



## Tougher consequences for promoters of tax avoidance

The Institute of Financial Accountants welcomes the opportunity to comment on [the Consultation](#) published on 27 April 2023.

We would be happy to discuss any aspect of our response and to take part in any further consultations in this area.

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## Questions raised in the Consultation

### ***Question 1: Do you agree that focusing a criminal offence on the continued promotion of a scheme covered by a Stop Notice will help to deter promoters?***

1. The IFA supports, in principle, deterrents targeted against promoters of aggressive tax avoidance. One critical question about this proposal regards its efficacy in relation to promoters like those referenced in the consultation document, including those in the examples, who are under no illusions that they are acting contrary to legislation, regulations and the public interest. With this subset of promoters, the shift from a civil offence to a criminal one will only be effective if it can be rigorously and consistently enforced. For promoters operating in a grey area, where there is ambiguity as to the acceptability of their scheme(s), the Stop Notice should in itself be effective by way of clarifying HMRC's position on their work.
2. A second critical point is definitional: this is the distinction between tax avoidance and tax evasion. At least some of the promoters referenced in this consultation document appear to be committing tax evasion and/or fraud (as acknowledged at 1.8). However, the consultation document does not appear to draw a clear distinction between tax evasion and tax avoidance. This both undermines the seriousness of tax evasion and raises concerns that an expansion of HMRC powers to penalise aggressive tax planning could (whether by collateral or intent) harm legitimate accountants working to minimise their clients' tax burden – despite the acknowledgement at 1.14 that “most tax advisers adhere to high professional standards and are an important source of support for taxpayers.”

### ***Question 2: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a comprehensive deterrent for promoters?***

3. One concern raised by IFA members was that this proposal is coming too late to curtail the adaptable market of aggressive tax avoidance. HMRC enforcement efforts have historically been targeted at the taxpayer enrolled in a scheme, landing poorly-informed individuals with daunting or impossible tax bills while leaving the harder moving target of the promoter. The proposals in this consultation document are in principle a welcome course correction, but as stated in paragraph 1 enforcement is key.
4. The combination of civil penalties and a criminal offence – with an open appeal against a Stop Notice not being sufficient reason for non-compliance with the Notice – appear viable and reasonable. However, with reference to paragraph 2 (above), care needs to be taken to clarify the distinction between legitimate tax planning and illegitimate tax avoidance, and to implement a balanced approach which does not unduly and unreasonably limit proactive tax planning on the part of taxpayers and their accountants.

### ***Question 3: In the circumstances set out in the example provided, as Mr A is significantly influencing the continued promotion activity, do you agree that Mr A is in scope of the criminal offence?***

5. The IFA agrees that the example shows a promoter who should be in scope of the proposed criminal offence. With reference to paragraph 1, “Mr A” is a textbook example of a promoter who is fully aware that their actions are illegitimate and contrary to legislation, regulations and the public interest.

### ***Question 4: Do you agree that these other obligations, where they do not relate to continued promotion, should not be subject to the criminal offence?***

6. In the interest of clear and effective legislation, the IFA would agree that the other obligations carrying civil penalties relating to Promoters of Tax Avoidance Schemes (POTAS) Stop Notices – notifying certain other persons, giving HMRC information about said other persons, informing clients and intermediaries, etcetera – should not be subject to the proposed criminal offence.

**Question 5: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution?**

7. 2.28 (further to 2.25) contains vital safeguards – that the decision to prosecute lies with the relevant prosecuting authorities, and that HMRC would have to prove its case in court to secure a criminal conviction.
8. That said, there remains some ambiguity in the consultation document. For example, 2.27 states that “The new criminal offence will be reserved for the most serious cases,” without adequately defining the characteristics of a “most serious case.”
9. With reference to paragraphs 2 and 4, the IFA would advise caution when drafting new criminal offences, so that powers to tackle illegitimate tax avoidance cannot be misinterpreted or misused in future to penalise upstanding professional accountants. The examples referenced in the consultation document are textbook bad actors, but significant grey areas exist between tax advice, avoidance and evasion. The IFA agrees that HMRC could and should do more to tackle aggressive tax avoidance, but the move from a civil penalty to a criminal offence should require due consideration of wider implications (including how legislation might be interpreted *de facto*, contrasted with its intent *de jure*).

