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Dear Sir or Madam

RE: CITY OF LONDON LAW SOCIETY'S RESPONSE TO "CLOSING IN ON PROMOTERS OF MARKETED TAX AVOIDANCE"

Please find below The City of London Law Society's ("**CLLS**") response to the HM Revenue & Customs ("**HMRC**") consultation document published on 26 March 2025 entitled "Closing in on Promoters of Marketed Tax Avoidance" (the "**Consultation**").

INTRODUCTION

The CLLS represents approximately 21,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. This response to the Consultation has been prepared by the CLLS Tax Committee. The current members of the Committee can be found at www.clls.org.

PRELIMINARY COMMENTS

CLLS supports the Government's broad objective to counteract the activities of the small group of abusive promoters who are responsible for the repeated mass-marketing of ineffective, possibly fraudulent tax avoidance schemes, and who in doing so are not co-operative with HMRC. CLLS members meet the highest of professional and ethical standards and are subject to a comprehensive regulatory regime, supervised by the Solicitors Regulation Authority (**SRA**), as well as long-established duties both to their clients and to the Court. CLLS does not represent the small number of organisations engaged in the behaviour at which the Consultation is directed, and does not condone their behaviour which, CLLS considers, brings bring the tax profession as a whole into disrepute.

While we share the government's broad objective, and want to support proposals intended to further that objective where possible, we have serious concerns with regard to several of the proposals in the Consultation.

Accordingly, before we set out responses to the questions in the Consultation, we set out below some general comments on the proposals.

To put the proposals into context, it is clear that the nature of the tax avoidance market has changed substantially since DOTAS was introduced. At that time, it was commonplace for avoidance

schemes to be designed which were (in many cases) accepted to be effective under the legislation then in force. It was also common then for reputable advisors to be involved in the development and marketing of tax avoidance schemes, bearing in mind that public attitudes were at the time largely more accepting of tax avoidance. Governments would usually move to counter a scheme through legislation, but this was a slow process due to the amount of time it would take for a scheme to come to HMRC's attention through the tax return and enquiry process.

DOTAS was introduced to operate as an "early warning system", to enable the government to counteract schemes more quickly through legislation. It is important to keep in view, when considering the proposals in the Consultation, that DOTAS was introduced to counter behaviour that was considered lawful even if was undesirable as a policy matter.

There was no suggestion from the government when DOTAS was enacted that being involved in a notifiable arrangement was in any way a criminal activity. On the contrary, DOTAS was clearly constructed so as to set the boundaries of what had to be notified more widely than the boundaries of what would necessarily be considered avoidance, and to attach disclosure obligations to a wide range of persons involved in order to ensure that disclosures were made, with no question of culpability in their part. It was acknowledged that some innocuous activity would be swept up by it. The same applied when the DOTAS hallmarks were introduced in 2006 and expanded in 2016. In short, DOTAS was not designed to set parameters for potential criminal liability.

As a result of a combination of DOTAS (which has enabled successive governments to introduce targeted anti-avoidance rules shutting down disclosed schemes), the GAAR, and a shift in public (and regulatory) attitudes towards tax avoidance, effective "schemes" are now a rarity, and reputable advisors involved in tax planning have generally limited their practice to bespoke planning in respect of specific client situations.

Instead, as the Consultation notes, activity in relation to marketed avoidance schemes is, HMRC estimates, carried on by 20 to 30 promoter organisations who sell mass-marketed tax avoidance schemes, which HMRC considers do not work. (CLLS members have limited awareness of these schemes, but would not disagree with HMRC's general assessment.) It is also noteworthy that some of those promoter organisations are based offshore. These organisations, it appears, have persistently sought to avoid sanction under the POTAS and "enablers of defeated avoidance" (**EOTDA**) regimes, that were introduced with a view to stopping this sort of activity.

The challenge that HMRC now face is therefore entirely different to the one that DOTAS was meant to address. In particular:

- As today's mass-marketed schemes are largely ineffective, there should in principle be no need to amend existing legislation to counteract the purported tax result. It is questionable what value HMRC obtain from being notified of the technical details of such schemes under DOTAS.

- Rather, the issue is a small group of unscrupulous organisations, some offshore, marketing low-quality products to a mass market, resulting in underpayment of tax to HMRC across a diffuse taxpayer base for a period of time before HMRC is able to stamp out the activity through prohibitions and compliance measures such as penalties and "stop notices" under the POTAS regime.

With this background, CLLS is concerned that the scope of several of the new regimes proposed in the Consultation, which carry criminal sanctions, is defined by reference to the boundaries of the DOTAS legislation. This risks bringing into the scope of potential criminal liability a wide range of persons who are carrying on lawful activity, given that the boundaries of DOTAS were deliberately set wide, and notification obligations potentially attached to broad categories of persons.

We would have much the same concern with the use of the "enabler" concept in the proposals, particularly if (as we are concerned may be the intention) that concept were used without the safeguards of the "knowledge conditions" which limit the scope of who is an enabler for the purposes of the EOTDA regime, in most cases to persons who are aware they are involved in abusive tax avoidance.

The fact that HMRC's estimate is that only 20 to 30 organisations are responsible for the abusive activity in question is a reflection of the fact that the overwhelming majority of the tax profession does not engage in that sort of activity. We do not wish to trivialise the £0.5bn tax gap that the Consultation describes, but we would suggest that this is not a sufficiently grave threat to the Exchequer to justify imposing draconian measures which might apply to a far larger group of persons who are not the perpetrators of the abusive activity. Similarly, we do not believe that the harm caused by the activity of such a small group of organisations justifies interfering with the protections in the DOTAS regime and in general law that are available to legal professionals and taxpayers generally. Although we understand HMRC's frustration at not being able to counteract the abusive promoter organisations more quickly, which appears to be the motivation for several of the proposals, that does not justify overriding fundamental rights: speed must not come at the expense of justice.

CLLS therefore does not agree with the general policy approach of applying measures that could affect the whole tax profession (with the exception of certain measures relating to information notices). In our view, some of the proposed measures in fact risk damaging the profession. As the profession is an important part of the thriving professional services sector that is an asset to the UK economy (not least because of its role in ensuring that the vast majority of taxpayers get their tax affairs right) and an important part of the UK's ability to attract inward investment, we believe that would be an undesirable policy outcome.

In addition, it is an unfortunate feature of several proposals (especially the PAN proposal) that they threaten sanctions, including criminal sanctions, on persons other than the perpetrators of the abusive conduct that HMRC wishes to stamp out, as a response to the difficulties experienced in penalising the perpetrators themselves. Imposing such "secondary" sanctions, especially criminal ones, on persons who have been acting honestly, while leaving the perpetrators unpunished, would not only be unjust, but we suggest would not deter the perpetrators. This problem would be exacerbated if offences were introduced within the UK's criminal jurisdictions while the abusive promoters are located offshore. We would anticipate further offshoring by such promoters in response to the introduction of offences onshore, leaving reputable onshore advisors and taxpayers to deal with the inconvenience of the new measures.

