

**Strengthening Tax Avoidance Sanctions and Deterrents
HMRC discussion document
Response by the Chartered Institute of Taxation**

1. Introduction

1.1. This consultation considers the following:

1. Proposals for financial sanctions for those who design, market or facilitate the use of tax avoidance arrangements which are defeated by HMRC, with the aim of deterring so-called ‘enablers of tax avoidance’ (Q1 – Q9);
2. Changing the way the penalty regime works for those whose tax returns are found to be inaccurate as a result of using such arrangements by defining what does not constitute the taking of ‘reasonable care’ and placing the requirement to prove ‘reasonable care’ onto the taxpayer (Q10 – Q12);
3. Defining what is meant by ‘defeated tax avoidance’ (Q13);
4. Seeking further ways to discourage avoidance and shrink the avoidance market (Q14 & Q15).

1.2. It puts forward proposals which are designed to tackle those who profit from tax avoidance schemes. One of the Chartered Institute of Taxation’s (CIOT) key objectives is to work for a better, more efficient tax system for all affected by it. Countering tax avoidance is clearly consistent with this objective, but the current proposals run counter to that objective in several respects. Any legislation must draw a distinction between promoting tax avoidance and advising on the law. The Government needs to be careful that in their efforts to wipe out avoidance schemes they do not prevent taxpayers from obtaining access to honest, impartial advice on the law. The proposals need to target penalties at objectionable behaviour both to ensure they work effectively to disincentivise it on a timely basis and to avoid penalising unfairly those who do not behave in this way. Definitions will be crucial.

2. Executive summary

- 2.1. The CIOT supports the Government's ambition to tackle and alter the behaviour of the 'shrinking but persistent minority'¹ of promoters and advisers who continue to market tax avoidance schemes. However, these proposals are far too widely drawn in that they potentially apply to those working on commercial transactions which are not in any sense tax avoidance schemes, irrespective of whether the party has devised or actively marketed any arrangement. It is of paramount importance that the proposals, if introduced, are aimed at the right targets. Key to this is that the relevant definitions are extremely clear and impact only those targets.
- 2.2. The challenge for the Government is therefore to frame legislation which will achieve their objective of preventing those who devise and market avoidance schemes from profiting from that activity, while maintaining the right of taxpayers to obtain full and expert advice on complicated and often unclear areas of law, enabling them to sensibly plan their tax affairs within the law and not lay themselves open to large, unintended tax bills.
- 2.3. Since the proposals impose a significant financial penalty, they will deter some from providing advice at all and (by extending to those who have not devised or actively marketed tax avoidance) risk making the UK a much less attractive place for commercial transactions and other activities. Given that the UK is the European base for many investments, this would be very damaging to the UK economy. We have heard reports that some overseas investors are already expressing concern over the proposals as outlined. At a time when the Brexit decision is already causing some overseas investors to re-evaluate the UK as a place to invest and do business, it is important that over-reaching counter tax avoidance measures do not add further uncertainty.
- 2.4. We regret that no consideration has apparently been given to the significant work HMRC and seven accounting and tax professional bodies, including CIOT, have recently been engaged in to cut down the supply of tax avoidance schemes. We also question whether there is enough current avoidance behaviour to warrant such a draconian and broad new measure, when targeted action could be taken against the 'shrinking but persistent minority' referred to in the consultation paper, who continue to 'peddle' schemes that clearly do not work.
- 2.5. It is also unclear whether the proposals only cover arrangements entered into after enactment of any new legislation or whether they will also apply to an arrangement entered into many years ago but with a 'relevant defeat' after enactment. We strongly oppose the latter which would create a penalty for actions taken many years ago when such sanctions did not exist. Following our raising of objections to the timing of these measures, HMRC have written to us and other stakeholders to provide clarification about the date from which the proposals would take effect. In this letter, they say that; *'The policy is intended to change future behaviour. The date at which any legislation would take effect will be decided by Ministers in due course within the usual tax policy making and legislative process'*. We conclude from this that HMRC will recommend to Ministers that the legislation should apply only to 'enabling' that takes place after the date that legislation is enacted. This is crucial.

¹ As referred to by Jane Ellison MP, Financial Secretary to the Treasury, in the Foreword to the consultation document.

- 2.6. With reference to the penalty model being proposed, we do not agree that a tax-gearred penalty is the right approach. It could result in a very significant and disproportionate financial penalty being imposed on an adviser. The penalty should be high enough to make advisers take due care to analyse the law accurately without promoting a particular option to the taxpayer but it should not be so draconian to deter them from giving advice at all. In our view, the size of the penalty should be limited to the amount of net fees or commission received by the enabler in respect of the advice given. We also think there should be a warning stage before the imposition of a penalty, similar to how the 'conduct notice' works under the Promoter of Tax Avoidance Schemes (POTAS) regime.
- 2.7. A suggestion for targeting these penalties properly at objectionable behaviour would be to require a more positive link within the definition of 'enabler' between the financial benefit and the tax avoidance, focussing on key indicators such as contingent and/or premium fees, confidentiality agreements and marketing methods. The mere fact that someone financially benefits (eg a company formation agent earning a normal fee) should not be enough to be caught nor should it be necessary for them to prove ignorance of the arrangements to escape. A company may be formed for many purposes including tax avoidance so this is too wide an approach. It will be difficult for the agent to prove that they did not know tax avoidance was the purpose.
- 2.8. A further suggestion for narrowing the focus of these measures to the 'persistent minority' is to provide a defence against the imposition of an enabling penalty for professional advisers. This would include an adviser who is a member of a regulated body or a body with professional rules that acceptably address the issue of tax avoidance, such as Professional Conduct in Relation to Taxation² (PCRT), and which have transparent disciplinary procedures for members who do not comply with professional rules and standards.
- 2.9. In considering how to target the rules at objectionable avoidance arrangements, we would encourage HMRC to incorporate a clearly-defined 'advice exclusion' exemption along similar lines to the Australian model (see paragraph 4.2 below).
- 2.10. The proposals, as drafted, mean that a long time will have elapsed between the provision of services and the point that an enabling penalty can apply, since it is proposed that the trigger will be the defeat of the arrangements in question. This may lead the 'persistent minority' to see little downside in continuing their behaviour in the short to medium term. We question whether the definition of enabler should instead be focussing on the adviser's behaviour rather than the outcome of the arrangements they have devised or marketed. How this might work in practice would require further consideration, but in our view, it should be possible to pinpoint what is unacceptable behaviour by reference to recognisable standards, such as PCRT and some rather than all aspects of the Disclosure of Tax Avoidance Scheme (DOTAS) Hallmarks (since DOTAS hallmarks are designed to ensure a flow of material information to HMRC going beyond what is necessarily avoidance).
- 2.11. Turning to taxpayer penalties, we do not favour introducing legislation that describes what does not constitute reasonable care. Whether or not reasonable care has been taken is a question that should be left to the tax tribunals to decide as it will vary on a

