HM Revenue & Customs

# Clamping down on promoters of tax avoidance

## Consultation

Publication date: 23 March 2021

Closing date for comments: 1 June 2021

# Summary

## Subject of this consultation

Proposals to further tackle promoters (and other enablers) of tax avoidance schemes and do more to support customers to steer clear of, and leave, tax avoidance arrangements.

## Scope of this consultation

The government is seeking views on a range of new measures including additional HMRC powers, and strengthened sanctions, to disrupt the business model on which promoters rely by:

- Clamping down on promoters who dissipate or hide their assets, by ensuring HMRC can protect its position and secure a promoter's assets to pay any relevant penalties;
- Tackling offshore promoters through the UK entities that support them by charging the onshore entities who are associated with, and who facilitate the promoter's activities, penalties linked to their involvement in the offshore promoter's business;
- Disrupting the business activities of companies involved in promoting or enabling tax avoidance by closing them down where it has been shown they are not operating in the public interest, and disqualifying the directors at the earliest point possible;
- Supporting taxpayers to steer clear of tax avoidance schemes, or get out of tax avoidance quickly, by providing more information on the promoters and their schemes, so they can make informed decisions.

## Who should read this

The government would like views from members of the public, representative bodies, advisers and promoters, as well as businesses and individuals who may have received marketing material, taken advice about, or used arrangements which seek to avoid tax.

## Duration

The consultation runs from 23 March 2021 to 1 June 2021.

## Lead official

HMRC

## How to respond or enquire about this consultation

Please send all responses or enquiries to: ca.consultation@hmrc.gov.uk

Please note that the mailbox will not accept emails larger than 10mb.

## Additional ways to be involved

HMRC welcomes meetings with interested parties to discuss these proposals.

## After the consultation

The government will analyse the consultation responses and publish its response later this year.

## Getting to this stage

The government responded to Sir Amyas Morse's Independent Review of the Loan Charge in December 2019 and announced that it would take further measures to tackle promoters of tax avoidance schemes.

HMRC published its Promoter Strategy for tackling promoters of mass-marketed tax avoidance schemes on 19 March 2020, which stated that further measures would be needed to tackle those promoters that remain in the tax avoidance market. The consultation launched on 21 July 2020, Tackling Promoters of Tax Avoidance, introduced proposals to strengthen existing anti-avoidance regimes and reduce the scope for promoters and enablers to market tax avoidance schemes. These measures have been included in Finance Bill 2021.

The Promoter Strategy also indicated that the government would bring forward further policy measures to tackle promoters of tax avoidance, designed to disrupt the business model of promoters and the economics of avoidance. The government announced on 12 November 2020 that it would consult in spring 2021 on these additional measures.

The government also published on 12 November 2020 a summary of responses and next steps from the call for evidence on raising standards in the tax advice market.
The government recognises that most tax advisers adhere to high professional standards, providing sound advice and support to taxpayers. The proposals outlined in this consultation are aimed at those promoters who seek to sidestep the rules so that they can continue to sell their schemes.

## Previous engagement

There has been no previous engagement with stakeholders on the specific proposals described here. There has been wider engagement on the July 2020 consultation described above, the call for evidence on tackling disguised remuneration tax avoidance published in July 2020, with a summary of responses published alongside this document, and the call for evidence on raising standards in the tax advice market, published in March 2020. Feedback from these exercises has helped inform and drive these proposals.

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# Foreword

HMRC have a strong record of tackling avoidance, and the avoidance tax gap has fallen from £3.7 billion in the tax year 2005 to 2006 to £1.7 billion in the tax year 2018 to 2019. Vigorous activity by HMRC has also driven a significant proportion of promoters out of the avoidance market since 2014.

However, the Government recognises that there is still more to be done. That is why it published a call for evidence at Spring Budget 2020 on raising standards in the tax advice market and a call for evidence in July 2020 on tackling disguised remuneration tax avoidance; it is why the policy paper 'Tackling promoters of mass-marketed tax avoidance schemes' published in March 2020 recognised that further action would be needed; and it is why it consulted on measures over summer 2020 to strengthen the anti-avoidance regime.

The new measures proposed in this document are intended to deliver on that commitment to do more to clamp down on promoters and their activities. They build on existing measures, making it riskier to promote schemes and directly disrupting the business models on which promoters rely.

The measures are necessarily robust, especially as promoters seek to frustrate HMRC's efforts to tackle their behaviour. However, the Government also recognises that any strengthening of HMRC powers must be targeted, proportionate and always balanced by appropriate safeguards.

Although HMRC's work in tackling promoters is very important, by itself it is not enough. That is why, alongside this document, and following on from the call for evidence, the Government is also publishing a consultation on raising standards in the tax advice market, which includes a proposal that all tax advisers be required to hold professional indemnity insurance and seeks views on a definition of tax advice. This aims to improve redress for those who receive poor quality advice, to improve standards in the market for tax advice, and to reduce the tax gap.

These proposals do not target legitimate tax advisers. They are instead targeted at those promoters who profit by sidestepping the rules, and whose unscrupulous actions often leave taxpayers with significant tax bills. HMRC will work closely with stakeholders, and in particular tax advisers, in order to ensure that these proposals are both effective and proportionate.

The Government is determined to bear down on deliberate non-compliance. The measures in this document will make it harder for promoters to operate, provide stronger sanctions when they do not comply and provide fuller and earlier information to taxpayers to help them steer clear of tax avoidance.

This consultation sets out the detail of each measure. I hope the widest possible range of individuals and businesses will contribute their views on the proposals, so that that they are as effective as possible, and that secure and proportionate safeguards are put in place alongside them.

**Rt Hon Jesse Norman**
**Financial Secretary to the Treasury**

# 1. Introduction

## Background

1.1 Tax avoidance is bending the tax rules to seek to gain a financial advantage never intended by Parliament. It often involves contrived or artificial transactions that serve little or no purpose, other than to reduce the amount of tax someone pays. Tax avoidance deprives important public services of the funding they need. Most tax avoidance schemes do not deliver the tax benefits they promise and individuals who use such schemes often end up with big tax bills on top of substantial fees already paid out to the promoters.

1.2 The government has a strong record of tackling tax avoidance. Legislation combined with robust action taken against promoters by HMRC, has been effective in driving many promoters out of the market. As a result, the annual amount of tax lost through avoidance has fallen from £3.7 billion in the tax year 2005 - 2006 to an estimate of £1.7 billion in 2018 - 2019.

1.3 A principle of the tax system is that individuals are responsible for their own tax affairs. If someone is unsure about an arrangement they are being offered, then they should seek advice from an independent accountant or tax adviser with appropriate expertise and who adheres to high standards of competence and ethics. However, it remains the individual's responsibility to ensure they pay the right tax at the right time. HMRC have a role in making information and guidance available to help taxpayers comply with their tax obligations, and to steer clear of avoidance. But taxpayers need to do their own research and ask questions about what is on offer before they enter into arrangements. HMRC also have an important role in tackling promoters of tax avoidance to disrupt their market and to reduce their scope for selling schemes. The measures proposed in this consultation would make an important contribution to HMRC's roles both in tackling promoters and in supporting taxpayers to steer clear of avoidance.

1.4 Although HMRC's existing anti-avoidance regimes have persuaded many promoters to stop their activities, a small but determined population remains in the market. Typically, promoters in this group refuse to cooperate and take every opportunity to sidestep the rules, so that they can continue to sell their schemes. This includes increasingly basing themselves offshore in order to hinder HMRC's investigations.

1.5 The government and HMRC are determined to tackle this group of promoters, and others involved in the promotion of tax avoidance. In March 2020 HMRC published a strategy for tackling these promoters, which set out a range of interventions including working closely with the accountancy professional bodies, and other agencies and regulators, to make sure all possible steps are taken to tackle promoters of tax avoidance.

1.6 In response to the Independent Loan Charge Review the government announced at Budget 2020 a package of measures to tackle promoter behaviour, a call for evidence on raising standards in the tax advice market and a call for evidence on tackling disguised remuneration tax avoidance.

1.7 In July 2020 the government consulted on the promoter measures announced at Budget 2020 and at the same time published accompanying draft legislation. These measures will enable HMRC to act faster, get information sooner, name non-compliant promoters earlier, and make it easier to secure significant penalties from enablers of tax avoidance. These changes are being legislated in the current Finance Bill. They will strengthen the existing regimes and support HMRC in tackling the determined group of promoters that remain in the market. The government has been clear though that it intends to take further measures to disrupt the promoters' business model.

1.8 Following the government call for evidence on raising standards in the tax advice market, the government announced that it would consult on requiring those providing tax advice to hold professional indemnity insurance, and a definition of tax advice, as a first step to improving standards in the market for tax advice and improve recourse for consumers of tax advice. The consultation is being published alongside this consultation.

1.9 The government consultation on tackling disguised remuneration tax avoidance was held in summer 2020. The government agrees with the many respondents to the consultation, who argued that tougher action is needed to address promoters and to alert taxpayers to the risks of entering tax avoidance schemes and has considered the many suggestions for how this can be taken forward. The summary of responses is being published alongside this consultation.

1.10 On 12 November 2020 the government announced a second tranche of measures that will complement those that were consulted on in summer 2020, with the intention of changing the economics of promoting tax avoidance schemes and disrupting the business model on which they rely. The government's commitment here is clear: if promoters continue to promote tax avoidance, the government will continue to take action against them.

## The proposals in this consultation

1.11 The measures proposed in this consultation deliver on the commitment made in the government's response to the Independent Loan Charge Review, to reduce the scope for promoters to market tax avoidance schemes, and to provide better support for customers who want to get out of tax avoidance arrangements. The proposals complement those that were consulted on in summer 2020 by protecting HMRC's ability to collect penalties, providing more tools for closing down promoter operations, reducing the supply of onshore enablers for offshore promoters, and providing a clearer framework for naming promoters in a wider range of circumstances. The proposals go beyond existing anti-avoidance regimes, recognising that changes to the existing regimes are not sufficient to deter the remaining group of determined promoters and help taxpayers protect themselves and be better informed about promoter activities and the risks of getting involved in tax avoidance.

1.12 The government recognises that most tax advisers adhere to high professional standards and are an important source of support for taxpayers. These new proposals are not aimed at professionals who help taxpayers fulfil their obligations to pay the right amount of tax at the right time. They are aimed at those promoters who seek to exploit every opportunity to personally profit by sidestepping the rules. The government welcomes the positive engagement of the many compliant professionals during the July 2020 consultation and their help in shaping those measures. This consultation looks to those same groups with the intention of building on that engagement, and continuing to work together, to ensure that the measures are appropriately targeted and have the right safeguards in place.

1.13 The proposals in this consultation are targeted at the most persistent and determined promoters of tax avoidance and they aim to:

- Clamp down on promoters who dissipate or hide their assets to avoid paying penalties, by ensuring HMRC can protect its position to secure promoters' assets to pay these penalties at the earliest point possible;
- Tackle offshore promoters through the UK entities that support them, by pursuing the UK entities for penalties linked to their involvement in the offshore promoter's business;
- Disrupt the business activities of companies involved in promoting or enabling tax avoidance by closing them down where it has been shown they are not operating in the public interest and disqualifying the directors at the earliest point possible;
- Support taxpayers to steer clear of tax avoidance schemes, or get out of tax avoidance quickly, by providing more information on promoters and their schemes, so they can make informed decisions.

1.14 These proposals would give HMRC the ability to intervene earlier than they can now to disrupt promoters' activities, ring-fence assets to protect HMRC's ability to collect penalties and apply strong sanctions for promoting or enabling tax avoidance. Some of these proposals would work together, some are linked to the changes consulted on over summer 2020, and some provide alternative routes for tackling promoters. This document sets out how the proposals in this package would interact with both the existing regimes and the package of measures consulted on over the summer, and how they would enable HMRC to remove the advantage from promoters who are currently content to risk downstream penalties in order to continue to sell their schemes and make significant profits at taxpayers' and the Exchequer's expense.

1.15 The document seeks views on the design of the proposals, including views in relation to the safeguards proposed for each measure. The government recognises it is important to strike the right balance between the powers and associated sanctions needed for HMRC to discharge its responsibilities and effectively deal with non-compliance, whilst providing the right level of protection and safeguards for anyone subject to these sanctions. This balance is at the heart of the principles set out in the Evaluation of HMRC's Implementation of Powers, Obligations and Safeguards Introduced Since 2012 Evaluation of HMRC's implementation of powers, obligations and safeguards since 2012
This consultation document seeks views on whether the proposals outlined here achieve an appropriate balance.

1.16 The government seeks views on proposals to change the economics of tax avoidance and to disrupt the business model on which promoters rely.

1.17 **Chapter two** proposes a new security payment or asset freezing order that would prevent promoters from dissipating or hiding their assets before paying the penalties that have been charged as a result of them breaching their obligations under the anti-avoidance regimes.

1.18 **Chapter three** proposes new rules that would enable HMRC to make a UK entity enabling the promotion of tax avoidance by offshore promoters subject to an additional penalty, up to the value of the total fees earned by all those involved in the development and sale of the tax avoidance scheme.

1.19 Chapter **four** proposes a new power to enable HMRC to present winding-up petitions to court and a new ground for director disqualification related to tax avoidance.

1.20 **Chapter five** proposes new legislation that would enable HMRC to name promoters, the websites they use and the schemes they promote at the earliest possible stage, so that HMRC could share that information publicly to warn taxpayers of the risks and help those already involved to get out of avoidance.

## Responding to the consultation

1.21 The government's focus is firmly on promoters and enablers of tax avoidance who push the boundaries and seek to sidestep the rules, so it is important that these changes are appropriately targeted. This consultation provides an opportunity to respond to these proposed changes. In particular, it provides interested parties an opportunity to comment on whether the measures are aimed at the right people and entities, and include appropriate safeguards, while allowing HMRC to act quickly to reduce the risk of taxpayers being drawn into tax avoidance schemes.

1.22 **Chapter seven** includes a list of all the questions on which responses are sought and **chapter eight** details how to respond or ask questions.

1.23 **Please** send any comments on this consultation document to ca.consultation@hmrc.gov.uk. The closing date for replies is the 1 June 2021.

# 2. Clamping down on promoters who dissipate or hide assets to avoid paying penalties

## Background

2.1 The government has introduced a wide range of anti-avoidance measures to deter the promotion and enabling of tax avoidance schemes. These include a number of reporting obligations and other requirements that those involved in promoting tax avoidance have to meet, with penalties for non-compliance. These measures have had a significant effect in deterring the promotion of tax avoidance and persuading many promoters and enablers to leave the tax avoidance market.

2.2 These measures include the following regimes:

- Promoters of Tax Avoidance Schemes (POTAS);
- Disclosure of Tax Avoidance Schemes (DOTAS);
- Disclosure of Tax Avoidance Schemes: VAT and other Indirect Taxes (DASVOIT);
- Penalties for enablers of defeated tax avoidance (Enablers penalties).

2.3 For ease, all later references to DOTAS include DASVOIT, unless otherwise stated.

2.4 HMRC seek to ensure that promoters comply with their obligations. Where promoters do not comply, the legislation includes a range of sanctions, including significant penalties. The penalties are summarised at Annex B below.