CLLS considers that a distinguishing feature of the abusive activity that the Consultation is focused on is the use of unsolicited mass-marketing of standardised products as a means of obtaining business. We believe that focusing measures on this type of activity would not only avoid collateral damage to reputable advisors and businesses, but in doing so, may allow new measures to be drafted more broadly, as there would be less need for safeguards to filter out reputable businesses. This applies to measures proposed in the Consultation, and also to some possible further measures that we have suggested in response to Question 1 below.

In view of the above, we would in summary:

- Not oppose the introduction of a new hallmark directed specifically at disguised remuneration schemes, provided it is clearly defined and limited to mass-marketed schemes.

- Oppose the introduction of a criminal offence for failing to notify arrangements under DOTAS altogether (and particularly strongly oppose any offence having strict liability.)

- Support the proposed updating of the DOTAS civil penalty regime.
- Oppose the introduction of USNs and PANs altogether.
- Generally support the introduction of stronger information powers in the form of CPINs and PFINs to enable HMRC to investigate persons who own and control promoter organisations, provided in the case of CPINs that the information covered is limited to identifying the identity of such persons. We would also urge the government to limit these powers so as to apply only in relation to promoters of mass-marketed arrangements.
- Oppose: (i) the proposed changes to the DOTAS legislation so far as it applies to legal professionals; (ii) the proposed changes to legislation on publication of the names of legal professionals; and (iii) (particularly strongly) the proposed deemed waiver of LPP.
- Support HMRC engaging with regulators, so as to enable regulators to enforce their own standards against firms involved in inappropriate conduct.
- Oppose the possible further measures that HMRC describe in Chapter 7 of the Consultation (with the exception of the use of AI if subject to suitable safeguards).

To the extent that HMRC do wish to proceed with any of the proposals, CLLS would encourage HMRC to implement proposals incrementally, so as to allow opportunity for observation of whether each measure is individually effective. We believe that draconian measures of the kind proposed in the Consultation should only be introduced and retained if they are demonstrably effective. We are concerned that if the measures were all introduced at once, as a "scattergun" approach, it would be impossible to tell which measures are effective and which are not, yet a range of measures would remain in place which could be detrimental to many ordinary businesses and advisors for decades to come.

COMMENTS ON CONSULTATION DOCUMENT QUESTIONS

Consultation Section 2: Introduction

Q1: What other ideas, in addition to the ones in this document, should the government consider to deliver its intent of closing in on promoters of marketed avoidance?

It appears to us that the entire business model of the abusive promoters that the government wishes to counteract depends on their ability to access new customers through unsolicited mass-marketing communications which promote standardised tax avoidance schemes. As noted in our introductory comments, this distinguishes these organisations from most reputable advisors.

We consider that there is a clear and compelling logic in favour of measures specifically directed at (and limited to) such mass-marketing activity. First, it would directly target the life-blood of the abusive organisations. By depriving such organisations of access to new customers, it is difficult to envisage how they could survive. This in our view appears more likely to be effective than indirectly targeting the organisations through imposing measures on others. Second, it would minimise the collateral damage of the measures to reputable advisors and taxpayers, as most reputable advisors do not engage in this type of activity. Third, if the measures were framed so as to leave reputable organisations largely outside their scope, they should need fewer safeguards in order to filter out unintended consequences, and are likely to be more robust as a result.

We therefore suggest that HMRC should explore measures that would cut the marketing/advertising supply chain at the point of access to the consumer. The UK's financial promotion regime could in our view potentially be a model to follow. The basis for a potential

approach could be a description of a type of promotion to which the regime would apply (we would suggest that suitable criteria would, in broad terms, need to include that the communication: (i) is unsolicited and not sent to an existing client or known personal contact; and (ii) contains details of a tax avoidance scheme with a view to the recipient entering into it). If a suitable definition of such a promotion could be developed, then it could form the basis for various measures, including potentially:

- prohibition on making such promotions altogether;
- stipulations as to content (e.g. that the communication must contain a description by the promoter of the intended tax treatment, accompanied by a prominent disclaimer stating that the product is a tax avoidance scheme which has not been approved by HMRC and that the recipient is strongly urged to obtain independent tax advice); and
- penalties (potentially including criminal offences).

Importantly, it could also be the basis for take-down requests issued to online platforms (such as social media) through which the promotion is distributed, which would be a potential means of obstructing the activity of promoters located offshore.

Q2: Is there more HMRC can do to support those who use tax avoidance schemes?

We welcome and support HMRC's efforts to alert taxpayers to the potential risks of entering into marketed tax avoidance schemes. We agree that it is desirable for HMRC to engage with taxpayers involved at all stages of the process, including through advertising campaigns, "real time" communications with taxpayers believed to have entered into schemes, and assisting taxpayers with exiting arrangements, having regard to the potential financial hardship involved.

We believe this to be an area where prevention is better than treatment. We would encourage HMRC to focus further efforts on countering the mass-marketing of the schemes concerned, in order to minimise the chances of taxpayers entering into such schemes in the first place. We have made suggestions in this regard in our response to Question 1.

Consultation Section 3: Expanding and strengthening the DOTAS regime

Q3: Do you think there are features of disguised remuneration schemes that could feature in a new DOTAS hallmark that makes it clearer that disclosure is required and reduces the burden on HMRC of sanctioning non-compliance?

We share HMRC's concern that the vast majority of mass-marketed tax avoidance schemes appear to relate to disguised remuneration. In principle, we support HMRC's focus on this area, provided it is tightly-focused on mass-marketed arrangements. We are, however, doubtful that a new DOTAS hallmark, that could not be "sidestepped", could be designed without it also catching innocuous arrangements that should not be within the DOTAS net. This could in turn force a high volume of disclosures in respect of innocuous transactions, especially if failure to disclose were criminalised (which we would oppose, and address further below). That would be a waste of resources for both taxpayers and HMRC. Exclusions from such a broader hallmark might be added in order to prevent innocuous arrangements from being caught, but would surely create further opportunities for abusive promoter organisations to develop tenuous arguments around the exclusions themselves. Ultimately, if HMRC wish to deter promoter organisations whose *modus operandi* is to take positions that are not a reasonable interpretation of the DOTAS hallmarks, we would question whether it is realistic to expect that changing the scope of the hallmarks will change that behaviour.

Q4: For the purposes of this DOTAS hallmark, should consideration be given to any specific exclusions, for example reimbursement of certain employment related expenses?

As stated in our response to Question 3, we are concerned that a new, broader hallmark would risk catching innocuous arrangements that should not be within the DOTAS net. As there are no details of the proposed new hallmark available for us to consider, it is difficult to suggest a comprehensive list of exclusions that would effectively filter out innocuous transactions. However, we envisage that some form of exclusion for dividends would be likely to be appropriate, and we agree with the suggestion in the Consultation that an exclusion for expense reimbursements should also be included.

