which is defeated by HMRC.

We strongly disagree with this approach as it reverses the conventional burden of proof and is therefore, in our view, unjust.

Further, such a measure would give rise to unreasonable uncertainty for compliant taxpayers, and a disproportionate legal and administrative burden. In our view, this would be unacceptable in an economic environment where taxpayers already face a heightened level of systemic uncertainty.

12. To what extent will these changes better ensure that those engaging in tax avoidance which is defeated by HMRC face financial penalties?

We believe we have effectively answered this question in our responses above.

13. Do you agree that this approach to identifying defeats of arrangements to which this measure should apply is appropriate?

We do not believe that the proposed approach to identifying defeats of arrangements is appropriate.

The proposed approach is based on an extremely broad definition of 'defeated tax avoidance,' as described in paragraph 4.5 of the consultation document. The point in

[4] Paragraphs 3.12 and 3.22 of the consultation document

time that this 'defeat' takes place is not defined. The lack of clarity over the point at which 'there is agreement between the taxpayer and HMRC that the arrangements do not work'[5] will give rise to significant uncertainty as to what might (even unintentionally) fall on the wrong side of the line. As ACCA has previously argued, it is not the place of HMRC to usurp the authority of the courts and impose penalties and sanctions by means of its own administrative processes.

To the extent that these rules are disproportionate, such uncertainty over what constitutes punishable tax avoidance, and the point at which penalties might fall, risks discouraging compliant taxpayers from undertaking legitimate financial planning. As noted above, we believe that the avoidance enabler penalty should be based on a penalty being charged on the user of the avoidance scheme, to mitigate the risk that the application of penalty is based on chance outcomes.

[5] Paragraph 4.4 of the consultation document