2.5 These sanctions have played a part in successfully persuading a number of promoters to leave the tax avoidance market. But there remains a determined group of promoters who seek to sidestep the rules within the anti-avoidance regimes, including exploiting safeguards as a form of delaying tactic to hinder HMRC in securing a penalty position and collecting that penalty. During this time some promoters continue to profit from promoting schemes while others seek to evade HMRC altogether by closing down their company, dissipating or moving their assets, and subsequently setting up a new company so they can continue to promote avoidance.

2.6 The measures already announced and consulted on during summer 2020 seek to strengthen the anti-avoidance legislation and support HMRC compliance work by:

- Introducing a change to the DOTAS legislation to enable HMRC to obtain information and documents, and identify the taxpayers using a scheme at a much earlier stage than it can now. This would apply to arrangements that HMRC have reason to suspect are notifiable;
- Enabling HMRC to issue a stop notice that would require the promoter to stop selling the scheme in question, with penalties and sanctions for those who do not comply;

- Strengthening information powers to enable HMRC to obtain information about the enabling of tax avoidance schemes as soon as they are identified and ensuring Enablers penalties are felt without delay, when a scheme has been defeated at tribunal.

2.7 These measures have been included in Finance Bill 2021 and, if enacted, will enable HMRC to take action more quickly against promoters and enablers who seek to sidestep their responsibilities. Promoters who do not comply with the requirements of the legislation will face penalties at an earlier stage. However, the government recognises that on their own these measures may not go far enough. The government therefore wants to supplement these rules and ensure that the financial risk associated with promoting tax avoidance schemes is felt, by reducing the risk of the promoter avoiding their penalties.

## Current position

2.8 The changes being introduced in Finance Bill 2021 will, if enacted, enable HMRC to move to penalise those who promote tax avoidance and fail to comply with their obligations sooner than is possible under the existing powers. For example, HMRC would be able to issue a stop notice soon after it identified a tax avoidance scheme where it believed the proposed tax advantage could not be achieved, or where a Scheme Reference Number (SRN) has been issued under the proposals to amend DOTAS.[1] If the promoter did not comply with the stop notice HMRC would then be able to issue a penalty. HMRC expect the changes in Finance Bill 2021, which serve to strengthen the current anti-avoidance regimes, to have a further significant deterrent effect.

2.9 To ensure that HMRC's powers are used only in appropriate cases the regimes include a variety of safeguards, including rights of appeal against stop notice penalties.

2.10 However, HMRC are aware that in the time it takes for any appeal to be resolved promoters may take actions to avoid payment of any penalties. Without further policy intervention some promoters would be able to continue to profit from selling schemes to taxpayers that ultimately will not deliver the benefits claimed by the promoter.

2.11 In some cases, promoters ensure that the company or other legal entity that promotes the scheme has no assets, in other cases promoters transfer the assets away from the business, for instance to directors or linked entities. This effectively leaves the company as a shell and without assets to pay any liabilities. The promoter may then close down the company and set up a new entity which they then use to market another scheme.

2.12 Box 2.1 describes how a promoter might respond to a challenge from HMRC. To provide the full picture it takes account of the measures announced in summer 2020 that are in the Finance Bill 2021.

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[1] https://www.gov.uk/government/consultations/tackling-promoters-of-tax-avoidance

**Box 2.1 Typical example of the current process for challenging a promoter and how it will work should the Finance Bill 2021 measures become law.**

Promoter XYZ develops new tax arrangements which it asserts will offer considerable tax gains to its clients, but which it thinks HMRC are likely to challenge under the DOTAS legislation. As this challenge would make the product less attractive to potential clients, Promoter XYZ decides not to disclose the arrangements to HMRC.

Subsequently, HMRC find out about the arrangements. HMRC have reason to suspect that Promoter XYZ is promoting or otherwise involved in the supply of the scheme and that it should have been disclosed under DOTAS. Having considered Promoter XYZ's previously limited co-operation with HMRC, HMRC issue a notice to Promoter XYZ giving it 30 days to satisfy HMRC that the arrangements are not notifiable.

After 28 days, Promoter XYZ provides very limited information that is insufficient to dissuade HMRC of its reasonable suspicion that the scheme should be disclosed. Accordingly, having completed its internal governance process, a few days later HMRC allocate a Scheme Reference Number (SRN) to the arrangements and issue it to Promoter XYZ.

Promoter XYZ appeals the allocation of the SRN. During the period before the appeal hearing Promoter XYZ would still be bound by all obligations under the DOTAS regime. However, the appeal process can take several months and in complex cases years, and during this time Promoter XYZ provides only limited information to HMRC or the courts regarding the case and their evidence.

The tribunal hearing for the issue of the SRN takes place and due to the complexity involved it takes some months for a decision to be made, notified and published. Promoter XYZ loses its appeal and the tribunal's decision is made in HMRC's favour.

HMRC prepare a case and apply for a second tribunal hearing to seek a penalty on Promoter XYZ for their original failure to disclose the scheme under DOTAS obligations. Promoter XYZ does not co-operate with HMRC and it takes some months before the second tribunal hearing takes place. Promoter XYZ uses this time to transfer and dissipate its assets so that when the hearing takes place there are no significant assets remaining to pay any penalty.

The second tribunal hearing takes place and the tribunal decides that Promoter XYZ should incur a penalty.

HMRC then have to consider whether it can effectively use insolvency powers to secure payment of the penalty given the time already elapsed and steps taken by the promoter to dissipate its assets. If HMRC can use insolvency powers this will take more time, adding to the time it takes for Promoter XYZ to feel the impact of the penalty due. In some cases, the result of these different processes and the time taken means the promoter never feels the impact of the penalty.

## Proposed changes

2.13 The government wants to ensure that where promoters fail to comply and penalties are due, such as in Box 2.1 above, the promoter always has to pay those penalties and that promoters cannot escape the financial consequences of their non-compliance.

2.14 This proposal seeks to protect HMRC's ability to recover from promoters the penalties arising from anti-avoidance legislation, as outlined in paragraph 2.18, and to ensure that promoters cannot dissipate their assets and avoid paying these penalties.

2.15 This consultation explores options to change the economics for promoters, so that they cannot continue to enjoy the benefits of their activities without incurring the financial downside of paying any anti-avoidance penalties. The proposal is for a new way of ensuring that a promoter's assets are ring-fenced, so that they cannot use the time it takes to resolve any appeal to dissipate them.

2.16 The proposal set out below covers:

I. The circumstances in which HMRC would seek to ring-fence the assets of a promoter, including the penalties in respect of which the measure would apply (paragraphs 2.17 - 2.23);
II. Two options for ring-fencing the assets: an upfront security payment and a freezing order (paragraphs 2.24 - 2.32);
III. Sanctions for failure to comply with the security payment or freezing order (paragraphs 2.33 - 2.34);
IV. Safeguards and protections for those affected by the proposal (paragraphs 2.35 – 2.45);
V. A summary of the proposed process (paragraphs 2.46 - 2.48).

## When the measure would apply

2.17 The proposal would create a new power for HMRC to seek an order from a court or tribunal, as outlined in paragraph 2.39, to ring-fence the assets of a promoter of tax avoidance (or directors or individuals linked to the promoter) where certain prescribed conditions are met. The first condition would focus on situations where HMRC has reached a penalty position under the DOTAS, POTAS or Enablers penalty regimes.

2.18 It is proposed that this would include one or more of the following circumstances:

- HMRC have identified that a POTAS stop notice has been breached and are about to issue a penalty;
- HMRC have identified a breach of obligations imposed by a POTAS monitoring notice which gives rise to a penalty position;
- HMRC have identified a failure to comply with a notice issued under information powers (such as under POTAS) in respect of requests made of the promoter in relation to an avoidance arrangement;

- HMRC have applied, or are about to apply, to the tribunal for a penalty for a person's failure to comply with a DOTAS disclosure or reporting obligation;
- HMRC have identified that the conditions have been met for an Enablers penalty to be sought;
- HMRC have identified that the conditions have been met relating to the new penalty, described in chapter 3 of this consultation document, and are about to issue a penalty.

2.19 HMRC would need to meet two conditions before the tribunal would agree to issue an order. The first condition relates to any of the penalties as set out in paragraph 2.18 being due from the promoter. It is important that any order to ring-fence assets is put in place before the promoter is able to dissipate or otherwise hide them. Therefore, the proposal is that HMRC would be able to seek an order in relation to penalties about to be issued, as well as for those where an application to the tribunal is about to be made. Under this proposal "about to be issued" would mean that HMRC had sufficient evidence, based on the criteria contained within each anti-avoidance regime, to reasonably believe that penalties were due and were ready to begin penalty proceedings shortly after seeking the order. The government would ensure that appropriate and proportionate safeguards were in place for the proposal (further details are set out in paragraphs 2.35 - 2.45).

2.20 The second condition is that HMRC consider that there is a risk of the promoter dissipating their assets and not paying the penalty. For example, this may be demonstrated by previous behaviour of the promoter (or directors or linked individuals) in failing to meet their tax debts, or where there is a history of removing assets and making companies insolvent.

2.21 Where both conditions were met HMRC would apply to the relevant court or tribunal to seek an order to ring-fence assets of the promoter up to the value of the penalty that has been, or will be, issued.

2.22 The proposal would be targeted at the assets of the promoter business for the scheme identified. However, where there was evidence that assets had already been moved or dissipated away from the business, for example to directors or individuals linked to the promoter, HMRC would be able to look wider and ask the court to apply the order to these moved assets.

2.23 The proposal would give HMRC the power to act early enough to ensure there would be assets available to fund any penalty due, once the tribunal penalty hearing is determined and penalty issued and any appeal hearing into the penalty was concluded. If it was subsequently determined that no penalty applied, then the order to ring-fence the assets would cease.

**Q1. Are the circumstances outlined in paragraph 2.18 reasonable situations for seeking an order to ring-fence assets?**

**Q2. Are the conditions outlined in paragraphs** 2.19 and 2.20 **reasonable for determining the grounds that need to be met before HMRC can seek a court order to ring-fence a promoter's assets, or are there other conditions that you think HMRC should meet before seeking an order?**

**Q3. Is the timing outlined in paragraph** 2.19 the **most appropriate point at which HMRC should be able to request an order to ring-fence assets, or do you consider**

**this could apply at an earlier point in the POTAS, DOTAS or Enablers penalty regimes?**

## Options for ring-fencing assets

2.24 The government is proposing two alternative ways of ring-fencing the promoter's assets:

- An upfront security payment; or
- A freezing order.

2.25 This consultation invites views on both options. Subject to responses to this consultation, the government proposes to take forward one or the other, not both.

### An upfront security payment

2.26 HMRC already have the power to require businesses to pay an upfront security, where HMRC believe there is a significant risk to the revenue, in relation to the payment of tax liabilities. This legislation is used where the security payment required relates to a range of taxes payable as a result of business activities. This legislation does not relate to penalties and interest and so cannot be applied to secure the payment of penalties incurred for breaching anti-avoidance measures.[2]

2.27 The proposal here, for a security payment, would provide for HMRC to be able to seek a security payment in relation to penalties associated with anti-avoidance regimes. This would require the promoter to pay to HMRC an amount ordered by the court or tribunal in line with the value of the penalty that was about to be applied for or issued.

2.28 Once paid the security would sit with HMRC and provide the necessary protections to ensure that when a penalty hearing and any subsequent appeal is concluded and it is ruled that a penalty is due, there are sufficient assets held to pay the penalty. If the court subsequently rules the penalty is not due, then the security would be repaid.

### Freezing Order

2.29 HMRC can, and does, apply for Freezing Orders using the existing procedures available under Civil Procedure Rules (CPR) Part 23, as supplemented by CPR 25 and associated Practice Directions.[3] For example, in cases where there is a clear prima facie case of fraud and a risk of assets being dissipated.

2.30 The proposal for a freezing order would be to ensure that HMRC could apply for freezing orders against promoters in relation to the type of anti-avoidance penalties set out in paragraph 2.18. Such a power could work alongside the existing

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[2] *Aggregates Levy, Climate Change Levy, Insurance Premium Tax, Landfill Tax, Machine Games Duty, PAYE, NICS, VAT, General Betting Duty, Pools Betting Duty, Remote Gaming Duty, Corporation Tax and Construction Industry Scheme deductions*

[3] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25

provisions for freezing orders. This proposal would either entail a clarification of part 25 CPR or provide an additional provision which would work in parallel with part 25 CPR. In either case any freezing order would utilise or replicate the existing process and safeguards for freezing orders (see paragraphs 2.35 – 2.45), but specifically cover the circumstances that are encountered in cases involving promoters of tax avoidance. This would allow HMRC to apply to a court to freeze the assets of a promoter, up to the value of any penalty that HMRC was about to seek in respect of the promoter's failure to comply with its obligations under the anti-avoidance regimes, where HMRC could demonstrate the assets needed to be protected.

2.31 This option would ensure the assets were ring-fenced whilst any penalty hearing and any subsequent appeal took place and ensure sufficient assets to pay the penalty would not be accessible to the promoter.

2.32 Under either of these options, promoters would still have access to appeal rights and other safeguards contained in the anti-avoidance regimes described in paragraph 2.2.

**Q4. Do you agree with the principle of requiring a security payment or obtaining an asset freezing order in the circumstances described?**

**Q5. Which option do you think would best achieve the policy aim to ensure that promoters could not escape penalties or use the time taken to determine appeals to dissipate their assets?**

## Sanctions for failing to comply with the security or freezing order

2.33 To ensure a new power was effective in tackling the risk that a promoter dissipates their assets there would need to be consequences for not complying with the security or the freezing order.

2.34 When civil freezing orders are granted in accordance with CPR r.25.1(1)(f), they are endorsed with a notice providing details of the consequences for failing to comply with the order. Any failure is a contempt of court and the recipient can receive a fine, imprisonment or have their assets seized. With current HMRC security provisions (for most taxes and duties) it is a criminal offence not to pay the security in full and to continue trading. In line with these existing precedents, the government proposes that non-payment of a security or any breach of a freezing order or security would be a contempt of court, punishable in line with current similar legislation, with a fine, up to 2 years imprisonment or seizure of assets.

**Q6. Do you consider the sanctions that currently apply in respect of security payments and asset freezing are appropriate to apply to promoters of tax avoidance in the circumstances outlined above?**

## Safeguards and protections within process design

2.35 The government recognises that obtaining a security or freezing order could have a significant effect on the continuing business of the promoter. It recognises that safeguards should be included that are in line with the design principles identified in the HMRC Powers Review of 2005, that are clear, accessible and responsive to the nature and purpose of particular powers and sanctions. It is important to strike the right balance between HMRC being able to take swift and robust action whilst ensuring these, they could only apply such powers in tightly defined situations.

2.36 It would be important that any decision by HMRC to proceed was taken at an appropriately senior level. HMRC has strong, pre-existing, internal governance for the use of powers to seek security payments or freezing orders under existing legislation. This involves a detailed review by both a solicitor and a designated officer from within HMRC's Insolvency Governance team who ensure the evidential test and CPR part 25 requirements, as set out in paragraph 2.40 below, are met before any application is made. They would also consider whether this is the most appropriate course of action and whether there is an alternative solution to achieve the required outcome. The government proposes that the same strict controls would apply to these measures.