Q5: Are there other areas or arrangements where a new DOTAS hallmark would help the government tackle marketed tax avoidance?

We are not aware of any such areas or arrangements.

In any event, we do not believe that the addition of a further DOTAS hallmark would be the best policy response to the emergence of mass-marketed schemes in a new area. As it is reasonable to expect that: (i) such mass-marketed schemes would be ineffective under the law as it stands; and (ii) the organisations promoting the schemes would claim that the schemes are not disclosable under DOTAS in any event, we are doubtful that the inclusion of a further hallmark would achieve its objective. In CLLS's view, it would be more effective for HMRC to focus on the nature of the problematic activity (that is, the mass-marketing of tax avoidance schemes), rather than the particular features of the schemes marketed. Please see our comments in that regard in our response to Question 1.

Q6: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a stronger deterrent?

Before we respond to this question, we will address the more important question of whether the proposed new offence is an appropriate measure at all, which was not specifically raised in the Consultation.

We strongly disagree with the proposal to introduce a new criminal offence for failing to notify arrangements to HMRC under DOTAS. We would oppose the introduction of such an offence of any kind, but the proposal for the new offence to have strict liability is particularly harmful.

Our overarching concern is that, even if the proposed new offence were effective in constraining the very small group of abusive promoters that are HMRC's focus (which we doubt, for the reasons set out below), the new offence would have a pernicious effect on reputable advisors and taxpayers. We are concerned that it would cause more harm than it would prevent.

Reputable advisors and taxpayers make up the vast majority of the advisor and taxpayer populations. For this reputable majority, the potential penalties for non-disclosure are already severe. Financial penalties potentially exceeding £1 million, and the risk of being "named and shamed", are more than adequate to deter such advisors and taxpayers from knowingly failing to make a required disclosure. We would question whether there is any evidence of such advisors or taxpayers deliberately not making DOTAS notifications where required. For such advisors and taxpayers, CLLS considers that a stronger deterrent in the form of a criminal offence is simply not necessary.

But it cannot be said that, in that case, if reputable advisors and taxpayers are already compliant with DOTAS, they have "nothing to worry about" with the proposed new offence. The government must acknowledge that:

- DOTAS has a very broad scope. It needs to be considered and complied with in relation to a large range of ordinary commercial activity which is far-removed from the mass-marketed avoidance schemes on which the Consultation is focused. As HMRC's own guidance on DOTAS states: "… *we do not regard all arrangements that include or meet a hallmark description as practices that are unacceptable to us … you may have to tell us about schemes that may not be considered to be avoidance*". In the ordinary course of even moderately complicated commercial transactions, it often needs to be considered whether a notification is required. Put simply, whether a notification is required can be relevant in almost any case where there is a choice of commercial courses of action with different tax outcomes; and

- the scope for reasonable disagreement on the interpretation of the "notifiable arrangements" definition, which was not designed to operate as part of a test of criminal liability, is plain to see. For example, Hallmark 9 requires an assessment of, among other things, whether: "*it would be reasonable to expect an informed observer (having studied the arrangements and having regard to all relevant circumstances) to conclude … that a main benefit, or one of the main benefits, of including a specified financial product in the arrangements is to give rise to a tax advantage*". That is just one example. The DOTAS legislation governing the scope of what are "notifiable arrangements" contains several other provisions requiring assessment of what "might be expected", of what is the "main benefit" of an arrangement, and of whether there is a "tax advantage". None of these expressions is straightforward to apply. For example, the range of judicial interpretations of "main purpose" tests in recent tax cases are a good indication of the difficulty of the not-dissimilar exercise of deciding whether there is a "main benefit". Moreover, it is likely that the DOTAS hallmarks will be changed over time and, especially in view of HMRC's wish to make certain hallmarks broader, the scope for such reasonable disagreements only seems likely to increase.

The above factors mean that reputable advisors and taxpayers are often required to assess whether notification is required, and cannot avoid having to do so, but there will inevitably be scope for judgements to be made honestly and prudently which are later shown to be incorrect.

In view of this, CLLS considers that it would be entirely inappropriate for any new offence to have strict liability, and that it is doubtful that there should be an offence at all.

Strict liability, and should there be an offence at all?

Offences with strict liability are usually only directed at acts that a person may choose to carry out that pose risks to public health, safety, or morals, where the public interest overrides the need to prove that the alleged offender knew that they were in fact committing an offence or carried out the act in question with any particular *mens rea* (see for example the judicial discussions in *Sweet v Parsley* [1970] AC 132 and *R v Jackson [2006]* All ER (D) 193 (Oct)).

We cannot see how the harm to society from a failure to notify a DOTAS scheme is so great that the public interest requires it to be criminalised regardless of the degree of knowledge or intent involved. "Notifiable arrangements" are (rightly) not in themselves criminal in nature. It is difficult to see why a failure to notify HMRC of such an arrangement should be treated as an inherently criminal act.

The proposals in the Consultation demonstrate this exactly. It is proposed that HMRC would have the "*flexibility to choose*" whether to pursue a criminal conviction where the grounds for the offence have been established, and that "*criminal investigation [would be reserved] for more serious cases*". If (as those proposals necessarily imply) there are "less serious" cases that would be caught by the new offence but HMRC would not consider worthy of prosecution, then this is not an appropriate case for strict liability, or even for an offence at all. If a criminal offence were introduced, it is vital in the interests of the rule of law that it incorporates a legislative test for determining which

acts are worthy of criminal sanction and which are not, and that the question of criminality is not left to HMRC's discretion. If HMRC cannot articulate such a legislative test, then no offence should be introduced at all.

It is also very important that a citizen is actually capable of changing their conduct in order to avoid undertaking the conduct in question (see Lord Diplock's comments in *Sweet v Parsley* at p163). The imprecision of the boundaries of the "notifiable arrangements" definition will often make it impossible for an advisor or taxpayer to determine with certainty whether an arrangement they intend to enter into (or advise on) is a "notifiable arrangement", and therefore to avoid a strict liability offence by making a disclosure. For any offence, it needs to be possible for a person to establish whether they are engaged in the conduct in question. The proposed offence would instead create a "minefield" for reputable advisors and taxpayers involved in any remotely complicated commercial activity.

The proposed "reasonable excuse" defence

For the reasons set out above, CLLS would oppose the introduction of any criminal offence for failing to notify arrangements under DOTAS. However, we have commented below on the proposed "reasonable excuse" defence in case the government decides to proceed to introduce a new offence.

The "reasonable excuse" defence is the only proposed safeguard from the new offence. Given the imprecision of the grounds for the proposed offence itself, it would be critical for advisors and taxpayers to be able to rely on this defence with confidence. However, there are in our view several serious shortcomings with the proposal.

- Most obviously, what constitutes a "reasonable excuse" would have enormous scope for different interpretations, causing the same problems as discussed above in respect of the "notifiable arrangements" definition. Even if the basic expression were supplemented by detailed objective criteria, difficulties of interpretation would inevitably remain.

