Response to the HMRC Consultation on 'Clamping Down on Promoters of Tax Avoidance' (May 2021)

This response is provided by a working group on behalf of the Centre for Commercial Law at the University of Aberdeen. The working group consists of Mrs Donna McKenzie-Skene, Dr Qiang Cai, Dr Burcu Yüksel Ripley and Mr Chike Emedosi.

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

The parallel in Scots law would seem to be the use of diligence on the dependence and by analogy, the proposals seem reasonable.

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?

They seem reasonable . Again, by analogy with diligence on the dependence, it is reasonable to allow an order to be sought at an early stage, but subject to the caveat that it must be possible to demonstrate at least a prima facie case at the point the order is sought.

It would be useful to clarify the threshold for the risk analysis in the second condition (e.g. is it reasonable risk or significant risk?).

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?

We would not favour allowing an order to be sought at an earlier stage – see response to previous question.

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

Yes. Note that reference in the discussion is made (only) to the CPR which apply only in England and Wales. In Scotland, the procedures are different – the equivalent of obtaining a freezing order would presumably be obtaining diligence on the dependence and this would need to be taken account of.

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?

We are not sure why it has to be one or the other – would it not be better to have both options available so that the remedy can fit the circumstances? If only one option would be proposed, we would favour the freezing order/diligence on the dependence route – while this could also have an impact on the running of the business, the requirement to provide security may be even more burdensome for businesses, which may not be able to access funds to pay the security or be inhibited in continuing their business in terms of the impact on cash flow.

By contrast, a freezing order could be applied to both monetary and non-monetary assets and thereby may offer a wider range of assets that could be available for the proposed measure. It may also offer a wider range of parties it could be applied to. Unlike the security payment which seemingly could only be directed to the promoter and connected third parties, the freezing order could potentially be directed to unconnected third parties who hold assets belonging to the promoter. For example, where the promoter or a connected party has funds in a bank account, a freezing order could be directed to the bank in relation to the account up to the value of the penalty. Another advantage of the freezing order concerns enforcement. The security payment option depends on the promoter's compliance in making the relevant payment which may be delayed, and assets could be dissipated in the process. A freezing order could be enforced by a court official or could also be directed to

third parties like banks without the cooperation of the promoter.

Attention should also be paid to the interaction between the two options if the government goes with the option of the asset freezing order. For example, it is a common practice for the defendant to make a payment into the court or to provide alternative security to the claimant in return for the discharge of the order. Therefore, it may be desirable for the government to take both options.

Notwithstanding, we suggest that the government adheres to the principle of proportionality in implementing asset freezing orders.

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?

Yes, this seems reasonable. Again, we note that references are (only) to the CPR which apply only in England and Wales.

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?

The High Court or Upper Tribunal seems reasonable. The equivalent Scottish court would be the Outer House of the Court of Session, although there may be an argument for allowing applications in the Sheriff Court.

Overall, there seems to be a need for legal systems of the three jurisdictions of the UK to be addressed and considered appropriately regarding the proposals.

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

The proposals seem reasonable – they are similar to the current requirements for diligence on the dependence in Scotland.

In addition to the safeguards provided, it may be useful to ensure that the promoter has

enough financial resources to fund their rights of appeal against the security order and the penalty order. This could be achieved by providing for a protected minimum amount to be available to the promoter for the purpose of pursuing their appeal rights. Also, the evidence on which the security order is granted should be served on the promoter along with the order. (This may already be the case, but we consider that it is worth pointing out).

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?

We think that the proposals give a reasonable opportunity for challenge.

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

No suggestions.

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

It should be clarified whether, after a freezing order or security is agreed by the court/tribunal, the promoters' right to appeal or request a review can also be directed to the HMRC in addition to the court/tribunal. The second bullet of paragraph 2.48 seems to support this internal avenue. We support granting promoters a direct access to the HMRC for the appeal and/or review purpose in addition to the judicial mechanism. This is based on the assumption that the internal review process within the HMRC could be more expeditious and efficient compared with the judicial process.