² The current version of Professional Conduct in Relation to Taxation (effective from May 2015) can be found at this link. This version is likely to be amended following recent discussions between HMRC and the seven professional bodies signed up to PCRT.

https://www.tax.org.uk/system/files_force/file_uploads/PCRT%20final%20CIOTATT%202015.pdf?download=1

case by case basis. We also disagree with the proposal that the onus of proof should be put on the taxpayer to demonstrate reasonable care. This would be a significant change which in our view is not justified

- 2.12. We consider the human rights aspects of these proposals in detail in the second appendix to this response.
- 2.13. In summary, we acknowledge that there are limited financial penalties at present for those who devise and actively market tax avoidance schemes. However, to ensure that any new measure is properly targeted, in our view, the following changes need to be made to the proposals:
 1. The breadth of 'tax avoidance' for the purpose of the rules needs to be cut down to apply only to arrangements caught by the General Anti-Abuse Rule (GAAR) and the DOTAS rules. If advice is not at least required to be disclosed under DOTAS then it is not part of promoting tax avoidance arrangements. Even DOTAS has a wider scope than true avoidance.
 2. The definition of 'enabler' needs to be limited to those who devise and play an active role in the promotion of tax avoidance schemes.
 3. There should also be a reasonable care defence available to the professional adviser and compliance with PCRT should form a key part of the defence.
 4. There should be a warning before a penalty is imposed.
 5. The penalty should be related to net fees, as anything else would be disproportionate.

3. Q1 – How far do the descriptions of enablers of offshore tax evasion also represent those who enable tax avoidance? What changes to these definitions would be needed to tailor them to tax avoidance?

- 3.1. In principle, in developing a definition for new legislation, it is a good idea to build out from existing definitions to ensure consistency and to avoid unnecessary traps or loopholes.
- 3.2. Paragraph 2.11 of the consultation document refers to the DOTAS and POTAS definitions and comments that they do not capture all participants in the supply chain who enable or facilitate tax avoidance, but it does not explain who it is that those definitions fail to capture.
- 3.3. The consultation document also does not make it clear in paragraph 2.12 whether it is contemplating a new definition to deal with the situations listed or whether it is intended that the definition of enabling in Finance Act 2016 Schedule 20 Paragraph 1(2)(b) will be used. This is that '*P has encouraged, assisted or otherwise facilitated [specified] conduct by Q that constitutes offshore tax evasion or non-compliance*' (in which case it is hard to see what needs to be 'tailored').
- 3.4. We would caution that the definition of 'enabler' is very open to interpretation. Words like 'assist' and 'facilitate' are extremely vague. They will need to be carefully defined so it is absolutely clear what kind of activity is being targeted. The suggestions at paragraph 2.12 of the consultation document could potentially cover

normal tax planning, for example, for a non-domiciled individual, or basic work such as helping to establish a company.

- 3.5. There will need to be intention or knowledge within the definition of enabling, as there is in Finance Act 2016 Schedule 20 Paragraph 1(5) '*...P knew that when P's actions were carried out that they enabled or were likely to enable, Q to carry out offshore tax evasion or non-compliance*'.
- 3.6. In paragraph 2.9, there is a list of those who can benefit financially from enabling others to implement tax avoidance arrangements. This includes company formation agents. They are a good example of why there must be an intention to enable someone to carry out tax avoidance. A company may be formed for all kinds of reasons and many company formation agents will assist in the formation of thousands, if not tens of thousands, of companies each year³. It would be impossible for them to do enough due diligence work to check the purpose of each and every company they are instructed to form. Paragraph 2.8 does allude to this by stating that safeguards should be provided for those who are within the definition of enabler but '*were unaware that the services they provided were connected to wider tax avoidance arrangements*'.
- 3.7. Additionally, it is far from clear that a definition drafted for 'enabling' tax evasion (ie a criminal offence) is really appropriate for defining an activity which, while undesirable in the eyes of many people, is legal, provided all appropriate disclosures are made to the tax authorities.
- 3.8. With specific reference to the list in paragraph 2.12 which details the ways in which an individual or business might enable someone to evade tax through the use of offshore structures, we make the following comments. Although the consultation says that many of these descriptions apply equally to avoidance, the list does not necessarily fit well with the concept of avoidance. Similarly, the infrastructure of avoidance can be very much like the infrastructure of ordinary tax planning and indeed commercial life.
 - If the list is to form the basis of a new definition, then it seems to lack the concept of origination of tax schemes. It may be that this is intended to come within the second bullet point of 'providing planning...' but this is not the best fit with the person who comes up with a concept and then has it validated by advice on technical issues or relative merits of different jurisdictions.
 - The list also omits the concept of 'selling' a scheme. Again, if an organisation has developed a concept, it is likely to want to sell it either through itself or through 'middlemen'. Perhaps that is 'providing planning' but it seems better to split them out to avoid arguments that X Ltd provided the concept but Y Ltd provided the detail of the scheme which X Ltd then sold to its own clients.
 - Non-reporting must be limited to circumstances where there is an actual duty to report. It is a useful criterion in an evasion case as duties to report suspicions of crimes and money-laundering are likely to be triggered. It does not seem a

³ Recent statistics from Companies House – 'In the United Kingdom in the 12 months to 31 March 2016, there were 611,372 company incorporations and 399,736 dissolutions. As a result, the number of companies on the total register – including those in the process of dissolution or liquidation (245,080) – reached 3,678,860. This was an increase of 214,704 companies (6.2%) compared to 31 March 2015'
<https://www.gov.uk/government/publications/companies-register-activities-201516/companies-register-activities-2015-16>

particularly good fit in an avoidance context where there may be no duty to report.

4. Q2 – Are there other classes or groups of person who should be included in, or specifically excluded from, the definition of enabler?