2.37 The government also considers that independent oversight would be appropriate in cases where HMRC was seeking to use the proposed power. Existing freezing orders, in the majority of circumstances, require an application to be made to the High Court. These can be heard without notice being given to the respondent referred to as an ex parte hearing, to prevent any assets being dissipated if prior notice of the hearing were provided. However, tax securities can be requested by HMRC without reference to the courts.

2.38 It is important that any hearing under this proposed new power is sought via the most appropriate court. For instance, to ensure that any application is heard swiftly and by a court experienced in the often complex nature of asset dissipation. It is proposed that under either option outlined above, HMRC would need to make an application to a senior court or Upper Tribunal and would be able to request to be heard ex parte.

**Q7. Is the High Court or Upper Tribunal the appropriate court for seeking either a security or asset freezing order, or would another court be more appropriate?**

2.39 The existing requirements that have to be met for freezing orders provide a helpful model for the standards that would form part of the proposed new measure. They detail what the applicant should do (which in this case would be HMRC) and what considerations need to be made of the respondent (in this case the promoter).

2.40 Under these proposals these requirements would include:

- The applicant must have a substantive case against the respondent, such as a reasonable expectation of a penalty position as described in 2.19 - 2.20;
- The applicant must have a good arguable case;
- There must be a real risk of dissipation of assets; and

- It must be reasonable to grant the freezing order, bearing in mind the rights of any third parties who may be affected by the freezing order, and whether such an order would cause legitimate and disproportionate hardship for the respondent.

2.41 If these provisions were replicated within this proposal, HMRC, as applicant, would have to prove to the court that the conditions for seeking a security or freezing order had been met. In particular, HMRC would need clear evidence of the penalty position and be able to highlight the risk that the promoter would dissipate the assets. This risk might, for example, be shown by reference to previous difficulties in collecting other tax or penalty debts from the promoter, or evidence of the promoter creating structures that make collection difficult.

2.42 If the hearing were to be held ex parte the applicant, HMRC, would be under a duty to give full and frank disclosure and ensure that all material facts were brought to the attention of the court. In addition, HMRC would also be required to provide certain undertakings, such as an undertaking to pay damages to compensate the promoter if it was later decided that the freezing order should not have been awarded.

**Q8. Do the provisions set out above provide appropriate safeguards for freezing orders or securities for promoters in penalty proceedings?**

2.43 Under the proposals, where a freezing order or security is agreed by the court or Upper Tribunal, the promoter would have a number of avenues for challenging the order or security. These would be in addition to any existing appeal rights against the underlying penalty.

2.44 In line with the safeguards for existing freezing orders, the promoter would be able to present evidence to the court or Upper Tribunal regarding their assets and why the freezing order or security should be overturned.

2.45 In addition, in recognition of the period that the freezing order or security would potentially be in place, it is proposed to allow the recipient to return to the court or Upper Tribunal for a review of their case. This would, for example, give a promoter the opportunity to show their circumstances had changed so that the order was no longer necessary.

**Q9. To what extent would this opportunity to present evidence and the later review, alongside existing appeal rights for the penalties, provide adequate avenues for challenge by promoters?**

2.46 In summary, the safeguards and protections included within the proposals include:

- That either the security or freezing order option would be determined by a court order;
- Full and frank disclosure of all material facts must be provided by HMRC, as the applicant, to the court;
- Following the court order the recipient could present their evidence as to why it should be withdrawn;

- Further reviews when circumstances change;
- Maintaining existing appeal rights against penalties within the anti-avoidance regimes, which would ultimately resolve the requirement for a penalty and the associated security or asset freezing order.

**Q10. Are there any other safeguards that HMRC should consider, to ensure the proposed power is only used in appropriate cases?**

## Summary of the proposed process

2.47 What follows is an outline of the steps that HMRC would take under the proposals and an example (in box 2.2) of how that might operate in practice. Where one of the conditions (see paragraphs 2.19 - 2.20) was reached HMRC would:

- Identify that a condition has been breached and a penalty is about to be charged or applied for to a tribunal;
- Calculate the amount of the penalty to be charged or a best estimate of any penalty being sought via tribunal;
- Identify, where possible, any assets relating to the promoter, and whether the promoter, or individuals and directors linked to the promoter, have already shielded or moved any assets relating to the promoting activities;
- Identify that there was a real risk that the promoter would hide or dissipate assets during any legal process;
- Seek approval in line with its internal governance processes. This includes review and sign off by both an assigned solicitor and an officer from within HMRC’s Insolvency Governance team, as set out at paragraph 2.36 above. This scrutiny would ensure that the evidential test and the civil procedure rules as laid out in Part 25 are met;
- Apply to the relevant court or tribunal for a freezing order, or security, from the promoter of an amount up to the value of the penalty. This could be an ex parte hearing to ensure assets are secured prior to the promoter being informed of the application for the order. HMRC would need to meet the criteria described in paragraph 2.40 above.

2.48 Once the security or freezing order was granted the following steps would take place:

- HMRC would proceed to issue the penalty or apply to the tribunal for the penalty being sought, in line with the provisions of the relevant anti-avoidance regime. The penalty would need to be issued promptly and the court could make this a condition for giving the order;
- Following the granting of a freezing order, or security requirement, the promoter would have the right to object to the order, presenting evidence regarding their assets and why the freezing order or security should be discharged or varied. HMRC would be able to defend its position at this point (again subject to its own internal governance);
- If the freezing order or security was upheld after the hearing above, it would remain in force until the court or tribunal judgment relating to the issue of the penalty was received and the relevant penalty paid. The recipient would have a right to return to the court for a further review, for instance, when the promoter

believed their circumstances had changed so that the order was no longer relevant or applicable;

- Similarly, HMRC could return to the court for a review of the security or freezing order where evidence of further assets was discovered, or a further penalty (or penalties) was chargeable or sought, and the amount secured or frozen would need to be increased;
- Once the first-tier tribunal judgment in relation to the penalty was received any security taken would be used to pay for the penalty, or where a freezing order was in place, this would be lifted to allow for the payment of the penalty.
- If the judgment was not in HMRC's favour the security would be repaid or freezing order lifted.

**Q11. Are there any other steps that would be appropriate in this process?**

2.49 The example that follows, continues from Box 2.1

**Box 2.2 How the proposed power would work where a freezing order or security was sought to cover a POTAS stop notice penalty.**

HMRC have issued an SRN to Promoter XYZ for the arrangements in question. At, or around, the same time HMRC issue a stop notice to Promoter XYZ under the POTAS legislation contained in Finance Bill 2021.

HMRC subsequently identify that Promoter XYZ has not complied with the stop notice and has continued to market the scheme. HMRC determine that a breach of the stop notice has taken place and a penalty position has been reached.

HMRC expect that Promoter XYZ will appeal the penalty when issued and has concerns that they will use the time it takes to determine the appeal to move assets from the company and leave insufficient funds to pay for any penalty. These concerns are based on previous behaviours of Promoter XYZ and of previous companies associated with its directors.

Immediately before issuing the penalty for breaching the stop notice, HMRC apply to the High Court for an ex parte hearing to request either a security payment or freezing order against Promoter XYZ, for the value of the penalty.

HMRC demonstrate that there is a real risk that Promoter XYZ will use the time it takes to resolve the appeal, to transfer or remove assets. HMRC use the proposed new power to request a court order to protect HMRC's position and ensure that sufficient funds to pay for any penalty are covered by a security or are subject to a freezing order.

The court makes the order.

Promoter XYZ receives notification from the court for either the requirement to pay a security or the order to freeze assets, and at the same time HMRC issues the stop notice penalty. Promoter XYZ has the opportunity to present their evidence to the court and provide reasons why the order should be overturned. The court considers the evidence but decides not to remove the order.

If Promoter XYZ appeals against the stop notice penalty the security or asset freezing order is in place and the funds to pay the penalty are ring-fenced. At the appeal hearing the tribunal finds in HMRC's favour and confirms the POTAS stop notice penalty on Promoter XYZ.

The penalty is paid using either the security that has been held by HMRC or by releasing the asset freezing order to allow for the penalty to be met.

If Promoter XYZ does not appeal, then the penalty is paid using either the security or by releasing the freezing order.

# 3. Tackling offshore promoters and the UK entities that support them

## Background

3.1 Promoters of tax avoidance schemes are increasingly basing their businesses offshore. Consequently, a significant proportion of the firms currently promoting tax avoidance are, or claim to be, based offshore. The regimes designed to tackle those who promote tax avoidance apply to promoters whether they are in the UK or offshore. However, tackling promoters who are based offshore presents a number of difficulties enforcing and collecting any sums due from the promoter. Complex offshore cases can take HMRC much longer to investigate and require more resource than equivalent UK cases.

3.2 Offshore promoters are aware that most people buying a product in the UK would normally prefer to deal with someone who is based here, with a UK telephone number or email address, rather than someone who is overseas. Customers of these offshore promoters often tell us that they were unaware they were dealing with someone who was not based in the UK. This is because, although the offshore entity is running the tax avoidance scheme, a UK based entity acts as an interface between the person with overall significant control (the underlying promoter) and the client. The UK entity provides a sense of reassurance and legitimacy.

3.3 Existing powers can be used in certain situations against these UK entities, but these powers are not always sufficient to persuade these entities not to work with offshore promoters. This chapter makes proposals that would allow HMRC to tackle those that support offshore promoters more effectively than it can now.

## Current position

3.4 Some promoters have set up their businesses overseas which makes it more difficult for HMRC to challenge them. Typically, they have set up associate companies in the UK, or use a network of facilitators, which under their guidance and instruction, advertise and sell the tax avoidance scheme for them. The support provided by UK entities to offshore promoters, through the promotion and marketing of schemes and the enrolment of customers to use them, provides the offshore promoter with vital access to UK taxpayers. Offshoring in this way makes it more difficult for HMRC to tackle the underlying promoter.

**Box 3.1 Example of a current scenario where an offshore promoter and UK entity are challenged with Enablers penalties.**

A tax avoidance scheme is devised by a promoter who is based offshore.

The marketing and selling of the scheme are undertaken in the UK through the promoter's associate company.

HMRC make enquiries and establish that the offshore promoter received £100,000 fees from promoting the scheme and its UK associate received £10,000 for marketing and selling the scheme.

Enquiries into a number of the taxpayers using the scheme are finalised, the scheme does not deliver the tax benefits promised and the majority of them settle their tax liabilities with HMRC.

The General Anti Abuse Rule (GAAR) Advisory Panel opinion supports HMRC's view that the arrangements entered into are not a reasonable course of action.[4]

HMRC have established that the offshore entity and its UK associate are enablers within the meaning of Part 3 of Schedule 16 to Finance (No.2) Act 2017 i.e. persons who are responsible, for the design, marketing or otherwise facilitating another person to enter into abusive tax arrangements.

HMRC seek Enablers penalties from the offshore company for their activities as a promoter of £100,000 and from the UK associate company of £10,000. HMRC pursue and recover the UK associate company Enablers penalty. However, the offshore promoter ignores demands for the payment of their penalty. HMRC continue to seek payment of the penalty liabilities from the offshore promoter, but they remain outstanding after the due and payable date has passed. No appeal has been received against the penalties and the liabilities are final.

3.5 In the above example, HMRC would seek to recover the penalties due from the offshore entity but are less likely to secure payment of the penalty than if the promoter was based in the UK. The promoter may not pay the penalty for their involvement in the development and sale of a tax avoidance scheme. It is very likely they will continue to sell different schemes in the future.

## Proposed changes

3.6 The government wants to deter UK based entities from acting on behalf of offshore promoters and so make it more difficult for these promoters to sell their schemes in the UK. The government proposes to do this by creating a liability on the promoter's UK associates, to penalise them for assisting the offshore promoter's activities. There is already some provision for penalties to be charged on UK entities facilitating the use of tax avoidance schemes in the existing anti-avoidance legislation, and the additional provisions included in Finance Bill 2021, including where the promoter is based offshore. For example:

[4] The GAAR Advisory Panel is an independent panel external to HMRC which provides opinions on cases where HMRC considers the GAAR may apply.

- The new DOTAS and POTAS measures which were consulted on in July 2020 and have been introduced in Finance Bill 2021. These will strengthen the existing DOTAS and POTAS regimes by allowing HMRC to impose certain obligations on UK entities who are involved in the development and sale of tax avoidance schemes on behalf of an offshore promoter. Where those obligations are not met, those UK entities will be liable to a penalty.

- The existing Enablers penalty legislation imposes penalties on UK entities for their involvement in enabling an offshore promoters' schemes.

3.7 However, these penalties are charged as a sanction for the UK entity's own activities within the promotion structure. They are not related to the location of the underlying promoter; they apply whether the underlying promoter is based in the UK or offshore. For example, a DOTAS penalty may apply to a UK entity where they have failed to share a scheme reference number with all the users of the scheme, or a POTAS penalty may apply where the UK entity has failed to adhere to obligations under a monitoring notice. Enablers penalties will apply where the UK entity has enabled the use of tax avoidance schemes through their activities, such as designing or marketing the scheme or managing its implementation. These penalties are chargeable on the UK entity irrespective of the location of the underlying promoter.

3.8 The government proposes to go further. Whilst the existing legislation and the amendments to it in the Finance Bill 2021 penalise the UK entity in respect of its own activities within the promoter structure (whether that structure is based in the UK or offshore), the government proposes the introduction of an additional penalty which will apply where those activities have been undertaken within a structure that includes an offshore promoter. This additional liability is to penalise the UK entity for facilitating an offshore promoter's business activities here in the UK.

3.9 The additional penalty would be chargeable on a UK entity, where all three of the following conditions apply, so that the UK entity has:

- Undertaken activities to facilitate the use of a tax avoidance scheme; and
- Been subject to a penalty under one of the anti-avoidance regimes in respect of its own activities in relation to that tax avoidance scheme, for example, an Enablers penalty for marketing abusive tax avoidance arrangements or a POTAS penalty for not complying with a stop notice; and
- Undertaken its activities in relation to that tax avoidance scheme within an offshore promoter structure.

3.10 In the above circumstances, the additional penalty would be charged directly on the UK entity and would reflect an amount up to the total fees earned by all those involved in the development and sale of that tax avoidance scheme, not just the fees earned by the UK entity, subject to the safeguards outlined in paragraphs 3.26 - 3.29.

3.11 For example, if the offshore promoter received fees of £50,000, the designer received £25,000, the marketer received £10,000 and the manager of the arrangements also received £10,000, the value of the additional penalty would be an amount up to £95,000.

3.12 The detail of the proposal set out below covers:

- The “UK entities” falling within scope of the proposal (paragraphs 3.14 - 3.15);
- The conditions under which the additional penalty would apply (paragraphs 3.16 -3.19);
- The time at which the penalty charge would arise and the value of that charge (paragraphs 3.20 - 3.22);
- The safeguards that would apply in charging the penalty (paragraphs 3.25 - 3.28);
- How the process would work (paragraph 3.29).

3.13 This proposal would significantly increase the financial risk to UK based entities of getting involved in the development and sale of tax avoidance schemes that include an offshore promoter. The aim of the proposal is to deter them from getting involved with an offshore promoter, which would in turn have the effect of disrupting the avoidance supply chain and reducing the underlying offshore promoter’s access to UK taxpayers.