- In terms of what specific criteria regarding "reasonable excuse" may be appropriate, in our view, obtaining and acting on the basis of advice from an appropriately qualified professional is all that any person could reasonably be expected to do in order to establish whether there is a DOTAS notification obligation. If they have done so, this should be a "reasonable excuse", without any more being required. However, HMRC presumably envisages that the burden of proving the defence would fall on the advisor/taxpayer concerned. If so, it is easily foreseeable that there would be cases where a person would, to prove the defence on the basis of having taken professional advice, need to disclose information that attracts legal professional privilege. We strongly believe that there should be no obligation to waive privilege in these or other circumstances. In our view, this shortcoming means that, unless the burden of proof were reversed so that HMRC had to prove that the person concerned did not have a reasonable excuse, the framing of the offence would be fundamentally unfair.

- We are concerned that HMRC may take the view that a person who does not follow HMRC's interpretations, or has not sought guidance from HMRC, may not have a "reasonable excuse". We believe that any "reasonable excuse" defence must leave scope for a person, having taken professional advice, to take positions that may differ from interpretations published by HMRC. Any requirement to the contrary would be contrary to the rule of law.

- Although detailed objective criteria would be essential if any "reasonable excuse" defence is to operate fairly, any objective criteria would, as HMRC acknowledge in the Consultation, surely also be exploited by the promoter organisations that HMRC wish to counteract. We

cannot see how HMRC would be able to design rules that would prevent those promoter organisations doing so, without including criteria referring to material (that is, details of the professional advice they have taken) that would typically be covered by legal professional privilege, which, as already stated, we strongly believe should not be required. Equally, we cannot see how a safeguard could be framed that would prevent such behaviour without making the safeguard unreliable for reputable taxpayers and advisors.

- For advisors and many taxpayers, it could be extremely damaging for HMRC even to allege that an offence had been committed, leaving the advisor/taxpayer to prove the "reasonable excuse" defence. An innocent advisor or taxpayers in this position could be left in an invidious position unless and until HMRC decides to withdraw the allegation.

The above uncertainties would be likely in our view to have several, serious, adverse consequences:

- we cannot overstate how damaging it could be for a reputable advisor or taxpayer to be subject to a criminal conviction. A criminal conviction would possibly (and, for professional advisors, probably) be catastrophic to their practice or business, even before the effect of any fine or sentence was taken into account. It is neither fair nor reasonable to hang the risk of criminal conviction over the heads of reputable taxpayers and advisors in attempt to counteract the activities of a tiny minority;

- given how damaging a conviction could be, reputable advisors and taxpayers would foreseeably wish to err on the side of caution, by making disclosures that they do not believe are actually required, but which might conceivably be required on the basis of unduly broad interpretations of the legislation. Such "over-disclosure" would be an unfair waste of taxpayer resources;

- moreover, wherever any such uncertainty exists, the advisors and taxpayers involved would be in a "Catch 22" situation. By "over-disclosing" in order to minimise the risk of criminal conviction, they would unduly subject themselves (and, for advisors, their clients) to the various negative consequences of involvement in DOTAS arrangements (such as accelerated payment notices, application of the "higher risk promoters" regime and "serial tax avoidance" rules, and various restrictions on their ability to rely on a "reasonable care" defence with regard to the application of penalties);

- the risk of criminal consequences arising from ordinary commercial activity could foreseeably deter taxpayers from entering into certain ordinary commercial transactions. It would be undesirable for the DOTAS regime to cause distortion of ordinary commercial behaviour;

- the likelihood that, in certain ordinary commercial situations, it will be impossible to avoid a risk of criminal liability arising, would become an unattractive feature of the UK tax system by international standards, and a potential factor counting against the UK in inward investment decisions by overseas investors; and

- it is easy to see that the possibility of being criminalised for actions taken honestly and carefully could deter potential new entrants to the tax profession. Similarly this risk could deter existing professional services firms from providing tax services, given the potential reputational damage of a criminal conviction, and other potential costs such as increased insurance premiums. A strong tax profession is highly important to the UK economy. As well as being an integral and valuable part of the strong professional services sector that is a major factor in attracting inward investment to the UK, a strong, reputable tax profession also plays an essential role in enabling the vast majority of taxpayers to get their tax affairs

right. In view of this, CLLS believes that damage of this kind to the tax profession at large would be a highly undesirable policy outcome.

A final point is that we would anticipate that the adverse consequences described above would almost entirely be suffered by reputable advisors and taxpayers. It is reasonably foreseeable that, if abusive promoter organisations considered the proposed offence to be a serious concern, they would relocate offshore (if not already offshore) so as to avoid the UK's criminal jurisdictions.

In response to Question 6 specifically, while it would appear superficially obvious that a criminal offence would provide a stronger deterrent than civil penalties alone, we are doubtful that in practice a criminal offence would create the effective deterrent that HMRC wish for. This is, as discussed above, because: (i) for reputable advisors and taxpayers, the civil penalties that already exist are an effective deterrent and so a criminal offence would not have a significant incremental effect; and (ii) for the promoter organisations that HMRC wishes to counteract, we believe that it is reasonable to expect them either to exploit any "reasonable excuse" defence or, if they were concerned by the prospect of a criminal offence, to move offshore so as to escape the UK's criminal jurisdictions.

In view of this, although CLLS agrees with HMRC's objective of speeding up effective action against abusive promoters, CLLS does not consider that the proposed criminal offence is an appropriately accurate and proportionate measure, and would urge the government to withdraw this proposal. CLLS considers that through other potential measures (as referred to in our response to Question 1), and further devotion of HMRC resources to pursuing abusive promoters under existing powers, HMRC would be able to advance its objective in a way that risks less damage to reputable taxpayers and advisors.

Q7: Should the criminal offence be restricted to schemes where there is a promoter acting?

As stated in our response to Question 6, we strongly oppose the proposal to introduce a new criminal offence. With that qualification, we consider that it would in certain respects be less harmful if the new offence were restricted to schemes where there is a promoter acting.

However, the breadth of the definition of "promoter" would still leave scope for advisors and taxpayers to remain in the scope of the proposed offence, even though their activities are far removed from the abusive conduct that HMRC aims to counteract. A restriction to schemes where there is a promoter acting would in our view be insufficient to prevent the adverse consequences described in our response to Question 6.

For the reasons stated previously, to the extent HMRC wish to introduce any new criminal offences in this area, these should not simply be based on the existing requirements for a DOTAS notification. Any offence should include further requirements which would target the offence properly. In our view, it would be appropriate, at the least, for there to be requirements which focus the offences on mass-marketed schemes sold through unsolicited marketing contacts.

Q8: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects? What reasons should be excluded from reasonable excuse?

This is addressed in our response to Question 6.

Q9: Do you agree that moving the issuing of DOTAS penalties from the Tax Tribunal to HMRC (appealable to the Tax Tribunal) is appropriate?