**Question 6: Do you agree that allowing HMRC to consider and bring disqualification proceedings against directors and those who control or exercise influence over a company involved in promoting tax avoidance will help deter and tackle tax avoidance?**

10. In general, and as aforementioned, the IFA approves increased HMRC action and power to deter bad actors in the tax advice industry, so long as new criminal offences are not defined in a way which could later be misinterpreted or misused against good actors in said industry.
11. The consultation document comes from HMRC but references the Insolvency Service (INSS), which is responsible for bringing disqualification proceedings against company directors under the Company Directors Disqualification (CDDA) Act 1986, and proposes to take the INSS out of the disqualification process for promoters of tax evasion. Given this, the IFA would like to raise a question regarding the opinions of the INSS and Department for Business and Trade on HMRC’s proposal, as inter-Departmental resistance could render this consultation moot.

**Question 7: What other factors should HMRC take into account when considering a director disqualification?**

12. *Response intentionally blank.*

**Question 8: Do you have any suggestions for ensuring these proposals deal effectively with those who directly or indirectly control or exercise influence over a company, for example shadow directors?**

13. Commonly accepted measures for identifying indirect control or shadow influence over a company include personal ties with company decision-makers, having access to private and confidential information, and public statements or actions indicative of insider knowledge. As acknowledged at 3.26, the chief difficulty in tackling individuals who hide their activities behind others is gathering sufficient evidence to prove to a court that an individual is exercising indirect control or shadow influence.
14. Organised crime, and laundering the proceeds of such, typically involves key decision-makers and controllers masking their involvement behind intermediaries and exerting shadow influence. The IFA would suggest that the National Crime Agency (NCA), being responsible for identifying and proving indirect control and influence in such cases, might have expertise to share with HMRC on gathering sufficient evidence for court.

**Question 9: Should undertakings form part of HMRC’s approach to director disqualification?**

15. As undertakings are currently part of the INSS disqualification process, and HMRC is not proposing to change the process itself so much as streamline it for POTAS Stop Notice cases, it is logical and fair

that undertakings should continue to form part of the approach to director disqualification should this consultation document's proposal become law.

**Question 10: Do you consider the current sanctions for breaching a disqualification or undertaking are sufficient for tax avoidance-related disqualifications?**

16. Response intentionally blank.

**Question 11: Do you consider the current safeguards outlined above are sufficient and provide adequate protections for directors? If not, what additional safeguards could be introduced?**

17. With reference to paragraph 7, the IFA is content that the established legal safeguards at 2.25 and 3.37 are consistent with the HMRC Powers Review and would apply to directors recognised in law (*de facto* as well as *de jure*), and other individuals exerting indirect control or influence.

**General comments**

18. The IFA would like to raise a concern about the volume and proximity of HMRC consultations opened on "Tax Administration and Maintenance Day", 27th April 2023. In total 11 consultations were opened 27th April, with deadlines falling in either June or July. This gives professional bodies and other interested parties approximately 8-12 weeks to respond to up to 11 consultations.
19. For professional bodies, providing meaningful representation requires engagement with members (which itself takes time, as members cannot be expected to respond immediately upon their professional body's request), collation of member responses and internal deliberation before a representation can be written, assured and submitted.
20. Professional bodies like the IFA are therefore left facing difficult decisions over where to focus attention and resource – decisions which would not be necessary if HMRC consultations were spaced more evenly throughout the year, and/or deadlines were extended where necessary in recognition of the proximity of so many consultations opening at once.
21. Labelling 27th April "Tax Administration and Maintenance Day" suggests that HMRC are considering making this mass release of consultations a regular annual event: the IFA would strongly caution against this, and request HMRC consider a more reasonable approach to stakeholder consultation. If this approach is maintained over time, inevitably consultation responses will skew further towards the largest professional bodies, whose interests are not always necessarily aligned with smaller accountancy practices and their small business clients who are the backbone of the UK economy.

**Contact details**

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