## Scope

3.14 The government wants these proposals to apply to UK entities who, based on the facts and evidence,

- act under the instruction or guidance of the offshore promoter, (whether that instruction or guidance comes directly from the ultimate promoter, or indirectly from another person involved in the network through which the ultimate promoter operates);

- or who are remunerated for the activities they undertake in facilitating the offshore promoter’s arrangements (whether that remuneration is channelled directly from the ultimate promoter or is channelled indirectly);

- or where the promotion and enabling of tax avoidance activities are co-ordinated between the overseas promoter and the UK entity. This would cover those situations where the overseas promoter and the UK entity are working hand in hand to maximise sales of the scheme across the UK market.

3.15 The proposals would apply both to UK entities who are connected with the offshore promoter for tax purposes and those who are unconnected with the offshore promoter. For example, these proposals are intended to catch designers or marketers of tax avoidance arrangements where they carry out their activities as part of a wider network involving an overseas promoter, or UK entities who manage tax avoidance arrangements in collaboration with an offshore promoter. This would include tax or legal advisers who have presented transactions in a particular way in order to facilitate the sale of the overseas promoter’s scheme and unconnected umbrella companies who have been remunerated by the offshore promoter to manage the implementation of the scheme. They are not intended to catch persons or entities who have provided advice on matters unrelated to the tax avoidance objective, for example lawyers or tax advisers who have provided advice on tax or company law without suspecting that their advice was to be used to further a tax avoidance purpose.

3.16 The definition of “promotion structure” within the POTAS legislation introduced in Finance Bill 2021 provides a framework for targeting the UK entities these proposals aim to catch as it focuses on the structure of those involved in the promotion of the avoidance. It is proposed that UK entities falling within the definition of a “member of a promotion structure” would come within the scope of these proposals. This would ensure that those entities who were actively involved in, and support, the avoidance supply chain are targeted. An explanation of the definition can be found at Annex C.

**Q12. Do you think that applying the “promotion structures” definition is the best way to capture UK entities facilitating offshore promoters’ activities?**

**Q13. Do you agree that UK entities who are unconnected with the offshore promoter for tax purposes, as outlined in** paragraph 3.15**, should be included within the scope of this proposal?**

## Conditions

3.17 The proposal would increase the financial risk to the UK entity by imposing an additional penalty on that UK entity, subject to the proposed safeguards outlined in paragraphs 3.26 - 3.29 below, as a sanction for facilitating an offshore promoter’s business activities here in the UK.

3.18 The conditions under which the additional penalty would apply are that:

- the UK entity falls within the definition of a member of a “promotion structure” as described in paragraph 3.16 above; and
- a penalty under anti-avoidance legislation becomes due and payable on a UK entity in respect of their own activities; and
- the activities giving rise to the penalty under anti-avoidance legislation were undertaken within an offshore promoter structure.

3.19 The reference to “a penalty under anti-avoidance legislation” would include any penalty arising under POTAS, DOTAS, DASVOIT and Enablers penalty legislation. It is proposed that the legislation for the new penalty would contain provisions for amendments to be made to it so that any future anti-avoidance penalty regimes could also be included.

3.20 The additional penalty would be charged in addition to the penalty due and payable on the UK entity under anti-avoidance legislation in respect of their own activities. This approach would ensure that the UK entity’s activities in facilitating the offshore promoter’s business activities in the UK were penalised. Separately, HMRC would continue to pursue any penalty that was due from the offshore promoter.

**Q14. Do you think that applying the conditions outlined above is an effective approach in determining when the additional penalty would apply?**

**Q15. Can you see any practical difficulties with this approach?**

## Timing and value of penalty

3.21 The proposed penalty would be achieved through the creation of an additional charge, which would arise at the point where the UK entity became liable to a penalty in relation to their own activities under an anti-avoidance provision in relation to a tax avoidance scheme, and where it was established that those activities giving rise to the anti-avoidance penalty were undertaken within an offshore promoter structure.

3.22 The additional penalty would be for an amount up to the total fees earned by all those involved in the development and sale of that tax avoidance scheme. This would include fees paid directly to the offshore promoter, together with fees paid to any other entities or persons who formed part of the "promotion structure" for the scheme. Where it was not possible to determine the value of those fees, provided HMRC has taken all reasonable steps to obtain that information, a best reasonable estimate would be used.

3.23 Where there was more than one UK entity involved that was within the definition of a member of a promotion structure, and they met the conditions for an additional penalty in respect of the same offshore tax avoidance scheme, the full amount of the additional penalty based on the total fees earned by all those involved in the development and sale of the scheme, would be chargeable on each UK entity.

**Q16. Is the basis for calculating the additional penalty a fair approach?**

**Q17. Do you think it is an appropriate approach in all scenarios regardless of the type of anti-avoidance penalty incurred by the UK entity?**

**Q18. What other methods could be used for calculating the penalty?**

## Securities and freezing orders

3.24 The additional penalty payable by the offshore promoter's UK associates could also interact with the proposed security payment or freezing order covered in chapter 2. There would be a strong possibility that UK entities, who were acting as part of a wider promotion network including an overseas promoter would employ similar tactics to promoters in order to escape the financial consequences of their non-compliance. The government believes that in these circumstances, a security or freezing order in relation to the UK entity may be appropriate.

3.25 The government therefore proposes that where HMRC discovered that the underlying promoter was based overseas, and a liability was charged on the UK entity for facilitating offshore arrangements, HMRC could seek a security or freezing order to protect the additional penalty imposed on the UK entity if HMRC believed there was a risk of assets being dissipated or the business being dissolved.

**Q19. Do you agree that UK entities who are liable to the additional penalty for facilitating offshore arrangements should be subject to a security or asset freezing order where there is a risk that assets will be dissipated before the penalty was paid?**

**Q20. Do you consider that the proposed approach outlined in this chapter would be an effective deterrent to UK entities facilitating, or contemplating facilitating, offshore promoters' activities?**

**Q21. Do you consider that the proposed approach outlined in this chapter is proportionate to the harms caused by offshore promoters?**

## Safeguards

3.26 The proposals in this section are necessarily robust in order to counter the business structures that offshore promoters create that make it more difficult for HMRC to challenge them. The government recognises that safeguards should be in line with the design principles identified in the HMRC Powers Review of 2005 to 2012 and that they should be clear, accessible and responsive to the nature and purpose of particular powers and sanctions. It is important that the right balance is struck between tackling overseas promoters and their UK associates, and ensuring that appropriate safeguards are in place.

3.27 One of the conditions for the additional penalty to apply is that a penalty under one of the anti-avoidance provisions is due and payable by the UK entity in respect of their own activities (see paragraphs 3.20 - 3.22). This means that safeguards will already have been followed in determining that the conditions have been met. For example, where the penalty due and payable by the UK entity was an Enablers penalty, the tax avoidance scheme to which it relates would already have been considered by the independent GAAR Advisory Panel, it would have been subject to review by a designated officer of HMRC and the UK entity would have had opportunity to appeal the penalty. Where the penalty due was a POTAS penalty, except for certain daily penalties, the penalty would have been determined by the First Tier Tribunal where the UK entity would have had the opportunity to appeal the penalty. To illustrate this point a summary showing the operation of the current statutory safeguards for the Enablers penalty is set out below. For this reason, it is proposed that additional safeguards are only required to the extent that they ensure the correct application of the additional penalty and that they allow the UK entity the opportunity to appeal both its application and its value. The proposed processes are set out below at paragraph 3.30.

### Safeguards for the Enablers penalty

The statutory safeguards for the Enablers penalty provide that where a GAAR Advisory Panel opinion is not already held:

- The case must be referred to an HMRC Designated Officer for consideration.
- The Designated Officer must notify the customer where they believe that a penalty may be due and where they propose to refer the matter to the independent GAAR Advisory Panel for an opinion. The customer is given the opportunity to make representations in response to that notice.
- Where, after considering those representations, the Designated Officer decides to refer the matter to the GAAR Advisory Panel they must notify the customer of their decision. The customer has the opportunity to make representations to the GAAR Advisory Panel.
- Where, following the GAAR Advisory Panel giving their opinion, the Designated Officer decides that a penalty should be assessed, HMRC must assess the penalty.
- The customer has the opportunity to appeal to the tribunal against the penalty assessment.

The statutory safeguards for the Enablers penalty provide that where a GAAR Advisory Panel opinion is already held in relation to an equivalent scheme:

- The case must be referred to an HMRC Designated Officer for consideration.
- The Designated Officer must notify the customer where they believe that the scheme is equivalent to one on which there is already a GAAR Advisory Panel opinion.
- The customer has the opportunity to make representations to the Designated Officer.
- Where, after considering those representations, the Designated Officer decides that a penalty should be assessed, HMRC must assess the penalty.
- The customer has the opportunity to appeal to the tribunal against the penalty assessment.

3.28 Approval for the additional penalty would be given by an authorised HMRC officer to ensure that the additional charge was correctly applied to those entities who, by undertaking activities within an offshore promoter structure, have facilitated the offshore promoter’s business in the UK and to ensure that the amount of additional penalty being assessed is not disproportionately punitive. The authorised officer would be an officer at Senior Civil Service grade who works outside the HMRC business area which has investigated the scheme and the entities involved in facilitating it. The UK entity subject to the proposed penalty would be given the opportunity to make representations to the authorised officer which will be taken into account by the officer in making their decision. The government will consider putting these safeguards into legislation as it has done for other anti-avoidance penalties.

3.29 In all cases, the UK entity would have the right to appeal against HMRC's decision to charge the additional penalty and to appeal against its value. The right to appeal would be to a tribunal or a court.

**Q22. Do these safeguards strike the right balance between tackling overseas promoters and fairness towards their UK associates who become liable to a charge under these proposals?**

## How the process would work

3.30 Under these proposals, the process of establishing the UK entity's liability to the additional penalty would look similar for each of the circumstances in which the penalty would be charged. Below is an example of how the process would work based on the scenario at Box 3.1:

- A tax avoidance scheme was devised by a promoter who was offshore;
- The marketing and selling of the scheme are done in the UK through the promoter's associate company;
- HMRC make enquiries and establish that the offshore promoter received £100,000 fees from promoting the scheme and its UK associate received £10,000 for marketing and selling the scheme. There are no other entities involved in enabling or promoting the scheme;
- Enquiries into a number of the taxpayers using the scheme are finalised, the scheme does not deliver the tax benefits promised and the majority of them settle their tax liabilities with HMRC;
- The GAAR Advisory Panel opinion supports HMRC's view that the arrangements entered into are not a reasonable course of action;
- HMRC have established that the offshore entity and its UK associate are enablers who are responsible for the design, marketing or otherwise facilitating another person to enter into abusive tax arrangements;
- An HMRC Designated Officer reviews the case and concludes that an Enablers penalty is chargeable on the offshore company and its UK associate company;
- At this point, where the penalty was about to be issued by HMRC and where both conditions for a security or freezing order have been met, as outlined in paragraphs 2.19 and 2.20, HMRC could seek an order to ring-fence assets of the UK entity up to the value of their Enablers penalty;
- HMRC then issue Enablers penalties to the offshore company of £100,000 and to the UK associate company of £10,000. The UK associate's penalty of £10,000 is determined on appeal and becomes due and payable;
- As a consequence of the UK associate's Enablers penalty becoming due and payable, the UK associate is now liable to an additional penalty for their facilitation of the offshore tax avoidance arrangements. The amount of

additional penalty is the value of the total fees earned by all those involved in the development and sale of the scheme. In this case that was an amount of £110,000;

- An authorised HMRC officer would review the proposed penalty to ensure that the conditions for its application have been met and to consider its value, before approving the issue of the penalty;

- The UK entity would have the opportunity to make representations to the authorised officer which the officer will take into account in making their decision on whether to approve the issue of the penalty;

- At this point, where the penalty was about to be issued by HMRC and where both conditions for a security or freezing order have been met, as outlined in paragraphs 2.19 and 2.20, HMRC could seek an order to ring-fence assets of the UK entity up to the value of the penalty;

- HMRC would then issue the additional penalty liability on the UK entity. The UK entity would have the right to appeal to a tribunal or a court;

- HMRC would seek payment of the total amount of penalties from the UK entity (totalling £110,000), or where a security or freezing order was in place, HMRC would use the assets that have been ring-fenced to pay the penalty. The penalty of £100,000 on the offshore promoter would also remain due.

# 4. Closing down companies that promote tax avoidance schemes and tackling the directors of those companies

## Policy objectives

4.1 The government wants to disrupt the business activities of companies involved in promoting or enabling tax avoidance. As part of this it wants to be able to close down companies at the earliest point possible, where it has been shown they are not operating in the public interest. In this context, “public interest” means protecting the public from the actions of the company or the directors which are causing harm. This could include companies that do not comply with their obligations under the anti-avoidance regimes, and/or those that are selling tax avoidance schemes where HMRC have a reasonable belief that the scheme will not deliver the tax benefits promised, and which leave individuals using the schemes with big tax bills on top of substantial fees already paid to the promoter. The government also wants to ensure that directors operating these companies cannot set up similar operations using a new company.

4.2 Taking action more quickly would allow HMRC to remove these companies from the market and reduce the harm they cause to taxpayers and the wider economy, prevent new companies being set up by the same directors and deter others from being involved in promoting and enabling tax avoidance in the first place.

## Background

4.3 Companies can be wound up by the court upon the petition of one or more creditors, the official receiver, Secretary of State for Business, Energy and Industrial Strategy (BEIS), or by the shareholders of a company, or the company directors. There are a number of reasons a court may wind up a company, the most common being when a company is not able to pay its debts, if it is just and equitable to do so, or it is in the public interest.

4.4 Investigations of live companies are undertaken by the Insolvency Service (INSS), on the authority of the Secretary of State. A possible outcome of such an investigation is that the Secretary of State presents a petition to the court for the winding up of the company in the public interest.

4.5 INSS will also bring disqualification proceedings against the directors of a company where there is evidence of director misconduct and it is in the public interest to do so. A winding-up order does not automatically result in disqualification action being taken against the company directors. There is a statutory requirement for the official receiver to investigate the business dealings and cause of failure of a company subject to a winding-up order, and if this reveals evidence of unfit conduct on the part of the directors, and it is in the public interest, it can lead to disqualification proceedings being brought.[5]

4.6 A disqualification order can be made on a number of grounds as set out in Company Directors Disqualification Act 1986. In most cases, INSS consider taking disqualification proceedings where there is evidence of unfit conduct. There is no defined list in legislation of unfit conduct which may lead to disqualification, but examples include:

- Conduct that seeks to deprive creditors of assets;
- Continuing to trade to the detriment of creditors when a company is insolvent;
- Fraudulent behaviour;
- Failures to:
    - keep proper accounting records;
    - prepare and file accounts or make returns to Companies House;
    - submit tax returns and/or fairly pay the tax due;
    - comply with other regulatory requirements;
    - co-operate with the official receiver and/or insolvency practitioner.

4.7 The period for which a director is disqualified is set by the court and can be up to 15 years depending on the seriousness of the conduct.

4.8 Disqualification from acting as a company director can have long lasting consequences for the individual and their livelihood. Once a person is disqualified, they cannot be a director of a company registered in the UK, or an overseas company that has connections with the UK, or be involved in forming, marketing or running a company without the leave of the court. In addition, there are restrictions on an individual while they are disqualified, for example a disqualified director might not be able to sit on the board of a charity or school, be a pension trustee, registered social landlord, or act as a solicitor, barrister or accountant.