- 4.1. If these proposals become law, we foresee a situation where a tax adviser would be unable to advise on any matter at all (not just tax avoidance schemes being peddled by a ‘persistent minority’) for fear of laying themselves open to an ‘enabling penalty’ at some point in the future. This surely cannot be the intention behind these proposals.
- 4.2. The Australian promoter penalty model (which is referred to very briefly in paragraph 2.16 of the consultation document) contains a reasonably comprehensive definition of ‘advice exclusion’. In its *‘Guide for Tax Intermediaries - Good Governance and Promoter Penalty Laws’*, the Australian Tax Office (ATO) recognises the important role that tax advisers play in the Australian tax system and sets out what it considers to be ‘advice exclusion’⁴. We have reproduced the full text in an appendix to this response document. We would urge HMRC to consider introducing a similar type of exclusion for independent and objective tax advice.
- 4.3. Under the present proposals, we are also concerned about a scenario where a taxpayer goes to their tax adviser for advice on risks attached to participating in a tax avoidance scheme, receives appropriate advice setting out these risks and the likelihood of the scheme being defeated, but decides to join the scheme despite this. It would be extremely harsh to penalise a tax adviser in this scenario where all the tax adviser has done is advise the taxpayer on the law as it stands. Is it in the public interest to deter an adviser from playing such a role even if taking full and balanced advice does not always lead to the client to abandon the scheme?
- 4.4. Clarity is needed on how the concept of ‘enabling’ fits with the avoidance ‘lifecycle’ described in paragraph 5.5 of the consultation document. In particular, would a tax return preparer ‘enable’ tax avoidance by taking a position in a return even though the preparer played no part in the design or implementation of a scheme? Does a second tax return preparer who takes over a client from the original tax return preparer also ‘enable’? Does a professional advisor who did not design or implement the scheme, but represents a client in an enquiry into or litigation involving that scheme, ‘enable’ avoidance? If not, is there a relevant distinction between this activity and that of a tax return preparer and what is that distinction?
- 4.5. In addition, it may become prohibitively expensive (perhaps even impossible) for the adviser to obtain professional indemnity insurance. The risk here is that it will affect, not only the ‘persistent minority’ but the entire tax profession, the majority of whom are not involved in the avoidance scheme ‘supply chain’.
- 4.6. It is important to be aware that court cases on tax matters are not only about avoidance. Often there are simply disagreements between HMRC and taxpayers

⁴ Page 8 ‘Good Governance and Promoter Penalty Laws’



about how the rules operate and the courts are asked to adjudicate. Losing a case of this kind in the courts should not be seen as tax avoidance by the taxpayer or as 'enabling' avoidance by their advisers.

- 4.7. In our view, it will be totally inappropriate, and in fact commercially unworkable, to introduce widely drafted legislation and then detail how it will be used in non-statutory explanatory HMRC guidance. This is because investors, banks and other advisers involved in high value commercial transactions will not be able to rely on HMRC guidance when making their decisions, if they could be faced with an enormous penalty at some point in the future for providing the advice.
- 4.8. A suggestion for properly targeting the definition of enabler would be to base it on behaviour, rather than to the outcome of the arrangements that have been enabled. As we referred to in our Executive Summary, this could draw on the thinking developed in discussions on PCRT, so that there is an exception where advice is given in a balanced way. We consider this in more detail when responding to Question 8 below.

5. Q3 – The government welcomes views on whether this approach is the right scope for a penalty on those who enable tax avoidance which HMRC defeats.

- 5.1. The Government is proposing to use 'the defeat of tax avoidance arrangements' as the trigger for 'enabler' penalties. How 'the defeat of tax avoidance arrangements' is defined will be key. We consider this in more detail in our response to Question 13 below. However, we do not believe that a penalty should be imposed on an 'enabler' who gives a tenable view of the law to his client with appropriate caveats and risk warnings and ensures that all appropriate disclosures are made to the authorities, even though it may ultimately prove unsuccessful in litigation.
- 5.2. We think there should be a warning stage before the imposition of a penalty, similar to how the 'conduct notice' works under the POTAS regime.
- 5.3. It appears that the effect of these proposals is that the enabler could receive an enormous penalty for providing advice, whilst the taxpayer they advised could receive no penalty at all. This is because the government is not proposing to link the enabler penalty to a penalty being charged on the user of an avoidance scheme that is defeated. We are not certain that we understand the logic of this. In our view, there should be a link between the penalty position of the taxpayer and the adviser, as there is with the offshore tax evasion enabling penalty. Otherwise, we will end up in the irrational position that an adviser who enables avoidance (which whilst objectionable in the eyes of many is nonetheless legal) is penalised more heavily than an adviser who enables tax evasion, which is after all a criminal offence.
- 5.4. It also raises potential conflict of interest issues between a promoter, potentially at risk from an 'enabling penalty', and their client which could disincentivise advisers from seeking to resolve matters by agreement.
- 5.5. The Government is also proposing to include the option of naming enablers who are subject to this new penalty. As a matter of broad principle, we think that HMRC should approach publishing names with caution. Legislation has already been in place for some time on naming deliberate defaulters and those found guilty of National Minimum Wage non-compliance. We recall that when naming was first proposed it was felt that it would be a very powerful tool, but anecdotal evidence

suggests that it has not had the impact hoped for. It would be useful if HMRC commissioned some research on this and in determining how it could best be targeted, before they introduce further naming provisions.

6. Q4 – The government welcomes views on whether a tax-gearred penalty is an appropriate approach.

- 6.1. We do not think a tax-gearred penalty is the right approach. It does not fit with principles 1 or 2 of HMRC's five broad principles that they consider should underpin any new penalty regime⁵. It is not clear from the consultation document why a penalty for 'enabling tax avoidance' should be subject to different principles than any other penalty.

These principles are:

1. The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.
 2. Penalties should be proportionate to the offence and may take into account past behaviour.
 3. Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.
 4. Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.
 5. Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.
- 6.2. If we consider principle 1, a tax-gearred penalty could raise significant revenues if we have understood the proposals correctly. For example, a defeated scheme may have produced a tax saving of £1m each for 100 taxpayers. If there are 10 people in the supply chain and each has provided services to all 100 taxpayers, it seems that HMRC could impose total penalties of £1,000m (ie 10 x £100m).
- 6.3. If we consider principle 2, the proposed tax-gearred penalty could be completely disproportionate to the enabler's role in the chain of avoidance. An adviser may have received an introductory commission payment of, say £5,000, on introducing a client to a promoter marketing a scheme saving, say £100,000 in tax. It seems that the adviser would be at risk of receiving a penalty of £100,000 if the scheme is defeated, when their only involvement has been to introduce a client to the promoter. This does not seem a proportionate or reasonable response.
- 6.4. In terms of proportionality, there is an argument that the penalty proposals contravene Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) (Protection of Property) due to their width and the fact that are treating advisers and those actively promoting arrangements in the same way when their responsibilities are very different. A more fundamental reason why they may be disproportionate is that they are not fault based.