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

Please see our answer below to Q 13.

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?

In response to Qs 12 and 13, it is noted that the proposals seem to utilise a sort of reverse vicarious liability and we have a sense that they go too far.

We therefore suggest excluding UK entities that are unconnected with the offshore promoter from the scope. However, we do recognise the need to interpret the concept of 'connection' in a broad manner to include not only the scenario of ownership control but also contractual or factual control. It would be useful to clarify the threshold for the connection analysis.

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

Please see our answer below to Q 15.

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

In response to Qs 14 and 15, we have some reservations: is there a danger of double recovery? What is proposed seems to be a form of strict liability – is this appropriate?

We therefore suggest that once HMRC manages to collect a penalty from the offshore promoter, it should accordingly repay part of the additional penalty imposed on the onshore entity. Related to this suggestion, the concern is that once this additional penalty rule is approved, HMRC may lack sufficient incentive to pursue the offshore entity, even though the recent development in international taxation – e.g. the implementation of the Common Reporting Standard (CRS) – provides more effective tools for HMRC to enforce tax laws against offshore entities.

Paragraph 3.15 states that the rule of additional penalty is not intended to catch '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'. This subjective condition may be difficult to prove.

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

Please see our answer below to Q 18.

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?

Please see our answer below to Q 18.

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

In response to Qs 16, 17 and 18, again, we have some issues, e.g. the liability seems to be joint and several - will there be a right of relief?

A related suggestion would be that where there was more than one UK entity involved in a promotion structure, only one additional penalty up to the total fees earned by the entire supply chain should be imposed, although we agree that some joint and several liability may be imposed to these onshore entities.

With respect to Q18, we suggest that the function of the onshore entities in the supply chain of the promotion structure should be taken into account in determining their additional penalties. Otherwise, the imposition of the additional penalty on a UK entity that only performs auxiliary or incidental function may contravene the proportionality principle. A similar functional approach can be found in paragraph 4.26, where entities whose role is incidental to a promotion structure will be carved out from the scope of winding-up proposal.

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?

This would be logical if this approach is adopted.

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?

We would anticipate that it would.

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

We consider that it might be proportionate perhaps only if there is deliberate conduct….

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?

They seem reasonable if this approach is to be adopted.

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?

Yes. There are precedents for petitions by other authorities (such as the FCA) in appropriate circumstances, and it would make sense to avoid the double procedure of having to refer the case to the Insolvency Service to petition.

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?

Yes. Such conduct could be taken account of under the existing provisions, but could be specifically highlighted.

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?

This approach would seem to target effectively companies and LLPs, and partnerships in England and Wales, which are subject to a modified form of the corporate insolvency regime, but there may be an issue with partnerships other than LLPs and other entities in Scotland, which are subject to the bankruptcy regime rather than winding up.

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?

These seem reasonable, although it might be questioned if it is necessary to specify them or whether the broad concept of public interest is sufficient without further specification.

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

No suggestions.

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

All relevant factors should be considered, but these will vary depending on the circumstances, so we suggest no need for specification. We note that once again, the focus of the discussion is on England and Wales – the procedure in Scotland would be similar, but there is no Official Receiver in Scotland.

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

There are precedents for similar specific grounds, such as those for breach of competition law, so this would not seem to be an issue in principle. The provisions, as in the example specified, should require the director to be unfit.

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

No. Sticking to the existing approach would promote consistency in disqualification cases.

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

Yes.

Q32. How helpful would this information be to taxpayers?

We consider that such information would be very helpful 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?

Prominent disclaimers on website/letters/other communications

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

We consider that it would be very helpful.

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

Perhaps more detailed general information, such as making clear what HMRC will and will not do in this context (in the same vein as banks telling customers that they will never ask for your password over the phone etc).

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?

In principle, yes, but we consider that there should be provision for extensions in appropriate cases.

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

On balance, yes.

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

We think there would have to be provision for issuing corrections and we wonder if it is reasonable to say no compensation in any circumstances – for example, if there is clear fault?