## Current Position

4.9 It is common for promoters to use contrived organisational structures to market tax avoidance schemes and avoid their obligations under current legislation.

4.10 They do this by distancing the person behind the promotion of the schemes from the legal body responsible for the scheme, continually rearranging the entities they use in the face of HMRC's challenge or separating out their activities into multiple legal entities to seek to circumvent the legislation. For example, the individuals who are the controlling minds behind one or more tax avoidance schemes quite often act as "puppet masters", remaining in the background and using multiple and different companies and other legal bodies, to promote tax avoidance schemes.

[5] An official receiver is appointed in England, Wales and Northern Ireland. There is no official receiver in Scotland, therefore when a petition is presented for winding up the creditor must nominate an insolvency practitioner to be appointed as interim liquidator by the court.

4.11 A company promoting tax avoidance schemes will often also take steps that delay and disrupt HMRC's investigation of their affairs, for example, by failing to respond to HMRC's requests for information or by providing partial replies.

4.12 Once tax avoidance schemes are sold, and particularly when HMRC raises challenges, it is not unusual for the company to be closed down or its activity significantly reduced, and new entities set up to continue the promoting activities. These behaviours perpetuate the sale of tax avoidances schemes.

4.13 HMRC currently identify companies that are promoting tax avoidance and make appropriate referrals to the INSS. INSS then consider taking action to investigate the activities of the companies and, if appropriate, present a winding-up petition in the public interest and, where the evidence supports it, disqualify the directors.

## Issues

4.14 HMRC can only take action itself against promoter companies under the existing insolvency legislation where there is an enforceable tax debt. For example, an enforceable debt in the context of a promoter could relate to a penalty for failure to disclose a tax avoidance scheme. To get to the point where the debt is legally due and payable, HMRC must first spot the scheme that might need to be disclosed, and seek further information from the promoter, where necessary using information powers to obtain further details about the scheme. Then the matter will need to be referred to the tribunal to consider whether the scheme is disclosable, and the case will need to return to the tribunal to consider whether to impose a penalty for failure to disclose the scheme. All of this can take years.

4.15 If there is no enforceable debt, but HMRC believe it has evidence that winding up may be appropriate, the case must be referred to INSS because there are no provisions within the insolvency legislation for HMRC to petition the court where there is no established debt. Where HMRC has conducted its own investigation, it will, in these circumstances, pass the information on to INSS. INSS will then undertake its own enquiries, assess whether an investigation is merited and if so, will present a winding-up petition in the public interest. As part of this, INSS take into account the company's compliance with its statutory requirements, such as with HMRC's anti-avoidance regimes. A combination of HMRC's investigation, followed by the INSS enquiries, can take a significant amount of time.

4.16 Director disqualification generally requires the company to have become insolvent, for example where the creditors force the company into liquidation. If the company does not enter formal insolvency and is not subject to an investigation, INSS can take disqualification action against the directors but only in limited circumstances. For example, where there is compelling evidence produced by INSS investigators or a referral of information from another department, including HMRC, that makes it clear that a disqualification in the public interest should be considered, INSS could proceed with presenting an application for disqualification to the court. This often means that it can take a long time, and in some cases more than a year or two before action is taken against the directors in addition to the time taken by the HMRC investigation.

**Box 4.1 Case Study which outlines the process for challenging promoters and how it will work should promoter measures introduced in the Finance Bill 2021 become law.**

Mr A has been behind a number of tax avoidance schemes and creates Promoter Company XYZ to run its promotion activities. HMRC identify Promoter Company XYZ as the latest company related to Mr A and one that is promoting a tax avoidance scheme. HMRC begin an investigation into the company, and request information about the arrangements from both Mr A and Promoter Company XYZ.

Neither Mr A nor Promoter Company XYZ cooperate with HMRC's investigations, but HMRC have enough information to give it reasonable grounds to suspect the scheme should have been disclosed under DOTAS. HMRC allocate a DOTAS reference number to the scheme and notify it to Mr A and Promoter Company XYZ. HMRC issue a stop notice under POTAS requiring that the promoter stops promoting the specified arrangements because they have been marketed as obtaining a tax advantage and the promoter has not complied with obligations to provide information under DOTAS. Promoter Company XYZ does not stop selling the scheme, consequently HMRC issue a penalty to Promoter Company XYZ, Promoter Company XYZ appeals and does not pay.

HMRC consider that there is a risk that Promoter Company XYZ is not trading in the public interest because, after the issue of the penalty, it continues not to respond to HMRC's enquiries and continues to promote a tax avoidance scheme that is subject to a stop notice. HMRC make a referral to INSS for them to consider whether it is appropriate to investigate Promoter Company XYZ as a live company, and subsequently whether it is appropriate to present a petition to the court to wind up Promoter Company XYZ. INSS then undertake their own investigations. This process can take many months, or even years, from when HMRC first spots the scheme to the time the petition is presented to the court. During this time the Promoter Company XYZ is likely to continue to market and sell the tax avoidance scheme, drawing more taxpayers into avoidance and making more money from the scheme.

If Promoter Company XYZ is wound up, whether on insolvency or public interest grounds, INSS will investigate the conduct of the directors and, if in the public interest, will make an application to the court for a disqualification order.

## Proposed Changes

4.17 The government considers that it would strengthen HMRC's ability to tackle those who promote tax avoidance if in certain circumstances it was possible to wind up companies, and disqualify directors, involved in the promotion or enabling of tax avoidance at an earlier stage and on a wider range of grounds. For example, the government believes it should be possible to wind up a company where there has been a significant breach of the anti-avoidance legislation. For example, they have not complied with the conditions of a POTAS monitoring notice. Additional factors, such as the director's history of closing down companies to avoid paying tax debts, may also form part of the grounds that it is in the public interest to wind up the company.

4.18 A more detailed explanation of what a significant breach of the anti-avoidance legislation would include is covered in paragraph 4.29.

4.19 To address the challenges set out in paragraphs 4.14 - 4.16 above, the government proposes the following changes:

- HMRC should have a new power that would, where there has been a significant breach of anti-avoidance legislation, enable them to present a public interest winding-up petition to court. HMRC would still need to demonstrate that the company should be wound up on public interest grounds. There would be no change to the public interest test and HMRC would need to provide the same level of evidence as INSS in petitioning the courts;
- Introduce a new ground for the disqualification of directors on the basis of their involvement in the promotion and enabling of tax avoidance where they have made decisions which constitute significant breaches of the anti-avoidance legislation. INSS would remain responsible for considering the case for disqualification.

4.20 As this would be a UK-wide measure the government needs to consider any potential implications and impacts on the devolved administrations in the design and implementation of this measure, both from a winding up and disqualification perspective.

4.21 The proposed changes to enable HMRC to present a public interest winding-up petition would provide for a more efficient process, as HMRC could undertake the enquiries in relation to both the anti-avoidance regimes (DOTAS, POTAS etc) and, in parallel, progress enquiries that may lead to a petition to wind up the company. This would in turn mean that, in appropriate cases, faster action could be taken against promoters under the winding up provisions, protecting the public from tax avoidance schemes being marketed and sold.

4.22 The proposed changes on director disqualifications mean that INSS would be able to consider disqualification solely on the grounds of a significant breach of the anti-avoidance regimes, but INSS may also include other grounds, such as unfit conduct, when considering disqualification.

4.23 There are different elements to the proposal which are briefly outlined below but are considered in more detail in the subsequent sections:

I. **Scope:** who would be within the scope of this new power to present a winding-up petition to the court (paragraphs 4.24 - 4.27);
II. **Threshold conditions:** under what circumstances would a winding-up petition be made to the court by HMRC, and what further factors would be considered before HMRC proceeds with the petition (paragraphs 4.28 - 4.35);
III. **Process:** how might the new power work in practice (paragraph 4.36);
IV. New **ground for disqualification:** what the proposed new ground for disqualification in relation to tax avoidance would be (paragraphs 4.37-4.39);
V. **Sanctions:** what the sanctions are for winding up and disqualification (paragraphs 4.40 - 4.41);

VI. **Safeguards:** what the safeguards are for winding up and disqualification (paragraphs 4.42 - 4.46).

**Q23. Where there is a significant breach of the anti-avoidance regimes and it is in the public interest to do so, do you agree that HMRC can act to present a winding-up petition to the court?**

**Q24. Do you agree that a company's significant breach of the anti-avoidance rules warrants consideration by INSS for disqualification of the company's directors?**

## Scope – Winding up proposal

4.24 This measure would mean that HMRC could petition the court to wind up a company where:

- A significant breach demonstrates non-compliance with the anti-avoidance legislation; and
- HMRC have established the evidence to petition the courts that because of a series of non-compliant and deliberate actions by the company, it should be wound up on public interest grounds.

4.25 The government wants these proposals to apply to promoters and companies who, based on the facts and evidence, act under the instruction or guidance of the promoter, (whether that instruction or guidance comes directly from the ultimate promoter, or indirectly from another person involved in the network through which the ultimate promoter operates), or who are remunerated for the activities they undertake in facilitating the promoter's arrangements (whether that remuneration is channelled directly from the ultimate promoter or is channelled indirectly). They would also apply where the promotion and enabling of tax avoidance activities are co-ordinated between promoters and companies and the ultimate promoter.

4.26 This would include both those who are connected with the promoter company for tax purposes and those who are unconnected with the promoter company. For example, these proposals are intended to catch designers or marketers of tax avoidance arrangements, or entities who, under the instruction of the promoter or in collaboration with the promoter, manage tax avoidance arrangements. This would include, for example, those involved in promoting or enabling tax avoidance through umbrella companies. They are not intended to catch persons or entities who have provided advice on matters unrelated to the tax avoidance arrangements, for example lawyers who have provided advice on company law or those whose role is incidental to the promoter's business activities, for example, a company providing services to design and develop a promoter's website.

4.27 The definition of "promotion structure" within the POTAS legislation introduced in Finance Bill 2021 provides a framework for targeting entities that are connected to the promoter company as it focuses on the structure of those involved in the promotion of the avoidance. It is proposed that entities who are a member of a promotion structure would come within the scope of these proposals. This would ensure that those entities who are actively involved in, and support, the tax avoidance supply chain are targeted. An explanation of the definition can be found at Annex C.

**Q25. Do you consider that the proposed approach will effectively target those in the tax avoidance supply chain? And are there other options which could help better target entities that are connected to the promoter company?**

## Threshold conditions

4.28 The government is proposing a number of threshold conditions and that if any one of them was met, HMRC would be able to take forward a winding-up petition on the grounds that there has been a significant breach. HMRC would still need to demonstrate that the company is operating against the public interest. These significant breaches are associated with the provisions within one or more of the anti-avoidance regimes set out below:

- Promoters of Tax Avoidance Schemes (POTAS);
- Disclosure of Tax Avoidance Schemes (DOTAS);
- Disclosure of Tax Avoidance Schemes: VAT and other Indirect Taxes (DASVOIT);
- Penalties for enablers of defeated tax avoidance (Enablers penalties).

4.29 We would consider the following to constitute significant breaches for HMRC to present a winding-up petition on the basis that the company was not operating in the public interest:

1. HMRC have identified that a POTAS stop notice has been breached and HMRC are about to issue a penalty;
2. HMRC have identified a breach of obligations imposed by a POTAS monitoring notice which gives rise to a penalty position;
3. HMRC have identified a failure to comply with a notice issued under information powers (such as under POTAS) in respect of requests made of the promoter in relation to the avoidance arrangement;
4. HMRC have identified that there has been a failure to comply with a DOTAS disclosure or reporting obligation following a determination/decision by the tribunal and HMRC has applied, or are about to apply, to the tribunal for a penalty;
5. HMRC have following the GAAR panel's opinion identified that the arrangements involved were not a reasonable course of action and the scheme has been defeated.[6] As a result, the conditions have been met for an Enablers penalty to be sought.

[6] A person is liable for a penalty under the Enablers penalty legislation when the abusive arrangements they have enabled are defeated. Abusive tax arrangements are defeated when the tax position of the user of those arrangements is final, and on the basis that the arrangements do not provide the anticipated tax advantage, either in part or whole. Arrangements are defeated where either condition A or condition B in paragraphs 5 and 6 of schedule 16 Finance Act (No.2) 2017 is met.

4.30 Once one of these conditions had been met, HMRC would then need to consider if there is evidence that the company is not operating in the public interest before deciding to proceed with the petition to the court.

4.31 HMRC would operate the same public interest test as INSS. In considering the evidence on public interest, HMRC would take into account the significant breaches of the anti-avoidance legislation, which constitute part of the threshold conditions set out above in paragraphs 4.28 - 4.35. For example, if the company is subject to a POTAS stop notice and has received a penalty for not adhering to it. However, HMRC would also look at additional factors in considering whether it is appropriate to move to petition for winding up the company on public interest grounds, such as compliance with tax filing and payment obligations.

4.32 In addition to any other failures to comply with the tax rules, other factors could include, but would not be limited to:

- The company has previously promoted a number of tax avoidance schemes that have been defeated in the courts to the detriment of many hundreds of taxpayers, who are now facing large tax bills;
- The directors also have a history of being involved in other companies that have liquidated themselves to avoid paying tax;
- Enforcement action taken by other government departments or compliance action by professional bodies on their members.

4.33 The above factors are not exhaustive, and would not be prescribed in legislation, but would form part of the evidential case for presenting a winding-up petition to the court which would further demonstrate that the company is not operating in the public interest. It would be for the courts to decide whether the company should be wound up on public interest grounds.

4.34 Any additional factors (even as a combination) would not be used to initiate a winding-up petition by HMRC on their own; this would require one of the threshold conditions to be met in the first instance. However, they would form part of the rationale and decision making for the petition.

4.35 Where companies were subject to other promoter measures being proposed in this consultation, the government does not propose these are treated as threshold conditions, but they could also form part of HMRC's overall consideration for seeking a winding-up petition on public interest grounds. These are:

- Security Payment/Freezing Order – the proposal would ensure that sufficient assets to pay for penalties are ring-fenced whilst any appeal or penalty hearing takes place;
- Tackling Offshore Promoters which enables HMRC to disrupt the offshore promoter's supply chain and access to the UK market by making onshore UK entities involved in facilitating the offshore promoter's business in the UK liable to an additional penalty.

**Q26. Are the significant breaches outlined in paragraph** 4.29 **the right ones to enable HMRC to consider whether a winding-up petition should be presented?**

**Q27. Are there significant breaches, other than those outlined in paragraph 4.29, that should constitute a threshold condition?**

**Q28. What other factors should HMRC take into account when considering whether a winding-up petition is in the public interest?**

## How the process could work

4.36 Below is how the process of HMRC presenting a winding-up petition to court could work in England and Wales. The process may be different in other devolved administrations.

- HMRC gather the necessary evidence and assess the relevant facts to determine if the company meets one or more of the threshold conditions for a winding-up case to be considered, for example, a penalty has been charged for breaching a POTAS stop notice.

- HMRC will take into account various other factors such as previous history of non-compliance with anti-avoidance regimes and voluntarily closing down companies to avoid paying their tax debts.

- Once the case has gone through HMRC's internal insolvency governance and review processes and has been considered by relevant experts and the authorising officer, a decision would be made to present a winding-up petition.