Yes. We believe this would be a reasonable change, provided that (as proposed in the Consultation) there would be a right of appeal to the tax tribunal.

Q10: Are there any other changes to DOTAS penalties HMRC should consider?

We have no specific suggestions in response to this question. As a general matter, for the reasons stated previously, we believe it would be appropriate for any new, increased penalties to be limited to mass-marketed schemes sold through unsolicited marketing contacts.

Consultation Section 4: Universal Stop Notices (USNs) and Promoter Action Notices (PANs)

Q11: Do you agree that the USN and PAN proposals would help to deter and tackle tax avoidance and that the deterrent effect would be proportionate to the costs of compliance?

No. We strongly disagree with both of these proposals, for the reasons set out in our responses to Questions 12 to 32. The potential harm caused by the proposals would not be limited merely to the costs of compliance. The proposals, as framed in the Consultation, would risk obstructing legitimate activity and raise questions of constitutionality. We do not believe that these powers should be introduced at all, regardless of any perceived benefits that HMRC might obtain from them. We would urge HMRC to withdraw these proposals and look to other measures instead.

Q12: Do you have any concerns or foresee any practical difficulties with the USN or PAN proposals outlined above?

Yes. We have several serious concerns, and see numerous practical difficulties, with each of these proposals, which we address in turn below.

With regard to the USN proposal:

- A fundamental concern in principle is that the USN proposal is so broadly framed that it would effectively give HMRC the power to criminalise, by regulation, with no mechanism for Parliamentary scrutiny and very little scope for judicial oversight, any conduct that HMRC might consider to amount to tax avoidance, with a potential scope of application far exceeding even the GAAR. USNs, if introduced as proposed, would become a body of "quasi-legislation" effectively prohibiting specified activities. The power to introduce such restrictions on such a broad scale should belong only to Parliament.

- We are particularly alarmed by the proposal for failure to comply with a USN to be a criminal offence operating on a strict liability basis. It appears to us that such an offence is manifestly unsuitable for strict liability (or even criminal liability at all), given the proposal that only the "most serious" cases would lead to criminal investigation, and the potential for a person to contravene a USN innocently (either by being reasonably unaware of the USN, or by acting on a reasonable interpretation of the USN which subsequently proves incorrect).

- HMRC draws a comparison to sanctions under the "stop notice" regime, and other unspecified HMRC powers, as if those were a precedent case of Parliament legislating for draconian powers along similar lines to the proposed USN regime. That is not a valid comparison, for two reasons at least. First, HMRC cannot issue a stop notice in respect of arrangements simply because those arrangements meet certain criteria which operate as a proxy for "tax avoidance" (in other words, if Condition A in 236A Finance Act 2014 is met, this is not itself sufficient for a stop notice to be issued). One or more further conditions (Conditions B, C and D in 236A Finance Act 2014) must also, or instead, be satisfied, each of which requires there to have been, or be likely to be, an element of abusive or non-compliant behaviour on the part of promoters in relation to the arrangements. Second, the recipient of a stop notice has the right to request withdrawal of the stop notice, backed by a right of appeal to the tribunal. In our view, the severe sanctions available to HMRC under

the stop notice regime are only justified by the presence of both those further behavioural requirements and the right of appeal to the tribunal. The USN proposal includes neither of these safeguards. The proposed right of appeal against proposed sanctions for non-compliance with a USN is no substitute for a right of appeal in respect of the issuance of the stop notice itself.

- HMRC refer to two types of mischief in the Consultation as the basis for the USN proposal. The first is "phoenixism" and other delaying tactics that abusive promoters have employed so that schemes can continue to be marketed after stop notices have been issued. We sympathise with this concern and wish to support HMRC in eliminating the problem. However, we believe that the USN proposal, in the form framed in the Consultation, is a disproportionate means of achieving this objective, and would cause great difficulty for reputable advisors and taxpayers, for reasons set out further below. In our view, it would be better for HMRC to address phoenixism by focusing on prosecuting stop notices through the existing "connected persons" provisions, coupled with enhanced information powers (such as CPINs and PFINs, which as stated in our responses below, we broadly support).

- The second mischief to which HMRC refer is less clearly-described, but appears to be that entirely new avoidance schemes may emerge, which it may take more time than HMRC would wish to counteract through legislation. In our view, the USN proposal is not a necessary or appropriate measure to address that concern. It is a fundamental feature of our tax law that it is for Parliament to decide what is "acceptable" tax avoidance and what is not. It would be incompatible with the rule of law for HMRC to have the effective power, without parliamentary scrutiny, to outlaw particular behaviour that HMRC may deem unacceptable from time to time.

As already stated, we strongly oppose the USN proposal. However, if the government were to proceed with the USN proposal, then we believe that the following modifications ought to be made in order for the measure to be more appropriately targeted and proportionate.

- The legislation framing any USN regime should limit the circumstances in which a USN could be issued. Suspected tax avoidance should not be sufficient. There should be both: (i) objective tests of the types of "tax avoidance" activity in respect of which a USN could be issued (similar to Condition A in 236A Finance Act 2014); and (ii) additional, objective requirements that there has been, or (on the basis of specific evidence, not merely that HMRC anticipates this) that there is likely to be, abusive or non-compliant behaviour in relation to the relevant arrangements, along similar lines to Conditions B, C and D in 236A Finance Act 2014.

- In order to ensure that the proposals are properly focused on phoenixism, we suggest that there should be a defence from any sanctions under the USN regime for any person who can demonstrate to a reasonable standard that they are not: (i) connected to the recipient of a previous stop notice in respect of the same or similar arrangements; or (ii) engaged (or likely to be engaged) in the abusive or non-compliant behaviour that we referred to in the paragraph above. Where there is phoenixism and such a connection does exist, this would relieve HMRC of the evidential burden that remains a difficulty, while also providing protection for citizens who are not involved in phoenixism, or abusive or non-compliant conduct.

- Because USNs would be issued to the public at large, and there would be no specific recipient who would have grounds to appeal against the USN on grounds of its validity, there should be judicial oversight of the issuance of a USN (and not merely with respect to the enforcement of a USN). Accordingly, we believe that tribunal permission should be required for HMRC to issue a USN.

- Any criminal offence for failure to comply with a USN should have a *mens rea*, given that it is entirely foreseeable that citizens could innocently contravene a USN through not being aware of the USN, or interpreting the USN in a way that HMRC disagrees with. In our view, knowing and intentional non-compliance with a USN would be the minimum appropriate standard for this purpose.