⁵ See paragraph 2.1 of 'HMRC Penalties: a discussion document Summary of Responses' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461357/HMRC_Penalties_a_Discussion_Document_-_Summary_of_Responses.pdf

- 6.5. In our view, the size of the penalty should be limited to the amount of net fees or commission received by the enabler in respect of the advice given. Net fees allows for the scenario where a promoter pays part of the fee to other promoters. This provides a more proportionate correlation between the size of the penalty and the enabler's particular role or position in the 'supply chain'. The penalty should be high enough to make advisers take due care but not so draconian to deter them from giving advice. There might be a risk that the providers of tax schemes could attempt to manipulate fees by charging apparently low fees for the tax product compensated by large fees for a non-tax service, but we would expect that legislation could deal with this (and with other scenarios like contingent fees). Arguably there would not need to be a cap if the penalty was fee based.
- 6.6. Some suggestions as to how a penalty along these lines might work:
- maximum penalty could be set at a % of the fees or commission earned with reductions for cooperation and disclosure; or
 - a tiered penalty, whereby the enabler could face a penalty of a higher % or multiple of those fees for persistent offences.
- 6.7. If a tax based approach is pursued, then it must be used only for extreme cases and in a targeted way given the huge penalties that could result.

7. Q5 – How should the penalty regime apply where a scheme has been widely marketed? What safeguards might apply in these circumstances?

- 7.1. See our comments at paragraph 6 above.
- 7.2. It is our view that the size of the penalty should be limited to the amount of net fees or commission received by the enabler, and not to the amount of tax understated by the scheme user.
- 7.3. If a tax based approach is pursued, then we agree that a cap would be needed. There will have to be robust and clear safeguards to ensure hugely disproportionate penalties are not levied.
- 7.4. As with other penalty regimes, there should be reductions available for disclosure and co-operation.

8. Q6 – Views are welcome on whether Schedule 36 would provide an appropriate mechanism to identify enablers of tax avoidance or whether a stand-alone information power would be more appropriate.

- 8.1. In our view, Schedule 36 already provides an appropriate mechanism to identify enablers. A stand-alone information power is not warranted.

9. Q7 – Would safeguards similar to those in Schedule 24 to the Finance Act 2007 be appropriate?

- 9.1. Yes, although it will be necessary to consider exactly what the enabler would be challenging. The possibilities seem to be at least:
- (i) whether they actually are or were an enabler;
 - (ii) whether an exclusion (as discussed in paragraph 2.29) was applicable;
 - (iii) whether the amount of the penalty should be reduced for disclosure;
 - (iv) whether the penalty was disproportionate given the enabler's participation in the arrangements;
 - (v) whether the penalty should be suspended; and
 - (vi) the interaction of the penalty with other penalty regimes.
- 9.2. To avoid delay and unnecessary costs, it would be worthwhile investigating whether the enabler's appeal against a penalty could be heard with or immediately after the hearing of the tax appeal to which it relates.

10. Q8 – To what extent would the approach taken in DOTAS be appropriate to exclude those who unwittingly enable tax avoidance from this new penalty? And, what steps should an agent take to show that they had advised their client appropriately?

- 10.1. PCRT contains the professional rules and guidance relating to the work of the tax adviser written by seven professional bodies, including the CIOT, for their members working in tax. It considers in detail the role of the tax adviser in providing tax advice to their client on a variety of activities. In recent months, HMRC and those bodies have been engaged in a significant amount of work to re-develop the professional rules relating to the adviser's involvement in tax avoidance. It is regrettable that the consultation document does not acknowledge this, apart from a very brief mention in paragraph 2.2.
- 10.2. If these proposals are pursued, we think that where a tax adviser who is a member of a regulated body or a body with professional rules (that acceptably address the issue of tax avoidance) can show that they have complied with them, that should be sufficient to demonstrate that they had advised their client appropriately and should provide a defence to the imposition of an 'enabler penalty'. This should form part of a 'reasonable care' defence. After all, professional and regulatory rules already reflect a detailed consideration of how to reconcile the professional's duties to their clients and to the public interest. The professional can be penalised for acting outside this, and the government can require that regulatory frameworks are improved, if that is necessary.
- 10.3. We are concerned that paragraph 2.30 of the consultation document displays a misunderstanding by HMRC of the role of the tax adviser. The paragraph says the following:

'For example, an agent who provides general accounting and taxation services may submit a return for a client, which is later found to be incorrect as a result of avoidance arrangements being defeated. If the agent could show that they had advised their client not to implement the arrangements, or that their client had not discussed the issue with them before implementing the arrangements, we would not want a penalty as long as they could also show that all appropriate disclosures were made when that return was submitted'.

- 10.4. There will undoubtedly be occasions where the adviser had advised a client not to implement particular arrangements and there will also be occasions where the adviser is unaware that a client has entered a particular arrangement until afterwards, perhaps only when the client approaches the adviser to assist them with completing their self-assessment tax return. It is appropriate to have an exclusion (or a limitation on the definition) to deal with these situations. Such an adviser can hardly be said to have enabled the avoidance. Filing a return is a legal obligation even for tax avoiders.
- 10.5. Advice will not be as simplistic as 'do it' or 'don't do it'. This is not the adviser's role. The adviser will set out a range of alternative courses of action for their client to consider, which will involve consideration of options, risks and consequences. It is ultimately the client's decision whether to take a particular course of action or not.
- 10.6. In addition, there is an evidential problem. How is the adviser to prove what advice they gave, without disclosing the advice to HMRC? In many cases, an adviser may be unable to disclose their advice for example, because they have a contractual duty of confidentiality or because the advice is protected by privilege and the client is not willing to waive privilege.
- 10.7. Because of the way that the proposals interact with legal privilege, they also possibly give rise to issues with Article 6 (Right to a fair trial) and Article 8 (Right to respect for private and family life) of the ECHR. Legal privilege may impact on a lawyer's ability to defend himself because the privilege lies with the client (which may give rise to issues under Article 6) and Article 8 is potentially impacted because of its interrelationship with confidential advice. We discuss this in more detail in the second appendix to this response.
- 10.8. There are other scenarios where it should be unthinkable to penalise the adviser where all they have done is advise a client on the law as it stands. For example, a situation where the adviser, despite not being party to designing or selling the scheme, has provided their client with appropriate advice on the risks attached to participating in a scheme and the likelihood of it being defeated.
- 10.9. Other situations that could very well arise in practice are:
 1. A firm of accountants has advised on a private equity transaction and is seeking input from a larger firm on certain aspects of it. The larger firm notices that the smaller firm has incorporated some planning into its advice, involving a Targeted Anti-Avoidance Rule (TAAR), that the larger firm considers to be objectionable, and which it thinks could be challenged by HMRC. If the larger firm continues to act does it risk being categorised as an 'enabler'?
 2. A company client has implemented a tax avoidance scheme but the company's accountant was not involved and provided no advice. However, the accountant now has to audit the company's accounts and will need to review the tax provision for the accounts. In order to do so they will have to consider whether the scheme works or not. It would be sensible to see all the paperwork pertaining to the scheme. The client may be able to provide this. However, in many cases, the scheme promoter has the information and will not release it unless the accountant signs a confidentiality agreement. The scheme may be so complex that the accountant has to charge additional fees for the time spent in looking at it. At what point in this scenario does the accountant become an 'enabler'?