- The authorising officer would consider all the facts and advice provided by relevant experts and make the final decision as to whether the winding-up petition should be presented to court. The authorising officer would also consider the taxpayer's position and will look at any evidence as to why the company should not be wound up.

- The case would then follow the standard process for petitions being presented to court, in the same way as currently applies when HMRC petition for winding up because of a debt.

- The existing process has a number of safeguards (outlined in more detail within paragraph 4.44) which allow the company to challenge HMRC's petition being presented and granted. These include:

    - Right to apply for an injunction to stop the petition being advertised by the court ahead of the hearing;
    - The company has the right to make representations during the court hearing which can include filing evidence during the proceedings, and evidence which HMRC will need to consider in order to reassess the public interest aspects of the decision to continue with the petition;
    - The company has the right to make an application to the court to rescind (i.e. cancel) the winding-up order.

- Ultimately, the court would have the final decision as to whether the company was wound up or not.

- If the winding-up order is granted, an official receiver is appointed by virtue of the order. The official receiver has two key functions:

  1) Investigate the cause of the failure of the company and the extent to which the directors were responsible or culpable; and
  2) Carry out the duties and functions of a liquidator.

- However, where there is a concern that assets will be dissipated or records will be destroyed, HMRC could ask the court to appoint a provisional liquidator who will take control of the company until the winding-up proceedings are concluded. This is in line with the current process.

## Director Disqualifications

4.37 The government is proposing to introduce a new ground for director disqualification in relation to non-compliance with the anti-avoidance regimes. It would still fall within the remit of INSS to investigate and consider whether to take forward disqualification proceedings. The decision to apply for a disqualification order would continue to rest with the Secretary of State for BEIS. There is currently wider work being undertaken by BEIS to consider how company directors can be held to account for their reporting responsibilities.[7]

4.38 INSS normally consider the conduct of unfit directors of insolvent companies or unfit directors generally as grounds for disqualification (see paragraph 4.6 for examples of what may constitute unfit conduct). Currently, failure to comply with avoidance legislation is not a specific reason for directors being disqualified, which means that other grounds, which may not take into account particular points in relation to tax avoidance, will have to be used.

4.39 The government is therefore proposing setting out in law a new ground for disqualification for directors who have been involved in significant breaches of the anti-avoidance regimes, such as those mentioned in paragraph 4.29. This would provide INSS with a specific reason in relation to tax avoidance to support their investigation into the directors of the company. This ground would be added to the list of other grounds in the Company Directors Disqualification Act 1986.[8]

**Q29. Do you agree that there should be a new ground for disqualification for promoters involved in tax avoidance?**

## Sanctions

4.40 There are established and wide-ranging sanctions within the existing legal framework for both public interest winding up and director disqualification, which are imposed by the court, and these are outlined below. The government would expect these sanctions to remain in place and apply to winding up or director disqualifications under the proposals outlined in this Chapter:

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[7] Restoring-trust-in-audit-and-corporate-governance
[8] Company Directors Disqualification Act 1986

## Winding up

Directors have a duty to co-operate with the official receiver and insolvency practitioner. Failure to do so could result in them being held in contempt of court and subject to a fine, imprisonment or both. Potential criminal offences are prescribed in the Insolvency Act 1986 and include such things as fraud in anticipation of winding up, or misconduct in the course of winding up, where a person found guilty of either offence is liable to a fine, imprisonment or both.[9]
There are other areas where civil or criminal proceedings may be brought against directors of insolvent companies, for example wrongful trading, or re-use of a prohibited company name, either of which could result in a director being required to make restitution for losses to creditors from their personal funds.[10]

## Disqualifications

*Acting as a director during the disqualification period*

It is a criminal offence to act as a director during the period of the disqualification without leave of the court. The penalties on conviction for acting as a director whilst disqualified are imprisonment for up to two years, a fine or both. A person who is involved in the management of a company while disqualified is also personally liable for all relevant debts of the company. Furthermore, if a director or manager acts on the instructions of a person whom they know has been disqualified, then they too are personally liable for relevant company debts.

*Disqualification period*

The current period of disqualification for directors of insolvent companies ranges between 2-15 years depending on the seriousness of the offence/ conduct. For directors of solvent companies who are disqualified there is no minimum period of disqualification with the same maximum period of 15 years.
The period of disqualification is entirely at the discretion of the court and there is no obligation to consider any recommendation made by the applicant. The court will use the Sevenoaks Court of Appeal case as guidance to determine which bracket the conduct fits into:[11]

**Lower:** 2-5 years for misconduct which does not merit a disqualification period in the next bracket. The minimum bracket should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. This may include cases around routine trading to the detriment of the Crown.

**Mid:** 6-10 years for more serious misconduct. The middle bracket should apply for serious cases which do not merit the top bracket. This may include cases where there has been a breach of duty or failure to maintain or preserve records to the extent that something material cannot be explained, for example, a large payment to a third party.

**Top:** 10-15 years for the most serious misconduct. The top bracket should be reserved for particularly serious cases. These may include cases where a director who has already had one period of

[9] Insolvency Act 1986
[10] Insolvency Act 1986
[11] Sevenoaks Stationers (Retail) Ltd. [1991] Ch.164

disqualification imposed on him falls to be disqualified again. Usually there is an element of fraud or dishonesty, for example, inducing members of the public to make investments into fraudulent schemes.

4.41 No changes are being proposed to the existing sanctions for both winding up and disqualification as part of this consultation.

**Q30. Are there any circumstances where the current approach to disqualification periods might not be appropriate for tax avoidance related disqualifications?**

## Safeguards

4.42 The government wants to address the behaviour of the remaining group of promoters who continue to sell tax avoidance schemes that do not work but does not want to inadvertently catch legitimate businesses within these proposals.

4.43 Winding up and disqualification are serious actions which often have long lasting financial consequences for directors and individuals connected to the company. It is important that there are robust safeguards to ensure, for example, that those who are involved in legitimate tax planning or who have acted appropriately would not be caught by this measure.

4.44 The established legal safeguards outlined below, which are part of the existing process for winding up a company or disqualification of a director, ensure that a person or company is able to explain, clarify and defend themselves against proposed actions by the government:

- A senior authorising officer, independent of the investigation team, considers the case for winding up and/or disqualification;
- The company has a right to apply for an injunction to stop the petition being advertised by the petitioner before the court hearing takes place;
- The company has the right to make representations during the court hearing which can include filing evidence during the proceedings, and evidence which HMRC will need to consider in order to reassess the public interest aspects of the decision to continue with the petition;
- The company and/or the director has the right to apply to the court to rescind or stay the winding up and/or disqualification order.

4.45 The government believes that these safeguards are adequate and is not proposing any changes to them or new ones.

4.46 The government recognises that safeguards should be in line with the design principles identified in the HMRC Powers Review and that they should be clear, accessible and responsive to the nature and purpose of particular powers and sanctions. It is important that the right balance is struck between closing down companies and disqualifying directors and ensuring that robust legal safeguards are in place.

**Q31. Do you consider the current safeguards outlined above are sufficient and provide adequate protections for individuals and companies?**

# 5. Supporting taxpayers to identify and steer clear or exit tax avoidance

## Background

5.1 The government is committed to strengthening the support provided to taxpayers to help them spot when they are being sold a tax avoidance scheme and make them aware of the risks of entering into tax avoidance.

5.2 Promoters use advertising and marketing to tempt customers into tax avoidance schemes. The publicity material focuses on the promised tax benefits of the scheme. But it is usually silent about the true risks of such schemes, and what happens when HMRC demonstrates that the scheme does not deliver the benefits promised or a scheme is defeated in court. As a result, too often taxpayers who enter into a tax avoidance scheme are left with significant tax bills.

5.3 All taxpayers are legally responsible for their own tax affairs and users of tax avoidance schemes are no different. HMRC would like to ensure so far as possible that anyone who makes a decision to use a tax avoidance scheme is in possession of all the facts and understands what they are getting into.

5.4 HMRC have always warned against engaging in tax avoidance, for example, through its guidance *Ten Things a Promoter of Tax Avoidance Will Not Always Tell You*. HMRC's Spotlights series about tax avoidance schemes, published on GOV.UK, also warns people about what to look out for. HMRC share these publications with partner bodies and interested stakeholders, including the accountancy representative bodies, employment agency representative bodies, tax agents and other relevant stakeholders. For example, Spotlight 54 about promoters targeting returning NHS workers was shared with National Health Service (NHS) and Department of Health and Social Care (DHSC), who both disseminated the message. The issue was covered in national media and HMRC also use social media to get the message across.

5.5 On 26 November 2020, HMRC launched a communications Tax avoidance: don't get caught out, directed at contractors who are targeted by those selling disguised remuneration tax avoidance schemes. It encourages them to *"stop, challenge"* what they have been told and "*protect"* themselves and public services by reporting schemes to HMRC.

5.6 HMRC have been working with representative bodies and other agencies to tackle those who promote tax avoidance. For example, HMRC and the Advertising Standards Authority published an Enforcement Notice on 26 November 2020 to address misleading marketing by promoters of tax avoidance schemes. Promoters who do not respond face sanctions, including having their paid advertising removed from search engines, or a referral to Trading Standards.

5.7 HMRC write to taxpayers that they spot are potentially involved in a tax avoidance scheme. HMRC aims to do this within a few weeks of spotting someone who may be using tax avoidance. These letters make taxpayers aware of the risks of participating in tax avoidance and explain how to contact HMRC if they have any questions or want to get out of the tax avoidance scheme.

5.8 Sharing information about the risks of tax avoidance schemes (be that through publishing online, writing to taxpayers, or by others means) assists taxpayers in identifying the risk associated with joining or remaining in a tax avoidance scheme. This in turn contributes to reducing the market for and use of tax avoidance. The government wants HMRC to be able to go further in informing taxpayers of the risks of tax avoidance by sharing more information with them. This chapter seeks views on two proposals that would:

i. Ensure taxpayers were aware that HMRC were looking into a specific scheme or promoter; and

ii. Enable HMRC to publicly challenge misleading information provided by a promoter.

## HMRC's role in sharing and publicising information on promoters

5.9 HMRC has a legal duty of confidentiality that prohibits HMRC from disclosing information held in connection with its functions except for a limited number of purposes. It is important that taxpayers can trust that the information HMRC holds about them is appropriately protected and only disclosed in controlled and limited circumstances where the law allows. HMRC only release information where there is a clear legal basis for doing so. The duty of confidentiality constrains HMRC's ability to share information about the promoters of tax avoidance schemes and its ability to provide information directly to taxpayers who are using tax avoidance schemes.

5.10 The government recognises the rights and freedoms of citizens under the UK GDPR[12] and the Human Rights Act, including the importance of keeping personal data confidential. But the government also recognises that there is a need to make taxpayers aware of the risks of entering into tax avoidance schemes. Releasing information in these circumstances would only be considered where that need outweighs the right to privacy and it is in the public interest to do so.

5.11 As described in paragraphs 5.4 to 5.8 above, HMRC work within this legal framework to warn people against using tax avoidance schemes as much as possible.

5.12 The DOTAS, POTAS, DASVOIT and the Enablers penalty anti-avoidance regimes all include specific provisions that enable HMRC to publish details about schemes and promoters in prescribed circumstances. For example, under POTAS, HMRC can publish information about a promoter that is subject to a monitoring notice under that regime. However, it can be several years after the promoter first came to HMRC's attention before the conditions are met for a monitoring notice to be issued. Throughout this period the promoter would have continued to sell their scheme and taxpayers will be unaware of HMRC's concerns.

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[12] UK GDPR Data protection law - GOV.UK
Data Protection Act 2018

5.13 Last year, the government announced changes to these regimes that will make it easier for HMRC to share information about promoters and their schemes. The proposed changes were consulted on in the summer of 2020 and are included in Finance Bill 2021. They will enable HMRC to publish information about a promoter at an earlier stage than is possible now. New rules in those provisions provide for HMRC to name anyone in the tax avoidance supply chain relatively early in the process, but this is still expected to be at least 4 - 6 months from when HMRC first becomes aware of the scheme and starts asking questions about it.

5.14 Using these new powers, and those that already exist, HMRC will, for example, be able to publish information on promoters and schemes in the circumstances described in Box 5.1 below.

| **Box 5.1 Powers available to HMRC for publishing information on promoters and schemes** | |
|---|---|
| **Publication** | **When (quickest to slowest)** |
| Issue Spotlight publications highlighting *types* of scheme that are of concern that are being considered by HMRC, these **do not** include scheme names or promoter names. | Soon after the scheme has been identified. |
| Publish the names of the schemes that have been issued with a 'Scheme Reference Number' under the new DOTAS regime rules along with the name of the promoter and other enablers in the supply chain of the scheme concerned (Power included in Finance Bill 2021). | HMRC expect to be able publish the name of the promoter and other enablers in the supply chain approximately 4-6 months after identifying the scheme. |
| Publish the name of a promoter where they have received a POTAS stop notice obliging them to stop selling a scheme. The details of the scheme will be published when the stop notice is issued. (As amended in Finance Bill 2021). | Following the issue of a stop notice; where no appeal or request for review is made, or at the end of the appeal period where the notice has been considered by the courts. |
| Issue Spotlight publications highlighting HMRC's success in the courts of defeating particular schemes, these include the name of the promoter. | After the scheme has been considered by the courts. |
| Publish the names of promoters (and other enablers) that have received a penalty for enabling tax avoidance. This does not include the names of the schemes to which the penalties relate. (Power as amended in Finance Bill 2021). | After the use of the scheme by a taxpayer has been defeated and the penalty position has been established and the appropriate penalty threshold achieved. |
| Publish the names of promoters who have been issued with a monitoring notice under the POTAS regime. | Only after the promoter has first met threshold conditions under the regime and has then received a POTAS conduct notice which they have then breached. |

5.15 With the exception of the Spotlight publications, the publication of information in the circumstances described in the above table will always be preceded by an opportunity, typically 30 days, for the promoter to make representations to HMRC as to why the relevant information should not be made public. In addition, nothing will be published until HMRC has gone through its own governance processes involving legal and technical experts and senior level sign off. In many cases the issue will need to have been considered by a tribunal or court before HMRC can publish the information.

5.16 The provisions set out in Box 5.1 will increase the information available to taxpayers regarding the risks of being involved with particular promoters. However, there would still be a period of time after HMRC had first raised concerns about a promoter or scheme and before they could publish information. During this period the promoter would be able to continue to sell their scheme and HMRC would not be able to tell taxpayers any details that would alert them to HMRC's concerns regarding a scheme or promoter. Outside the circumstances set out above, there is also no provision for HMRC to directly refute any misleading claims made by a promoter about their schemes.

5.17 The government wants to make the position more transparent for individuals who have bought, or might buy into tax avoidance schemes, so that they are aware as soon as possible of HMRC's concerns about a promoter or a scheme that is being offered and the potential risks of entering it.

## Current Issues

5.18 The earliest point at which HMRC would be able to name the promoter of a scheme would be under the new DOTAS rules, which are included in Finance Bill 2021. This could be four to six months after identifying the scheme. There is no specific provision that provides for HMRC to name a promoter at an earlier stage. For example, if HMRC spot an advertisement making claims that unrealistic tax benefits are available, even where HMRC know this is linked with a known promoter of tax avoidance, they could not make the public aware of their concerns until the steps involved in the new DOTAS provisions had been completed (typically four to six months after HMRC identifying the scheme).