- There should be further statutory definition of what arrangements would be treated as "similar" to those described in the USN. The Consultation states that "'similar' would take the same meaning as in the current SN powers". We take this to mean "similar in form or effect", which is how the term is employed in the stop notice legislation. However, the term "similar" is not itself defined further in the stop notice legislation or even in HMRC guidance, and remains extremely broad and subjective. Although it is not in our view ideal that the term is already in use in the stop notice legislation without further definition, the recipient of a properly issued stop notice (who must necessarily be, or be suspected to be, a promoter) is likely to have a reasonable chance of being able to determine whether activities they are contemplating are "similar" to arrangements specified in the stop notice. In contrast, it could be extremely difficult for a person with no awareness of the context of a USN to tell whether activities they may be contemplating are "similar" to arrangements described in the USN. This difficulty would of course be exacerbated if HMRC were to proscribe arrangements in broad terms, which the Consultation rather suggests HMRC would want to do.

- With regard to "enablers", in our view "marketers" are the only category of "enablers" to which the USN should apply, for the following reasons.

    - The Consultation does not indicate exactly how the category of "enablers" would be defined for the purposes of the USN regime. Presumably HMRC's intention is for the regime to follow in some way the definition used in the EODTA regime set out in Schedule 16 Finance (No.2) Act 2017. However, that definition (rightly) incorporates "knowledge conditions" that exclude all categories of "enabler", other than "marketers", from the rules where, broadly, the person in question could not reasonably be expected to know that they are involved with "abusive tax arrangements". Such knowledge conditions do not appear compatible with HMRC's vision of the USN regime, and we are therefore concerned that HMRC would want to exclude them from the USN regime.

    - Without "knowledge conditions, we believe that there would be a high chance of reputable advisors and taxpayers being penalised as "enablers" when unwittingly involved in a tax avoidance arrangement, not least because the "threshold" for the proposed USN regime (unspecified categories of perceived tax avoidance) is much lower than that for the "enablers" regime ("abusive tax arrangements"). It would in many cases not be reasonable to expect such persons to be aware of the publication of USNs on GOV.UK, or even that they may be participating in proscribed arrangements, without them having to suffer the cost and inconvenience of introducing a new compliance system or engaging a third party service provider. That cost and inconvenience appears especially disproportionate given the tiny number of organisations that HMRC say are responsible for the abusive behaviour that USNs are meant to counteract.

    - We would acknowledge that a distinction could be drawn between "marketers" and other types of "enablers" in the context of the USN proposal (similar to the distinction drawn in the EODTA legislation. It would in our view be more reasonable to expect that suppliers of services consisting of the advertising or marketing of tax avoidance products would monitor the publication of USNs, and also to take steps to establish whether the advertising/marketing content that they are dealing with

meets the specified description, than it would be for other types of "enablers" generally to do so.

With regard to the PAN proposal, as already stated, we strongly oppose the proposal generally. However, if the government were to proceed with the PAN proposal, then we believe that several modifications ought to be made in order for the measure to be more appropriately targeted and proportionate. We have concerns in four broad areas:

(1) The proportionateness of the proposal with regard to the promoter/enabler who is named in the PAN

The severity of a PAN with regard to the promoter/enabler named in it is in our view equivalent to that of a criminal sanction. This would be a highly disproportionate measure to apply to many organisations who could potentially be within the scope of the PAN proposal as currently framed. In view of this, it would in our view be appropriate to narrow the scope of the PAN regime and build in reliable safeguards before a PAN can be issued (several of which are similar to safeguards we have proposed above for the USN in our response to this Question). In particular:

- The implementing legislation should limit the circumstances in which a PAN could be issued. Merely suspected promotion/enabling of tax avoidance should not be sufficient. There should be both: (i) objective tests of the types of "tax avoidance" activity in respect of which a PAN could be issued (Condition A in 236A Finance Act 2014 might be a reasonable basis for these); and (ii) additional, objective requirements that there has been, or (on the basis of specific evidence, not merely that HMRC anticipates this) that there is likely to be, abusive or non-compliant behaviour on the part of the relevant promoter/enabler in relation to the relevant arrangements (Conditions B, C and D in 236A Finance Act 2014 might be a reasonable basis for these).

- In our view, it would not be appropriate for PANs to be capable of being issued merely because an individual or business is "suspected" of being a promoter/enabler, any more than it would be appropriate to impose punishment on a mere suspect for a criminal offence. In such a case, even if there were an appeal process, it would seem equivalent to requiring the suspected promoter/enabler to prove their own innocence. Given the severity of the damage that a PAN would inflict, it is unlikely that the damage could be remediated if HMRC's suspicion were later established to be unfounded. We believe that a PAN should only be issued where HMRC has the evidence to demonstrate beyond reasonable doubt that objective conditions have been satisfied, such that the PAN could be struck down on appeal where appropriate.

- The PAN proposal as framed in the Consultation contemplates that the recipient of a PAN may have certain appeal rights, but none are contemplated for the promoter/enabler who is named in the PAN. In our view, it is fundamentally important that any such promoter/enabler has the right to defend themselves by appeal to the tribunal in respect of the issue of a PAN, or as a minimum that there is independent judicial oversight of HMRC's decision to issue a PAN. Accordingly, tribunal permission should in our view be required for HMRC to issue a PAN, with clear and objective criteria for the tribunal to consider (such as those we have suggested in the previous paragraph) so that the tribunal is not effectively constrained to follow HMRC's exercise of discretion. It would also be appropriate for a PAN which is the subject of judicial proceedings to be suspended pending resolution of those proceedings. The damage of a PAN to the named promoter/enabler would occur rapidly, and given the likely speed of judicial proceedings may not be remediable if the PAN were only lifted after a successful appeal.

- The Consultation makes no mention of the possibility of a PAN being lifted once no longer reasonably required, which in our view is a material question that must be addressed if the proposal is pursued. In our view it would be vital for any PAN regime to allow for a PAN to be lifted if the promoter/enabler concerned no longer meets the requirements for a PAN to be issued in the first place. A permanent deprivation of access to services would be a highly disproportionate sanction.

- With regard to "enablers", in our view "marketers" are the only category of "enablers" in respect of which HMRC should be able to issue a PAN. As set out in more detail in our comments above with regard to USNs, the category of "enablers" would (without the incorporation of "knowledge conditions" such as those used in the EODTA rules, which HMRC does not mention in the Consultation) capture a wide range of innocent businesses who are acting lawfully. This is particularly important in the context of the proposed PAN regime, given that the "threshold" for the proposed PAN regime (unspecified categories of perceived tax avoidance) is much lower than that for the "enablers" regime ("abusive tax arrangements"), which not only makes it more likely that offences would be committed but also that enablers who are not tax professionals would be unaware of being involved in a proscribed arrangement.

- We welcome the suggestion in the Consultation that a PAN would not apply to legal services. However, this may in itself be of limited benefit to a recipient who has been deprived of banking services by a PAN, and therefore may be unable to pay for legal advice.

- As a general matter, if the government does decide to proceed with the PAN proposal irrespective of the concerns we have identified, we would urge the government to consider imposing limitations so that PANs could only be issued in respect of promotion/enabling in relation to tax avoidance schemes that are sold to users through unsolicited mass-marketing. Such limitations would significantly lessen some of the difficulties and concerns with PANs that we have identified (although we would emphasise that, even with such limitations, we would still have material concerns with the proposals).