3. The difficulty facing an auditor could similarly apply to a situation where there is uncertainty regarding the potential application of a TAAR, for example an audit of a subsidiary company which has borrowed money in circumstances where there might be an unallowable purposes challenge. There is also an issue if the accounting treatment is key to the tax analysis. Would the auditor face a penalty if they signed off an accounting treatment which gave a tax advantage (for example if there was more than one possible accounting treatment)?

10.10. We note that at paragraph 2.8, the consultation document states that a tax agent who, in the circumstances described in paragraph 2.30 of the consultation document, does no more than prepare the client's tax return for submission to HMRC is not the focus of this measure. It would be very worrying if they were, but even this example is over-simplistic. Chapter 3 of PCRT contains detailed guidance about the tax adviser's responsibilities in the completion of tax returns, including appropriate disclosures. In particular we draw your attention to paragraph 3.6 of PCRT which states that:

'A member must act in good faith in dealings with HMRC in accordance with the fundamental principle of integrity. In particular the member must take reasonable care and exercise appropriate professional scepticism when making statements or asserting facts on behalf of a client. Where acting as a tax agent, a member is not required to audit the figures in the books and records provided or verify information provided by a client or by a third party. A member should take care not to be associated with the presentation of facts he knows or believes to be incorrect or misleading nor to assert tax positions in a tax return which he considers have no sustainable basis'.

- 10.11. We reiterate the point already made that if an agent who is a member of a professional body that has signed up to PCRT can show that they have complied with PCRT that should be sufficient to demonstrate that they had advised their client appropriately, whether that be preparing the client's tax return for submission to HMRC or providing advice about a particular arrangement, and that this should provide a defence to the imposition of an 'enabler penalty'.
- 10.12. The DOTAS exclusions outlined in paragraph 2.29 would appear to be a good starting point for excluding altogether people on the periphery of the supply chain of a tax avoidance scheme from these measures. But if the DOTAS tests are to be used, they will need to be significantly adapted as the existing tests typically focus on the creation or design of the technical tax scheme. Exclusions of this nature will tend to eliminate certain of the categories listed in paragraph 2.12 of the consultation document. For example, the 'non-adviser' test arguably would eliminate all infrastructure providers. Similarly the 'ignorance' test would eliminate many middlemen and providers of financial assistance who would find it convenient to turn a Nelsonian 'blind eye' to the details of the scheme. Equally very few lawyers or accountants would be asked, or would agree, to provide the connected company advice referred to in connection with the 'benign' test without enquiring about the context of the question.

11. Q9 – We welcome views on whether these safeguards are appropriate, and what, if any, other safeguards might be needed.

- 11.1. This approach seems reasonable.

12. Q10 – To what extent would defining what does not constitute reasonable care enable HMRC to more effectively ensure that those engaging in tax avoidance schemes that it defeats, face appropriate financial penalties?

- 12.1. We do not favour introducing legislation that describes what does not constitute reasonable care. Whether or not reasonable care has been taken is a question of fact and degree that should be left to the tax tribunals to decide. Changing this risks usurping the role of the tribunal.
- 12.2. The exclusion approach described in paragraphs 3.22 to 3.26 is unlikely to be helpful to HMRC but will handicap taxpayers in establishing that they have taken reasonable care. In our view the position seems to be sufficiently clear under current law.
- 12.3. Definitions of what does not constitute reasonable care cannot be black and white as each case depends on its own merits, eg not taking additional advice over that provided by the promoter might or might not be careless depending on the circumstances. By way of further examples, taking the bullet point examples at paragraph 3.22 of the consultation document:
- If the third party has the same tax circumstances as the client in question, for example the sole interest is in sheltering a one-off capital gain, it might be perfectly appropriate to recycle parts of the technical advice rather than re-working it in totality;
 - How would the potential client know that advice had been commissioned on the basis of incomplete or leading facts? This is a key point to the basic unfairness of this proposal;
 - Equally, the question of who paid for the advice is relevant to assessing the quality of the advice, but does not automatically mean that the advice was not reliable or thorough. The adviser giving the advice would owe a duty of care to the taxpayer who was likely to rely on the advice;
 - If the potential client is introduced to the promoter by his accountant who earns a (fully disclosed) commission and, say, the accountant has obtained his own counsel's opinion before recommending the promoter/scheme, the client is surely not careless if he fails to find yet another tax expert for a third opinion;
 - It may be careless to rely solely on tax advice provided by an obvious non-tax specialist such as an Independent Financial Adviser but a client receiving technical advice from an apparent specialist supported by what seems to be a relevant counsel's opinion, is unlikely to appreciate that there may be a need to obtain a second opinion. Often it may not be obvious to the client that the person selling a product is not a tax expert, especially if he appears to be knowledgeable and experienced in tax matters. How is the tax layperson client supposed to know otherwise? Is that really careless or has the client simply been convincingly sold a product which appears valuable and viable?

13. Q11 – We welcome views on the extent to which placing the burden on the taxpayer to demonstrate they have taken reasonable care would ensure that appropriate penalties are charged in cases of avoidance which is defeated by HMRC?