5.19 There are a number of circumstances in which promoters have made exaggerated or untrue statements, or they have implied that there are no or minimal risks to the schemes they are selling: statements which HMRC have been unable to correct. For example, these may include claims on the following lines:

- A promoter suggests that they have never been defeated by HMRC, when HMRC have in fact defeated their schemes or have successfully challenged or penalised the promoter themselves. HMRC do not have a power that allows them to specifically highlight these defeats in a way that would directly refute the claim made by the promoter.
- A promoter might write to existing clients, claiming that they have provided schemes similar to the one they are using, which have a 100 per cent success rate in the courts, when HMRC have in fact regularly defeated these cases. While HMRC can tell taxpayers about the outcome of a court case, not all

cases are concluded in the courts. HMRC would not be able to name schemes that had not been considered by the court but where HMRC had settled with the users of the schemes and collected the tax legally due, the tax that the promoter promised would be avoided. HMRC do not have a power that would specifically allow it to share information about its success in defeating one or more schemes marketed by the same promoter, so is unable to correct the misleading impression given by the promoter.

- A promoter claims to its clients (or in its advertising aimed at attracting new clients) that the scheme has been fully disclosed to HMRC and suggest that it has been approved. HMRC are unable to share information explaining that they are taking formal action against the promoter under DOTAS because the promoter has only provided partial information.
- A promoter claims in its advertising that HMRC cannot challenge a scheme because it has been approved by a barrister. HMRC cannot share information to explain that they are taking action against the scheme and are making enquiries into it.
- A promoter claims that they are 100 per cent compliant with anti-avoidance legislation. HMRC are unable to share information explaining that they are taking action under POTAS against the promoter for breaches of the anti-avoidance rules, and the promoter has been given a conduct notice to improve their behaviour.

## Proposed changes

5.20 The government has already taken steps to make it easier for HMRC to name promoters where those promoters have failed to comply with specific elements of the anti-avoidance legislative framework, and to do so at an earlier stage than was possible before. It believes that this will raise taxpayers' awareness of the promoters who are regularly selling schemes that do not work, or who rely on secrecy to promote their schemes (for example, by not explaining fully how the scheme works or requiring those who buy the scheme to commit to not sharing details with HMRC).

5.21 The government believes that if taxpayers are to be fully informed when making tax decisions then HMRC need to be transparent about the schemes and promoters that it is enquiring into. To give taxpayers a more balanced perspective, HMRC need to be able to:

- Make clear where arrangements are being considered by HMRC because they are potentially tax avoidance schemes;
- Make clear where promoters are being considered by HMRC for potential breaches of anti-avoidance legislation;
- Respond quickly and publicly to what is happening in the market, and in particular refute claims made by a promoter about the chances of a scheme being successful.

5.22 Therefore, the government is proposing a new power that would allow HMRC to:

- Inform taxpayers of HMRC's enquiries into specific promoters and schemes, including at an earlier stage than it can currently, or could under the provisions included in Finance Bill 2021 (paragraphs 5.25 - 5.33 below);

- Ensure that taxpayers understand better whether the information they have been provided by their promoter accurately reflects the information held by HMRC (paragraphs 5.34 - 5.39 below).

5.23 The safeguards that would accompany these proposals are described at paragraphs 5.40 - 5.53 below.

5.24 The government recognises that in the consultation on the measures to be included in Finance Bill 2021 there were mixed views on the benefits of naming promoters. However, the government considers that providing more comprehensive and up to date information on promoters and schemes on GOV.UK would encourage taxpayers to make use of this information.

## Increasing transparency about HMRC's enquiries into promoters and their schemes

5.25 While the government recognises HMRC may have only limited information when a potential tax avoidance scheme first comes to light, it wants taxpayers, who may be considering joining the arrangement, to be alerted so that they ask more questions and understand the risks. The government therefore believes that it is important that HMRC are transparent about the promoters and schemes that they are considering so that taxpayers can fully understand the risks involved in using a tax avoidance scheme.

5.26 To achieve this the government proposes a new power that would allow HMRC to publish the name (and details) of schemes and the relevant promoters where the following all apply:

(i) HMRC have grounds to suspect that on the basis of the information they have seen that the arrangements could be tax avoidance; and

(ii) HMRC have initiated enquiries into the scheme and its promoters; and

(iii) Where a promoter has not adequately responded to HMRC's request for it to make representations as to why the information should not be disclosed.

5.27 Under the proposal, HMRC would limit the information published to (i) the name of the scheme (ii) the names of those believed to be the promoters, and (iii) the fact that that HMRC was enquiring into them. HMRC would publish the information on GOV.UK. HMRC would also be able to provide this information directly to taxpayers in relevant circumstances.

**Q32. How helpful would this information be to taxpayers?**

5.28 Where a promoter advertises what they claim is a tax efficient arrangement, for example offering a 90 per cent tax saving, HMRC would consider the information available, which may be limited to not much more than the advertisement at an early stage. HMRC may also have other information about the promoter operating the scheme, if they have a history of promoting tax avoidance, but it is not proposed that such additional information would be required in order to name the promoter under these proposals. Where, on the basis of this information, HMRC had reached the view that in order to achieve a 90 per cent tax saving the arrangement would be very likely to involve a tax avoidance scheme, and the promoter had provided no other information as to how this tax saving could be achieved, HMRC would initiate their enquiries. HMRC would then publish the fact that they had made enquiries about the scheme and the promoter. This could be done quickly, shortly after HMRC had spotted the advertisement.

5.29 When publishing the information HMRC would be clear that no conclusions had yet been reached, by HMRC or the courts, about whether the arrangements were tax avoidance, or whether they delivered the promised tax saving. The published information would simply state that HMRC had begun its enquiries and would be gathering information into the arrangements and/or the promoter. HMRC would also need to confirm every 12 months that the information remained on the lists where those enquires continued.

5.30 HMRC would not provide updates on how the work being undertaken towards that challenge was progressing. However, where the scheme or promoter was named formally under a different tax avoidance naming power, such as those described in Box 5.1, the information would be removed from the GOV.UK published list of enquiries (unless there were other outstanding enquiries). HMRC would provide a link to where further information could be found about schemes and promoters who had been formally named so that taxpayers were fully informed.

5.31 Conversely, where HMRC subsequently concluded that the arrangements were not a tax avoidance scheme or had finished its enquiries into the scheme or promoter it would remove the details from the published list at the earliest opportunity and would note separately that the details had been removed from the published list, so that it was clear that the information published was no longer being considered by HMRC.

5.32 Publishing in this way would help taxpayers, and professional advisers that are not involved in tax avoidance, to understand where HMRC have concerns and to identify the particular schemes of interest to HMRC. It would help taxpayers to identify if they were being offered such a scheme and help them to understand the risks. This would also help a taxpayer identify that what they are involved in is likely to be tax avoidance, if this had not been clear to them before. This information would provide professional advisers with a reputable source of information that they could use to inform their clients, separate from the information provided by the promoters. The government has also published a consultation on potentially mandating professional indemnity insurance for tax advice; this information could also prove useful in helping insurers make judgements about pricing and offering such insurance. https://www.gov.uk/government/consultations/raising-standards-in-the-tax-advice-market

5.33 There is a risk that customers assume that any information HMRC published on tax avoidance was comprehensive, and that if a promoter or scheme was not on the list then they are not involved in tax avoidance. That may not be the case, any published list of information would be unlikely to be comprehensive, given HMRC would always need time to identify new schemes, start enquiries and make decisions about what to publish. Therefore, the appropriate caveats would need to be made to ensure that taxpayers did not consider the absence of a name on the list indicated that HMRC accepted the arrangements were not tax avoidance and would deliver the tax benefits promised.

**Q33. How can HMRC ensure that taxpayers do not incorrectly assume that if a promoter or scheme was not on the list then they cannot be involved in tax avoidance?**

## Providing taxpayers with clarity on the claims made by promoters about the chances of success of their schemes

5.34 The government is concerned that promoters are making claims that do not provide taxpayers with a full picture of risk concerning the schemes that they promote. As set out in the examples at paragraph 5.19 promoters make a range of claims to disguise the risks of joining tax avoidance schemes, or to keep clients who have already entered into the schemes, or to discourage them settling their tax liabilities with HMRC.

5.35 Therefore, the government proposes that HMRC would have a new power that would allow it to share information with taxpayers that would clarify or correct such claims to ensure that taxpayers had a fuller picture of the risks involved. Details of how the information would be shared through publishing, writing or other means are outlined in paragraph 5.36 below.

5.36 HMRC would share information only where it related to its own actions and all information would be factual. Where:

I. A promoter of a tax avoidance scheme made a claim about the arrangements that they are promoting; and
II. HMRC had information that suggested that a claim was not accurate; or HMRC considered the promoter's claim would prevent a taxpayer from fully understanding the risks of entering, or remaining in, the scheme,

then HMRC could share the information they hold relating to the claim by the promoter.

5.37 It would not be possible to include a definitive list of the type of information that HMRC might share under this proposal because it would need to be flexible enough to respond to the promoter's claim, but for example, it could include:

- Actions HMRC is taking under DOTAS, including, where relevant, whether they believe that the scheme is disclosable;
- Confirmation that the scheme has not been approved or disclosed to HMRC;
- Confirmation that similar schemes have been found to not give the benefits claimed;
- Details of where relevant schemes have been defeated where a promoter had suggested that the schemes always worked;
- Details of where a promoter has been successfully challenged under POTAS, DOTAS or the Enablers penalty regime;

- Details of a promoter's previous defeats under different names, or organisational structures, where they claimed to be a new promoter or fail to draw attention to their failures under that name.

**Q34. To what extent would information of the sort described here help taxpayers understand the risk of entering into tax avoidance?**

**Q35. What other information would be helpful for HMRC to share with taxpayers to clarify claims made by promoters?**

5.38 The government proposes that the provision should enable HMRC to take a flexible approach to the way it shares information to counter the ever-shifting modus operandi of promoters. This would allow HMRC to adapt the way it shares the information under this aspect of the proposals with taxpayers. This would range from writing letters to posting information on social media platforms and it would give HMRC discretion to share information in the most effective way.

5.39 By taking a flexible approach to the way the information is shared, HMRC would be in a position to respond to various claims made by promoters as they move from one communication channel to another when selling their schemes. Being able to respond directly via the same channel the promoter has used would enable HMRC to have a greater impact when countering unrealistic claims made by promoters.

## Safeguards

5.40 The government recognises that safeguards should be in line with the design principles identified in the HMRC Powers Review and that they should be clear, accessible and responsive to the nature and purpose of particular powers and sanctions. It is important that the right balance is struck between informing taxpayers, so they are aware of the risks of tax avoidance and ensuring the promoter has access to proportionate safeguards.

5.41 As with other pre-existing naming provisions, it is proposed that HMRC would give promoters an opportunity to make representations as to why their name, the scheme or other information correcting their claims should not be shared under the powers proposed here. This opportunity would be included within the legislation, but it would not be prescriptive on what those representations should include, as it will depend on the information that HMRC would be planning to release.

5.42 The representations by the promoter to HMRC could include information on why the activities of the promoter should not be of concern to HMRC or why HMRC should not need to enquire further into a scheme. The representations might also contend that HMRC is raising its concerns with the wrong person and that the individual or business is not connected to, or involved with, the person doing the promoting. HMRC would consider this information in reaching a decision whether to share the information or not.

5.43 The focus of this new power would be on promoters of tax avoidance schemes. The person approached could make a representation to HMRC that it was not connected to the scheme and HMRC would need to consider this. However, the representation would need to demonstrate this clearly. For example, some promoters have previously suggested that they were not a promoter in order to sidestep the obligations and responsibilities placed on them by the legislation. The government has previously legislated to reduce the risk of promoters sidestepping anti-avoidance legislation. Under these proposals, the government would seek to define a promoter by mirroring the definition used in these earlier provisions and apply that definition to these new proposals.

5.44 For this proposal to work effectively, it would also be important that promoters were not given the opportunity to create unnecessary delays. The government recognises that any individual faced with their name being shared by HMRC should be able to make representations but wishes to ensure that any such safeguards provide avenues for challenge without creating opportunities for unnecessary delays. For example, if the promoter did not reply to HMRC's contact with them seeking their representations this should not prevent HMRC from proceeding to share information on that promoter where it met the parameters described above. Ultimately the government wants to ensure that HMRC is able to act as swiftly as possible, given that delays give promoters time to continue to sell their tax avoidance scheme.

5.45 The government recognises the need to achieve an appropriate balance between powers and safeguards. The government is committed to including a right to make representations in this proposal, as detailed in paragraphs 5.41 - 5.44. The period for making these representations will be 30 days in line with the periods in other naming provisions in the anti-avoidance legislation. The proposals here are predicated on a need to disclose information at a point early enough to keep taxpayers informed of the risks associated with tax avoidance whilst ensuring that there are appropriate safeguards in place for promoters affected by HMRC's decision to share information.

**Q36. Do you agree that a 30 day period strikes the right balance between giving promoters sufficient time to make representations and ensuring that taxpayers can be informed quickly?**

5.46 If after considering any representations HMRC decide to share details about the promoter and/or the scheme, there would also be a right of appeal once HMRC had taken action to share that information. Where information was published on GOV.UK and was under appeal it is proposed that this would be flagged on the list. The appeal would allow the decision to share information to be considered by the tax tribunals. The tribunal would be able to consider issues of inaccuracies such as where incorrect facts were published or whether the correct person had been named. The tribunal would have the power to agree, amend or overturn the decision and also, where overturned, to require HMRC to clarify this on the GOV.UK list.

5.47 HMRC would put robust governance in place to oversee the process and to make sure only appropriate information was published and shared with taxpayers. It is proposed that information would only be shared where it had been signed off by an independent senior officer of HMRC and its solicitors. As with similar existing governance processes, the person making the decision whether to share information would be independent of any enquiry into the scheme or promoter and would see the representations received from the promoter.

5.48 Any decision not to share information would not prevent HMRC from releasing information that had been anonymised, although doing so would potentially reduce the value to taxpayers.

**Q37. Do these proposals strike the right balance between safeguarding promoters and acting swiftly?**

### Information is shared, and subsequent events change HMRC's view of the arrangements

5.49 The information to be shared in both proposals, as described above, would be factual and based on the information that was held at that time. However, as further information emerges the situation may develop over time. For example, a court case may change the commonly held view of how a tax provision works or a promoter may provide information showing the arrangements in a different light.

5.50 HMRC could correctly highlight its concerns about a scheme or promoter but the scheme or promoter could later be found not to fall within DOTAS or within scope of any of the anti-avoidance regimes. For example, the publishing of the fact that HMRC was enquiring into the scheme or the promoter would not have been incorrect, but clearly there would be implications for the promoter in question.

**Q38. To what extent do the safeguards described above, provide adequate protection for those on whom information is shared?**

5.51 Despite the safeguards described above, HMRC may have shared information on a scheme or promoter where HMRC's concerns were subsequently addressed. For example, where a scheme was found by a tribunal not to be within the scope of one of the existing anti-avoidance regimes, or where the promoter had successfully demonstrated how it had delivered advice in a manner not caught by those regimes. The government proposes that in such circumstances HMRC would share information to correct the position previously described.