(2) The difficulty of fairly defining a "connection to the promotion of avoidance"

The Consultation states that PANs would not apply to "*products and services supplied to a suspected promoter of avoidance that have no connection to the promotion to avoidance (sic)*". Water supplies "*to a suspected promoter's private residence*" are the only example given of a service supplied that could not be the subject of a PAN, with the implication that water supplies to the promoter's office (and presumably therefore also any other general business supplies such as banking and insurance) would be considered to be connected to the promotion of avoidance.

This illustrates what would be a serious shortcoming of the PAN proposal if (as appears to be the intent) a PAN would simply bar the recipient from providing any services whatsoever to the named promoter/enabler. In that case it is difficult to see how the PAN could, workably in practice, operate in a proportionate way for an organisation whose business consists only partly of promoting tax avoidance schemes, where the supplier's services would relate partly to promotion/enabling activities and partly to other activities. It would clearly be unrealistic to expect a supplier of general services such as utilities, banking or insurance to be able to tell to what extent their supplies relate to "good" activity or "bad" activity, so from the perspective of such a supplier the only practicable approach would be to discontinue supplies to the named organisation altogether.

However, any such general requirement to discontinue supplies would risk some highly undesirable outcomes. For example, suppose that a handful of partners out of hundreds in a large, international accountancy firm were engaged in promotion that HMRC wished to counteract. If HMRC were able to issue a PAN to the insurers and banks providing services to the firm as a whole, that would likely

put the whole firm out of business, which would obviously be unfair to the hundreds of other partners and employees who would lose their jobs but had not been involved in the promotion/enabling.

It may be superficially attractive to say, in response to that concern, that firms could readily avoid that risk by steering clear of promoting/enabling activity. However, the government must recognise that, especially in view of the shifting boundaries of what HMRC might consider tax avoidance, it would not be practical for a firm which provides tax advice to follow a policy of not carrying out a work that could ever be regarded as promoting/enabling. To illustrate this, we need only refer to Question 60 in the Consultation, which explores how DOTAS might be expanded to capture a "wider range of tax avoidance", with no indication of what this might be, and suggests a further redrawing of the boundaries of "tax avoidance".

This creates risks both that reputable advisory firms may be deterred from providing normal tax advice due to the risk of receiving a PAN, and that service providers such as banks and insurers may be deterred from providing services to reputable advisory firms (or would provide services on less favourable terms) because of the great difficulty that would be caused by bringing a large and complex customer relationship to an abrupt halt if a PAN were ever issued. We hope it is uncontroversial to say that both of those would be undesirable policy outcomes.

Although, conceptually, it might help for there to be a requirement for PANs to be issued only in respect of individuals or business whose activities or revenues related (for example) "wholly or mainly" or "to a substantial extent" to the promotion/enabling of tax avoidance schemes, we would anticipate that abusive promoters would simply arrange their businesses so as to sidestep the requirement. In our view, the only viable solution to this difficulty would be for the scope of PANs to be limited to certain categories of services provided by the recipient that are inherently linked to the promotion/enabling of tax avoidance schemes. The only types of supply that would in our view meet that description are supplies of services consisting of the advertising or marketing of tax avoidance products meeting a specified description. Those services would be inherently linked to the "bad" activity that the PAN proposal is intended to counteract, and it should be practicable for suppliers to establish whether the advertising/marketing content that they are dealing with meets the specified description.

We would therefore urge the government to consider restricting the scope of a PAN so that it could only be issued to a recipient who provides marketing or advertising services to a promoter/enabler in respect of tax avoidance products of a specified description, and only restricts the recipient from providing services of that kind to the promoter/enabler, and not other kinds of service.

(3) The impact of a PAN on the service provider receiving it.

We are glad that the government recognises that the recipient of a PAN would not typically have been involved in wrongdoing. We believe that it is equally important for the government to recognise that recipient will almost inevitably suffer real damage in complying with the PAN, in the form of lost revenue from work for the relevant promoter/enabler. Lost revenues cannot easily be replaced. We are not convinced that, except where the promoter/enabler has been engaged in the most obviously egregious conduct, recipients who themselves have been entirely compliant with tax obligations would welcome a loss of revenue for the sake of raising tax compliance standards, as the Consultation suggests they would. The impact of a PAN would naturally become more difficult, the smaller the business of the recipient. A further difficulty is timing. Recipients will be better able to absorb the negative impact of a PAN if they have time to make adjustments, but allowing time for adjustment would be incompatible with HMRC's wish to act quickly against promoters.

There is also a concern regarding the position of the recipient of a PAN that has been issued invalidly, a possibility that would be significantly reduced if: (i) PANs could not be issued merely on

the basis of "suspicion"; and (ii) tribunal permission were required for the issue of a PAN, as we have proposed above. We have no doubt that HMRC would exercise a power to issue PANs carefully, but it cannot be assumed that no mistakes will be made. In our view it would be fair for an individual or organisation that has wrongly been issued with a PAN to be able to claim compensation from HMRC. Such compensation would practically be difficult for the recipient to pursue under general public law remedies, so we would propose that a specific compensation right is included in any implementing legislation.

The Consultation does not expressly propose the introduction of a criminal offence for failing to comply with a PAN, but refers to this as a possibility. We would oppose the introduction of such a criminal offence, particularly strongly if the offence were to operate on a strict liability basis. Recipients of a PAN would typically be reputable businesses for whom financial penalties should be assumed to be an adequate deterrent. A criminal offence would clearly be disproportionate. Moreover, HMRC would (we hope) only consider it necessary to issue a PAN where HMRC had been unable to enforce a serious penalty against the promoter organisation itself. There would be an obvious unfairness in criminalising a business that has been involved innocently and lawfully with the promoter organisation, while the promoter organisation goes unpunished.

It is reasonable to assume that promoters/enablers named in a PAN will in some cases seek to challenge the issue of a PAN in the courts, through judicial review or (if relevant) by appeal against a tribunal decision to permit the issue of a PAN. This could leave the recipient of a PAN in a difficult position while the matter is resolved.

In view of the above, if the PAN proposal is implemented at all, we would urge the government to make the following modifications in order to mitigate the inevitable adverse effects on recipients.

- As stated above, there should be no criminal offence for failure to comply with a PAN.

- If there is to be a criminal offence, it should have a *mens rea*, and should not operate on the basis of strict liability. We believe that intent would be the most appropriate *mens rea*. As with the USN proposal, any such offence would in our view be manifestly unsuitable for strict liability, given the proposal that only the "most serious" cases would lead to criminal investigation, and the potential for citizens to contravene a USN innocently by being reasonably unaware of the USN, or acting on a reasonable interpretation of the USN which subsequently proves incorrect.

- We believe that PANs should only be capable of being issued to individuals or businesses providing marketing or advertising services, and then only with respect to services involving the marketing or advertising of tax avoidance schemes.