- 13.1. We strongly disagree with the proposal that the onus of proof should be put on the taxpayer to demonstrate reasonable care. This would be a significant change which in our view is not justified. Reversing the burden on proof in this way will result in the

accuser (HMRC) no longer having to prove its case where a tax-geared (ie criminal) penalty is levied. As a matter of principle, a person seeking to impose a punishment should make the case for the penalty to be charged rather than the taxpayer being forced to show sufficient reasons why they should not be punished.

- 13.2. As Chapter 3 of the consultation document explains, HMRC have had difficulty in proving that taxpayers involved in defeated tax avoidance schemes have failed to take reasonable care when completing their tax returns. However, HMRC's reasoning that this is somehow due to deliberate obfuscation or lack of co-operation by the promoter or taxpayer is over-simplistic. Often the taxpayer will have had an honest belief that his tax return was correct and he will have relied fully on the advice he received from his accountant and on what he believes to be the expertise of the promoter⁶.
- 13.3. It is paradoxical that the proposals to place the burden on the taxpayer to prove that they took reasonable care by taking appropriate advice are being proposed in the same document that is effectively restricting the availability of advice because of the risk posed by an 'enabler' penalty. The better approach is the one pursued through the PCRT discussions of imposing professional obligations on advisers to ensure that advice is based on realistic assumptions as applied to the taxpayer's specific circumstances.
- 13.4. There may be a difficult timing issue here as the taxpayer may not want to disclose the advice that they have received or other privileged material until after the resolution of the tax claim.
- 13.5. Legislation to enforce compliance with information requests already exists in Finance Act 2008 Schedule 36. We have not seen any substantive evidence that delays in responding to information requests, or giving incomplete information in response to requests, normally prevent HMRC establishing that the taxpayer did not take reasonable care.

14. Q12 – To what extent will these changes better ensure that those engaging in tax avoidance which is defeated by HMRC face financial penalties?

- 14.1. This is the wrong question. The appropriate question should be: What changes are needed to ensure that those who have failed to take reasonable care are subject to penalties? If the purpose is really to 'ensure that those engaging in tax avoidance which is defeated by HMRC face financial penalties', then the solution is to introduce automatic penalties with rights of appeal. For the avoidance of doubt, we would not support the introduction of automatic penalties in such cases.
- 14.2. It is unclear whether the consultation document is favouring one or both options. Paragraph 3.30 of the consultation document seems to favour using both options, ie defining what is not reasonable care **and** putting the burden of proof on the taxpayer, whilst paragraph 3.21 seems to be looking at one or the other of the two options (the word '**or**' is used).

⁶ See the recent case of *A Bayliss* [2016]UKFTT 500 where HMRC failed to prove that a taxpayer who had used a failed tax avoidance scheme had been either fraudulent or negligent in completing his tax return.

15. Q13 – Do you agree that this approach to identifying defeats of arrangements to which this measure should apply is appropriate?

- 15.1. What is not clear in the consultation paper, but is of fundamental importance, is the timing of arrangements that the proposals will apply to. Will the proposals only cover arrangements entered into after enactment of any new legislation or will they apply to an arrangement entered into many years ago but with a 'relevant defeat' after enactment? We strongly oppose the latter which would create a penalty for actions taken many years ago when such sanctions did not exist.
- 15.2. Following our raising of objections to the timing of these measures, HMRC have written to us and other stakeholders to provide clarification about the date from which the proposals would take effect. In this letter, they say that *'The policy is intended to change future behaviour. The date at which any legislation would take effect will be decided by Ministers in due course within the usual tax policy making and legislative process'*.
- 15.3. If introduced, we do not think these proposals should apply to advice given before the legislation is enacted. It is our view that, due to the criminal nature of the penalty being proposed, not restricting the penalty to future advice would render the legislation plainly contrary to Article 7 of the ECHR
- 15.4. According to the consultation document, enabling can take many forms some of which are ongoing such as acting as trustee, providing loan arrangements or advice subsequent to entry into the actual arrangements such as tax return inclusion (or non-inclusion). Some thought is therefore required about linking commencement to 'enabling' (as a defined term) otherwise a situation could arise where there is post-commencement 'enabling' of a scheme that was first entered into many years ago.
- 15.5. Tax avoidance 'arrangements' is given an extremely wide definition at paragraph 4.2 which could easily encompass planning that it is not the purpose of these proposals to discourage. This definition may be more appropriate, however, if it is narrowed so as to apply only in the case of arrangements which:
- a) Have been counteracted by the GAAR in Finance Act 2013; and/or
 - b) Are notifiable under the DOTAS or VADR regimes (but see paragraph 15.8 below).
- 15.6. The definition of 'relevant defeat' has two aspects: formal resolution through the tribunals and the courts, and informal resolution by agreement between HMRC and the taxpayer. This approach may have unwanted consequences:
- If there is the possibility of a penalty for the adviser as well as the taxpayer, there is a possibility of a conflict of interest between the adviser and their client as to whether to agree that a defeat has occurred;
 - Taxpayers may be less likely to agree to informal dispute resolution or will be prepared to do so only on terms that it is not treated as a 'relevant defeat' so HMRC may be forced to litigate more cases;
 - Where cases are litigated, and a number of alternative arguments are present, it may be necessary to litigate all points, to establish whether the defeat is 'relevant', see below. This will add to the costs and time spent by HMRC as well as the taxpayer;