5.52 Similarly, as detailed in paragraph 5.31, where HMRC subsequently concluded that the arrangements were not a tax avoidance scheme and had finished its enquiries into the scheme or promoter it would remove the details from the published list at the earliest opportunity. HMRC would also note separately that the details had been removed so that it was clear that the information published was no longer being considered by HMRC.

5.53 Where HMRC had written to taxpayers using the powers proposed here, they would direct recipients of the letters to the GOV.UK website for any material updates, such as removal from the published list. It is further proposed that HMRC would write again to taxpayers where it was subsequently found that those letters included a factual error.

5.54 The government is not proposing to pay compensation in these circumstances on the grounds that HMRC would, in the course of carrying out its functions, be acting in the public interest.

# 6. Assessment of impacts

## Summary of impacts

| Year | 2020 -21 | 2021 -22 | 2022 -23 | 2023 - 24 | 2024 - 25 |
|---|---|---|---|---|---|
| **Exchequer impact (£m)** | +/- | +/- | +/- | +/- | +/- |

| Impacts | Comment |
|---|---|
| Economic impact | Some of the elements of these measures are not expected to have an exchequer impact, though there is potential for upstream yield impacts via the winding up of companies and disqualifying directors, as well as the proposal to tackle offshore promoters via the UK entities that support them. Any Exchequer impact will depend on the policy development and the consultation process. The final costings will be subject to scrutiny by the Office for Budget Responsibility and will be set at the next fiscal event. This measure also supports the Exchequer in its commitment to protect revenue. |
| Impact on individuals, households and families | There is no change to individuals at present. Any future impact on individuals will be fully explored and detailed as the policies are developed and via the consultation process.<br>If introduced the measures being developed to support individuals to exit or steer clear of tax avoidance are intended to improve the individual customer experience for this population.<br>The measure is not expected to impact on family formation, stability or breakdown. |
| Equalities impacts | It is not anticipated that there will be impacts for those in groups sharing protected characteristics.<br>HMRC will provide extra support to customers as appropriate. |
| Impact on businesses and Civil Society Organisations | There is no change to businesses or civil society organisations at present. Any future impacts on businesses or civil society organisations will be fully explored and detailed as the policy is developed and via the consultation process.<br>If introduced the measure is intended to have economic and behavioural impact on the small group of persistent tax avoidance promoters who currently delay and sidestep the existing anti-avoidance measures. |

| | |
|---|---|
| Impact on HMRC or other public sector delivery organisations | The new measure being developed for HMRC to have a new power to wind up companies for tax avoidance related activities and breaches of current legislation would have an impact on Department for Business, Energy & Industrial Strategy (BEIS) and The Insolvency Service (INSS). We are working closely with BEIS and INSS to develop the proposals and scope the impact and costs that could be involved on both sides.<br><br>If introduced all the measures could have significant impacts on the Ministry of Justice (MoJ). We will continue our ongoing engagement with MoJ to both develop the proposals and scope the impact and costs that could be involved on both sides, depending on the further development of the measures.<br><br>If introduced the measures would be UK wide.<br>As part of the consultation process and the design and delivery of the measures any differential impacts will be considered, particularly in regard to winding up and disqualification. Some aspects of insolvency are devolved so we will work through any competency issues. |
| Other impacts | A Data Protection Impact Assessment will be completed before any measures are implemented. |

# 7. Summary of consultation questions

**Q1. Are the circumstances outlined in paragraph** 2.18 **reasonable situations for seeking an order to ring-fence assets?**

**Q2. Are the conditions outlined in paragraphs 2.19 and 2.20 reasonable for determining the grounds that need to be met before HMRC can seek a court order to ring-fence a promoter's assets, or are there other conditions that you think HMRC should meet before seeking an order?**

**Q3. Is the timing outlined in paragraph 2.19 the most appropriate point at which HMRC should be able to request an order to ring-fence assets, or do you consider this could apply at an earlier point in the POTAS, DOTAS or Enablers penalty regimes?**

**Q4. Do you agree with the principle of requiring a security payment or obtaining an asset freezing order in the circumstances described?**

**Q5. Which option do you think would best achieve the policy aim to ensure that promoters could not escape penalties or use the time taken to determine appeals to dissipate their assets?**

**Q6. Do you consider the sanctions that currently apply in respect of security payments and asset freezing are appropriate to apply to promoters of tax avoidance in the circumstances outlined above?**

**Q7. Is the High Court or Upper Tribunal the appropriate court for seeking either a security or asset freezing order, or would another court be more appropriate?**

**Q8. Do the provisions set out above provide appropriate safeguards for freezing orders or securities for promoters in penalty proceedings?**

**Q9. To what extent would this opportunity to present evidence and the later review, alongside existing appeal rights for the penalties, provide adequate avenues for challenge by promoters?**

**Q10. Are there any other safeguards that HMRC should consider, to ensure the proposed power is only used in appropriate cases?**

**Q11. Are there any other steps that would be appropriate in this process?**

**Q12. Do you think that applying the "promotion structures" definition is the best way to capture UK entities facilitating offshore promoters' activities?**

**Q13. Do you agree that UK entities who are unconnected with the offshore promoter for tax purposes, as outlined in paragraph 3.15, should be included within the scope of this proposal?**

**Q14. Do you think that applying the conditions outlined above is an effective approach in determining when the additional penalty would apply?**

**Q15. Can you see any practical difficulties with this approach?**

**Q16. Is the basis for calculating the additional penalty a fair approach?**

**Q17. Do you think it is an appropriate approach in all scenarios regardless of the type of anti-avoidance penalty incurred by the UK entity?**

**Q18. What other methods could be used for calculating the penalty?**

**Q19. Do you agree that UK entities who are liable to the additional penalty for facilitating offshore arrangements should be subject to a security or asset freezing order where there is a risk that assets will be dissipated before the penalty was paid?**

**Q20. Do you consider that the proposed approach outlined in this chapter would be an effective deterrent to UK entities facilitating, or contemplating facilitating, offshore promoters' activities?**

**Q21. Do you consider that the proposed approach outlined in this chapter is proportionate to the harms caused by offshore promoters?**

**Q22. Do these safeguards strike the right balance between tackling overseas promoters and fairness towards their UK associates who become liable to a charge under these proposals?**

**Q23. Where there is a significant breach of the anti-avoidance regimes and it is in the public interest to do so, do you agree that HMRC can act to present a winding-up petition to the court?**

**Q24. Do you agree that a company's significant breach of the anti-avoidance rules warrants consideration by INSS for disqualification of the company's directors?**

**Q25. Do you consider that the proposed approach will effectively target those in the tax avoidance supply chain? And are there other options which could help better target entities that are connected to the promoter company?**

**Q26. Are the significant breaches outlined in paragraph 4.29 the right ones to enable HMRC to consider whether a winding-up petition should be presented?**

**Q27. Are there significant breaches, other than those outlined in paragraph 4.29, that should constitute a threshold condition?**

**Q28. What other factors should HMRC take into account when considering whether a winding-up petition is in the public interest?**

**Q29. Do you agree that there should be a new ground for disqualification for promoters involved in tax avoidance?**

**Q30. Are there any circumstances where the current approach to disqualification periods might not be appropriate for tax avoidance related disqualifications?**

**Q31. Do you consider the current safeguards outlined above are sufficient and provide adequate protections for individuals and companies?**

**Q32. How helpful would this information be to taxpayers?**

**Q33. How can HMRC ensure that taxpayers do not incorrectly assume that if a promoter or scheme was not on the list then they cannot be involved in tax avoidance?**

**Q34. To what extent would information of the sort described here help taxpayers understand the risk of entering into tax avoidance?**

**Q35. What other information would be helpful for HMRC to share with taxpayers to clarify claims made by promoters?**

**Q36. Do you agree that a 30 day period strikes the right balance between giving promoters sufficient time to make representations and ensuring that taxpayers can be informed quickly?**

**Q37. Do these proposals strike the right balance between safeguarding promoters and acting swiftly?**

**Q38. To what extent do the safeguards described above, provide adequate protection for those on whom information is shared?**

# 8. The consultation process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

| | |
|---|---|
| Stage 1 | Setting out objectives and identifying options. |
| Stage 2 | Determining the best option and developing a framework for implementation including detailed policy design. |
| Stage 3 | Drafting legislation to effect the proposed change. |
| Stage 4 | Implementing and monitoring the change. |
| Stage 5 | Reviewing and evaluating the change. |

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

## How to respond

A summary of the questions in this consultation is included at chapter 7.

Responses should be sent by 1 June 2021, by email to ca.consultation@hmrc.gov.uk

Please note that the mailbox will not accept emails larger than 10mb.

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

## Confidentiality

HMRC is committed to protecting the privacy and security of your personal information. This privacy notice describes how we collect and use personal information about you in accordance with data protection law, including the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act (DPA) 2018.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, UK

General Data Protection Regulation (UK GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs.

## Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the UK General Data Protection Regulation.

### Your data

We will process the following personal data (*delete/add as appropriate*):

Name

Email address

Postal address

Phone number

Job title

### Purpose

The purpose(s) for which we are processing your personal data is: *Clamping down on promoters of tax avoidance*

### Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

### Recipients

Your personal data will be shared by us with HM Treasury.

### Retention

Your personal data will be kept by us for six years and will then be deleted.

## Your rights

- You have the right to request information about how your personal data are processed, and to request a copy of that personal data.
- You have the right to request that any inaccuracies in your personal data are rectified without delay.
- You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.
- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.
- You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

## Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

0303 123 1113

casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

## Contact details

The data controller for your personal data is HM Revenue and Customs. The contact details for the data controller are:

HMRC

100 Parliament Street

Westminster

London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:

The Data Protection Officer

HM Revenue and Customs

14 Westfield Avenue

Stratford, London E20 1HZ

advice.dpa@hmrc.gov.uk

## Consultation principles

This call for evidence is being run in accordance with the government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: Consultation Principles Guidance

If you have any comments or complaints about the consultation process, please contact the Consultation Coordinator using the following link:

Submit a comment or complaint about HMRC consultations

Please do not send responses to the consultation to this link.

# Annex A: Relevant (current) Government Legislation

**The main DOTAS legislation and guidance can be found here:**

Legislation: http://www.legislation.gov.uk/ukpga/2004/12/part/7

Guidance: https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview

**The main DASVOIT legislation and guidance can be found here:**

Legislation: http://www.legislation.gov.uk/ukpga/2017/32/schedule/17/enacted

Guidance: https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview

Guidance: Disclosing VAT and other indirect tax avoidance schemes (VAT Notice 799)

**The main POTAS legislation and guidance can be found here:**

Legislation: http://www.legislation.gov.uk/ukpga/2014/26/part/5/enacted

Legislation: http://www.legislation.gov.uk/ukpga/2014/26/schedule/34/enacted

Legislation: http://www.legislation.gov.uk/ukpga/2014/26/schedule/35/enacted

Legislation: http://www.legislation.gov.uk/ukpga/2014/26/schedule/36/enacted

Guidance: https://www.gov.uk/government/publications/promoters-of-tax-avoidance-schemes-guidance

**The main Enablers penalty legislation and guidance can be found here:**

Legislation: http://www.legislation.gov.uk/ukpga/2017/32/schedule/16/enacted

Guidance: https://www.gov.uk/government/collections/tax-avoidance-enablers

**Insolvency Act legislation can be found here:**

Legislation: https://www.legislation.gov.uk/ukpga/1986/45/contents

**Company Directors Disqualification Act legislation can be found here:**

Legislation: https://www.legislation.gov.uk/ukpga/1986/46/contents

**Civil Procedure Rules legislation can be found here:**

Legislation: https://www.legislation.gov.uk/uksi/1998/3132/contents

# Annex B: Overview of promoter and enablers penalties for anti-avoidance regimes including the changes contained in Finance Bill 2021.

**Promoter and/or suppliers**

Develops and sells avoidance arrangements

**Enablers**

Support development, facilitate and help sell arrangements

**Joint and several liability of company directors (and LLPs)**

- Directors and other persons connected to companies involved in avoidance can be made jointly and severally liable for the avoidance debts of the corporate entity where they use insolvency to avoid those tax liabilities
- For users (companies only) applies to the tax avoided
- For promoters and enablers applies to all penalties above

**DOTAS and DASVOIT-** Promoter required to notify arrangements

- Initial Penalty for failing to disclose a notifiable proposal or notifiable arrangements on time **– up to £600 per day** or, if greater, not exceeding **£1m**
- Initial Penalty for failing to provide further information requested by HMRC **– up to £5000**
- Initial Penalty for failing to provide information and not providing client with number **– up to £5000 per failure**
- Continuing penalty for failure to comply with an HMRC notice **– daily penalty up to £600**, for each day that the failure to provide information continues after an initial penalty has been determined
- Continuing penalty for failure to comply with a tribunal order **– £5000 per day**
- Note: penalties also apply to users where there is no promoter of the arrangements. All but the first listed penalty can also apply to suppliers.

**POTAS -** Tribunal will look at all considerations including the amount of fees received or receivable in connection with the monitored proposal/arrangements

- Tribunal determined initial penalty of **up to £1m** for:
  - Failing to adhere to Monitoring Notice obligations (eg duty to notify users of monitoring notice),
  - Failing to provide information in relation to a Monitoring Notice (eg duty to provide information or produce document)
  - Inaccurate information in relation to a Monitoring Notice or Conduct Notice
  - Failure to comply with a stop notice when also subject to a Monitoring Notice
- Tribunal determined continuing penalty for failing to provide information in relation to a Monitoring Notice **– Up to £10k per day**
- HMRC determined continuing penalty for failing to provide information about users in relation to a Monitoring Notice or Conduct Notice **– Up to £600 per day**
- HMRC determined initial penalty of **up to £100k** for failure to comply with a stop notice
- HMRC determined initial penalty of **up to £5k** for failure to comply with first party information notice, or failure to provide details of clients the arrangements sold to, or per client that has been sold the stop notice after the notice has been issued. The latter penalty increases **up to £10k** where a person is subject to a monitoring notice
- HMRC determined initial penalty of **up to £10k** where a person fails to inform connected party that they are subject to an SN, **up to 5k** where they fail to inform a user or intermediary, and **up to £25k** where they failure to tell HMRC which connected parties they have informed
- Third party information penalties will be the same as those in Schedule 36 FA 2008

**Enablers penalties**

- HMRC determined penalty for failing to provide information regarding enabling – Initial £300 and up to £60 per day
- HMRC determined enabler penalty, applies to anyone responsible for the design, marketing or otherwise facilitating another person to enter into abusive tax arrangements – **100% of gross fee received or receivable for enabling those arrangements.**

# Annex C: Explanation of the POTAS definition in Finance Bill 2021

New legislation in Finance Bill 2021 is adding to the current POTAS definition of a person carrying on a business as a promoter to include promotion structures, which will mean that persons that are part of a promotion structure can be challenged through POTAS. A person is part of a promotion structure if they:

1. Control other persons that carry out promoting activity
2. Act under the instruction or guidance of an overseas promoter
3. Are closely connected to one or more persons and they collectively carry out activities which, if carried out by a single person, would meet the POTAS definition of a promoter
4. Have a promoting business, in whole or in part, transferred to them so that they can continue its promoting activities