- Where a number of points arise for decision, it may be that the taxpayer fails as a result of flawed implementation or an inability to prove a point on which they relies. If so, any conclusion on the application of the GAAR or a TAAR or unallowable purpose test may be strictly *obiter* or the tribunal or court may decline to express a view on the matter. This may make the application of new penalty provisions capricious.
- 15.7. Under the proposals it is likely that there will be a significant gap, probably many years, between the implementation of the scheme and a 'relevant defeat'. Whether or not the advice equates to 'enabling' must be tested by reference to the law at the time it is given rather than at the time of the defeat.
- 15.8. It is proposed that a 'defeat' is then relevant if it satisfies one or more of the criteria in paragraph 4.5 of the consultation document. As a general point, we are concerned that the proposals are using definitions of key terms from other parts of the tax code, but not necessarily providing the same safeguards. In particular, the POTAS threshold on 'serial defeats' requires there to be three defeats within a period of five years but here there needs to be only one defeat to trigger an 'enabler penalty'.
- 15.9. Counteraction under the GAAR is unobjectionable, but the inclusion of arrangements that are notifiable under DOTAS does raise issues. We have a broader concern that HMRC now view the DOTAS regime as a signifier that taxpayers are engaged in unacceptable conduct, rather than an information gathering mechanism. When DOTAS was introduced, it was on the basis that it was not conclusive of the technical position. If HMRC are going to continue to repurpose the regime, we believe there is a need to revisit the hallmark system. The danger is that compliance with DOTAS will reduce and in any event its information gathering role will be lost. We would therefore welcome a more comprehensive review of the DOTAS regime with the intention of determining the extent to which it should be used to underpin other mechanisms and sanctions.
- 15.10. We do not agree that a defeat in respect of arrangements that have been the subject of a targeted anti-avoidance rule (TAAR) or unallowable purpose test contained within a specific piece of legislation or regime should be caught. This is too wide. It would catch cases which are based purely on technical disagreements between HMRC and taxpayers in bona fide commercial transactions and which are not in the category of cases of tax avoidance arrangements 'developed, marketed and facilitated by a persistent minority of promoters, advisers and other intermediaries'.
- 15.11. We think that the inclusion of TAARs and unallowable purpose rules will have to be limited if these proposals are going to be workable in practice. We accept that there is clearly a distinction between differences of opinion or disagreements on the operation of a TAAR in a commercial transaction and the blatant disregard for the rules or the design of a contrived arrangement specifically to engineer a way round a TAAR. The legislation needs to be designed to reflect this, although the difficulty is that the boundary between what is acceptable tax planning and what is not is not always clear cut.
- 15.12. Some examples of situations involving unallowable purpose rules and TAARs that will arise in practice are:
1. Corporation Tax Act 2009 section 441 concerns loan relationships for unallowable purposes. This can in theory apply to any loan due to tax relief being available on the interest deduction. Almost every commercial investment into the UK will be at least partly loan financed so will receive advice on this

area. The introduction of an enabling penalty will disincentivise advisers from providing advice on this type of transaction.

2. Finance Act 2016 section 35 introduces a new TAAR in certain cases of distributions made to an individual of share capital in a winding up of a UK resident company. The CIOT has recently written to HMRC⁷ setting out 18 examples where we think the TAAR will apply and where HMRC's view is needed. Our point is that the very broad nature of the TAAR has created uncertainty for businesses undertaking commercial transactions with no tax avoidance motive. The enabling penalty will increase the risk and difficulty for all taxpayers to obtain professional impartial advice in this area.
- 15.13. As already mentioned, in our view, it will be totally inappropriate, and in fact commercially unworkable, to introduce widely drafted legislation and then detail how it will be used in non-statutory explanatory HMRC guidance. This is because investors, banks and other advisers involved in high value commercial transactions will not be able to rely on HMRC guidance when making their decisions, if the advisers could be faced with an enormous penalty at some point in the future for providing the advice. Business risk would effectively become uninsurable.
- 15.14. We note that the impact assessment on page 30 of the consultation document is likely to be incorrect in its assessment that the economic impact of these proposals is not expected to be significant and that the measure will have no impact on businesses undertaking normal commercial transactions.
- 15.15. It may not be necessary to include TAARs and unallowable purpose rules if the GAAR is included. This deserves further consideration.
- 15.16. Our concern with including arrangements to which Follower Notices (FN) under Part 4 Finance Act 2014 have been issued within the definition of arrangements for these purposes is that a FN can be issued if 'HMRC is 'of the opinion' that there is relevant judicial ruling. The test is one of HMRC's opinion, without any independent oversight, rather than one of objective fact. There is no possibility of appealing the FN (the taxpayer may only make representations to HMRC) and the Tribunal decision in *Rowe* indicates that a challenge by way of judicial review faces serious obstacles. Therefore, we have reservations about whether arrangements subject to a FN should be included within the definition of a scheme for these purposes.
- 15.17. FNs are also problematic because no one knows at the time that advice is provided if a FN will be issued to them, because a FN depends on the outcome of someone else's case, not your own case. Including past FNs within these measures might just be acceptable (subject to the general points made above on timing) but future FNs are more problematic.
- 15.18. If the lead case is subsequently defeated under the GAAR or a TAAR or purpose test, and the taxpayer's case actually is governed by the outcome of the test case, then it is probably appropriate for the defeat in the test case to be read across to the follower case. However, if the test case fails on a point that is not the GAAR or a TAAR or purpose test, and so would not itself be liable to a penalty, it is not appropriate for a follower case to be penalised.

⁷ <https://www.tax.org.uk/policy-technical/submissions/ciot-comments-hmrc-finance-bill-2016-clause-35-distributions-winding>

16. Q14 – Do you agree that more ‘real-time’ interventions, targeted at particular decision points, could sharpen enablers’ and users’ perceptions of the consequences of offering/entering into tax avoidance arrangements?

- 16.1. We agree that more can and should be done to discourage users in particular from entering into marketed tax avoidance arrangements in the first place, rather than seeking to penalise heavily the users who may have been led into them by apparent tax experts. Information being provided to users at the earliest possible stage is key.
- 16.2. As personal Digital Tax Accounts (DTAs) are rolled out, we agree that this presents a good opportunity to use them to send real-time targeted messages about avoidance schemes to selected taxpayers via their DTAs. These could be a combination of general messages providing information about how to spot an avoidance scheme etc or specific messages about particular schemes as highlighted, for example in HMRC Spotlights. HMRC could select taxpayers who they know have used tax avoidance schemes in the past (eg identifying them from DOTAS disclosures) or from promoter marketing lists (if HMRC obtain powers to request them).

17. Q15 – Could any of the options above create effective, proportionate incentives for users and enablers to change behaviour? Are there other, better ways to achieve the behavioural change government is looking for?

- 17.1. We agree that HMRC need to know who is in the ‘supply chain’ between promoter and end user if they are going to be able to target their Counter-Avoidance work appropriately and successfully. Requiring promoters to tell HMRC about other parties who will be involved sounds like it will achieve that. We presume that Data Protection rules would need to be considered.

18. Acknowledgement of submission

- 18.1. We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

19. The Chartered Institute of Taxation

- 19.1. The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s

comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 17,600 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
12 October 2016

APPENDIX ONE

Definition of Advice Exclusion and Reliance on Advice Exception

Reproduced from the Australian Tax Office's 'Guide for Intermediaries – Good Governance and Promoter Penalty Laws'

ADVICE EXCLUSION

As the promoter penalty laws are not meant to curtail the provision of ordinary tax advice, an entity is not a promoter merely because they provide advice about the scheme, even if that advice provides alternative ways to structure a transaction, or sets out the tax risks of the alternatives.

The promoter penalty regime is not intended to inhibit the provision of independent and objective tax advice, including advice regarding tax planning. People who advise on tax planning arrangements, even those who advise favourably on a scheme later found to be a tax exploitation scheme, are not at risk of civil penalty to the extent that they have merely provided independent, objective advice to clients.

However, the fact that an entity qualifies their conduct by stating that they are an adviser or that they have merely provided advice, does not, of itself, exclude the entity from being a promoter if their conduct otherwise meets the tests in these laws.

Advisers should familiarise themselves with the promoter penalty laws to ensure they do not cross the line from advice to promotion. Advisers who promote legitimate tax minimisation schemes are encouraged to acquire an understanding of the promoter penalty laws to manage their exposure to promoter penalties.

There are particular risks for advisers who provide advice to clients for the purposes of sharing that advice with third parties, such as prospective customers of that client. It is important for advisory firms to recognise these risks, so that they may manage them properly in their business operations.

RELIANCE ON ADVICE EXCEPTION

The Commissioner cannot seek an application for a promoter penalty where the promoted scheme is based on treating a taxation law as applying in a way that agrees with either advice given to the entity (for example, in a Product Ruling), or a publication approved in writing by the Commissioner (for example, in a Taxation Ruling).

The exception does not apply to advice that is given by the Commissioner to someone other than the promoter or to a publication that relates to a materially different arrangement.

APPENDIX TWO

HOW THESE PROPOSALS IMPACT ON HUMAN RIGHTS

1.

- 1.1. In our view as these proposals are formulated in the consultation document they will potentially contravene several rights in the European Convention on Human Rights (ECHR), which is enshrined in UK law by the Human Rights Act 1998.
- 1.2. Firstly, the imposition of penalties at the level being suggested, which as discussed above we consider are disproportionate, will contravene Article 1 of the First Protocol to the ECHR – *The right to protection of property*.
- 1.3. Penalties can be viewed as the confiscation of property by the State and case law has held that this must be proportionate to the legitimate aims of the legislation. We refer you to *Lindsay v Customs and Excise* [2002] STC 588 in which the Court held that the refusal to restore a car to an individual who had had it confiscated under excise duty laws to prevent smuggling was disproportionate because it failed to draw distinctions between degrees of culpability and, therefore, contravened Article 1, Protocol 1. The case established that a fair balance must be struck between the general public interest in preventing smuggling and the individual's fundamental right to peaceful enjoyment of their property.
- 1.4. Article 1 of the First Protocol and article 7 of the Convention also requires provisions to comply with principles of legality, which requires the interference to be sufficiently foreseeable. With penalty provisions, underlying these articles is a requirement that the person must be able to determine 'what acts and omissions will make him criminally liable': see *OAO Neftyanaya Kompaniya Yukos v Russia* - [2011] STC 1988 para 567. In relation to the proposals, it is very difficult to determine what arrangements fall within the proposals. For example, the GAAR and its double unreasonableness test can be difficult to apply. Drawing distinctions between acts of tax avoidance and tax mitigation, which can be relevant to many targeted anti-avoidance provisions, can also be very difficult to determine. Indeed, under the proposals it would appear to be sufficient to attract a penalty that a client has conceded that the tax is due, so that advisors may be subject to penalties for arrangements that technically work because a client decides to concede a liability for reputational reasons or on cost grounds. An adviser could also be subjected to penalties because of the defective execution of arrangements by others for which he has no responsibility. The adviser in these circumstances can hardly be said to be in a position to know what he has committed is an offence. Against this background, we consider that it must be open to serious doubt whether the provisions are sufficiently clear to justify the imposition of non-fault penalties.
- 1.5. We suggest that in the context for these proposals, this means that the penalties flowing from the actions being targeted must strike a fair balance between the general public interest in preventing tax avoidance and the enabler's right to peaceful enjoyment of their property. We suggest that the level of penalties being proposed is so disproportionate that this balance is not reached and that the penalties would contravene the enabler's fundamental right under Article 1, Protocol 1.
- 1.6. There are a number of reasons why the penalties are disproportionate:

- the fact that they treat advisers (which may not even be negligent) and those actively promoting arrangements in the same way when their responsibilities are very different;
- they are not fault based because they are linked to the tax at stake in all cases and, therefore, do not distinguish between degrees of culpability. Indeed, they even potentially apply to arrangements that work but which a client may have conceded for reputational reasons or on costs grounds or to arrangements that would have been effective were it not for their defective implementation by others; and
- particularly if it is linked to the total tax at issue from all users of an arrangement, the level of penalties also appears to us to be completely disproportionate. In this regard we observe that an adviser may have absolutely no control over who uses an arrangement.

- 1.7. In addition to the way the proposals interact with legal privilege should be considered as they arguably contravene Article 6 (*Right to a fair trial*) and Article 8 (*Right to respect for private and family life*) of the ECHR. Legal privilege may impact on a lawyer's ability to defend himself because the privilege resides with the client (which may give rise to issues under article 6 especially since the proposed penalties would appear to be penal for the purposes of the Convention) and article 8 is potentially impacted because of its interrelationship with confidential advice. In *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* - [2002] STC 786 Lord Hoffmann at para 38 observed that: 'the European Court of Human Rights has said that legal professional privilege is a fundamental human right which can be invaded only in exceptional circumstances'. The importance that the Courts have placed on privilege and the ability of citizens to obtain proper advice in the context of these articles will also, in our view, colour a Court's view on the proportionality of imposing penalties on professional advisors under article 1 of Protocol 1, particularly when the provisions do not apply on a fault basis.
- 1.8. In this regard we observe that the 'benign advice' exclusion, referred to in paragraph 2.29 of the Consultation Document, is very limited. So for example a third party adviser will find himself caught by the provisions for explaining how an arrangement could be made effective. If he fails to do this, the adviser will be acting negligently and in breach of his duty to his client. By placing even such advisers in an impossible position, the proposals undermine the right to seek proper advice. In *OAO Neftyanaya Kompaniya Yukos v Russia* - [2011] STC 1988 para 567 the Court took account of the possibility of obtaining advice when assessing whether provisions complied with requirements of legality. So the Courts may be more willing to consider that there is a breach in relation to users of arrangements if the provisions relating to enablers mean that they in practice cannot obtain advice, which is a possible consequence of the proposals.
- 1.9. We understand that the government is considering not to implement these proposals retroactively. If the changes did apply to arrangements that have been implemented prior to the date that the new legislation is enacted we consider that would be plainly contrary to Article 7 of the Convention.