Further potential difficulties for the recipient of a PAN are discussed in our response to Question 20 below.

(4) Doubtful effectiveness against intended targets

We are concerned that disreputable promoters would be able to avoid the effect of PANs, leaving the uncertainty and inconvenience of the PAN regime to be borne by compliant businesses and advisors. We anticipate that the PAN proposal would further incentivise "offshoring" by such promoters, many of whom we believe are already located offshore. Such promoters might be inconvenienced by a PAN but would foreseeably be able to obtain equivalent services from offshore suppliers against whom PANs could not be enforced.

Q13: Do you have any alternative suggestions around how businesses would be able to tackle the issue of promoters using their products and/or services?

We expect that most businesses would want to be left to self-regulate in this respect. As stated previously, we doubt that in most cases a business would welcome receiving a PAN, and the same applies to any other form of mandatory intervention which constrains activities the business has been carrying on lawfully. There is already publicly available information, in the form of HMRC's list of promoters and enablers of tax avoidance schemes, available for businesses that wish to ensure they are not dealing with such promoters and enablers. It might be considered whether HMRC could alert businesses dealing with listed individuals and organisations to the fact of the listing, although this would raise a double jeopardy concern. A more proportionate approach would be to advertise the existence of the list, to increase awareness of it among concerned businesses without adding punishment specifically to any of the listed individuals or organisations.

Q14: Do you consider that the first contact letter mentioned above would support legitimate businesses to engage with HMRC?

Although an opportunity to discuss the matter with HMRC would ordinarily be helpful to a potential recipient of a PAN, in this context we envisage that it would be a source of difficulty. It is likely that for several types of service provider, there would be confidentiality obligations towards their customers which would put them in breach of contract for voluntarily disclosing information to HMRC, and most service providers would be subject in law to data protection restrictions which would preclude certain voluntary information disclosures.

Given that a first contact letter would be potentially defamatory and damaging to the promoter/enabler named in it, there is also a question whether the promoter/enabler would need (or in any case have through judicial review) a right to challenge even a first contact letter. Any resulting uncertainty could cause significant difficulty for a recipient in deciding to what extent it is able to engage with HMRC in the process.

Q15: Do you think that the USN is appropriately targeted? If not, could you indicate where you see the issues are and how these could be resolved?

We do not think that the USN is appropriately targeted. Our reasons for this, and our suggestions for addressing our concerns, are set out in our response to Question 12.

Q16: How reasonable do you think it is for those involved in promoting or enabling tax avoidance to be expected to be aware of a universal stop notice published on GOV.UK and what more could HMRC do to ensure that all those affected by a USN are aware?

Our response to this question is subject to the overarching concerns in respect of the USN proposal set out in our response to Question 12.

It would be reasonable to expect tax advisors to be aware of the publication of a USN on GOV.UK as a matter of course. We also believe that "promoters" who are not tax advisors could reasonably be expected to check for such publications, even if they would not routinely monitor all HMRC publications.

The question is more difficult to assess with regard to "enablers", because the Consultation does not indicate exactly how the category of "enablers" would be defined for the purposes of the USN regime. However, we are concerned that HMRC's intention may be for the regime to adopt the definition used in the "enablers of defeated tax avoidance" regime set out in Schedule 16 Finance (No.2) Act 2017, but without the "knowledge conditions" that exclude all categories of "enabler", other than "marketers", from the rules where, broadly, they could reasonably be expected to know

that they are involved with "abusive tax arrangements". In that case a large range of persons could be brought into the "enabler" category, including those who have no awareness that they are involved in a tax avoidance arrangement. It would not be reasonable to expect such persons to be aware of the publication of USNs on GOV.UK, or even that they may be participating in proscribed arrangements, as that would most likely require them to suffer the cost and inconvenience of introducing a new compliance system or engaging a third party service provider. This is a principal reason why, as discussed in our response to Question 12, we do not believe the USN regime, if introduced, should apply to "enablers" other than marketers.

Q17: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects?

Our responses to this question relate to the USN proposal and are subject to the overarching concerns in respect of the USN proposal set out in our response to Question 12. We address the equivalent questions with regard to the PAN proposal in our response to Question 20.

As a preliminary point, for the same reasons as set out in our response to Question 16, it would not in our view be reasonable for restrictions similar to those in paragraph 3A Schedule 24 Finance Act 2007 (that is, a rebuttable presumption of carelessness) to be imposed in respect of any failure by an "enabler" who is not a "marketer" to comply with a USN.

More generally, the possible use of "reasonable care/excuse" as a potential (and possibly the only) defence to criminal liability for failure to comply with a USN raises similar concerns in the context of the USN proposal as it does in the context of the proposal to criminalise failures to make DOTAS notifications, and accordingly some of the following points are addressed in more detail in our response to Question 6. In particular:

- What constitutes a "reasonable excuse" would have enormous scope for different interpretations, unless the basic expression is supplemented by detailed objective criteria.

- In the context of the USN, there should in our view be at least two "reasonable care" defences. First, for a person who has taken reasonable care to make themselves aware of a USN having been issued, but is not aware of the USN. Second, for a person who is aware of a USN and has taken reasonable care to comply with it, but for any reason has not complied with it.

- With regard to what amounts to reasonable care by a person to make themselves aware of a USN, it is difficult to identify a single test that would fairly provide for the full range of persons that could be subject to a USN in the form proposed. In our view, there is a strong argument for a higher standard for promoters and enablers who are "marketers" than for the other categories of enabler, rather than a "one size fits all" test. Indeed, for those other categories of enabler, it is arguable that there should be no expectation that they would take active steps to make themselves aware of USNs at all, as the costs for them in having to do so would be disproportionate to the risk of them engaging in harmful conduct. If the requirement were limited to promoters and "marketers", it would in our view remove many of the otherwise considerable difficulties of framing a fair definition.

- With regard to what amounts to reasonable care to comply with a USN of which the relevant person is aware, obtaining and acting on the basis of advice from an appropriately qualified professional (or, if such a professional themselves, give careful consideration to the matter) is all that any person could reasonably be expected to do. However, this causes the difficulty of how a citizen could prove such a defence when the necessary evidence may in some cases at least attract legal professional privilege. It would in our view be wrong to

frame any offence in a way that could necessarily require any person to disclose their privileged advice in order to prove their innocence.

- We also believe that any "reasonable excuse" defence must leave scope for taxpayers, having taken professional advice, and appropriately qualified advisors who have given the matter due consideration, to take positions that may differ from interpretations published by HMRC.

- For advisors and many taxpayers, it could be extremely damaging in itself for HMRC to allege that there had been a failure to comply with a USN, leaving the advisor/taxpayer to prove the "reasonable excuse" defence. An innocent advisor or taxpayer in this position could be left in an invidious position unless and until HMRC decides to withdraw the allegation.

- With regard to how a "reasonable excuse" defence could be framed in a way that promoters could not abuse, as with the similar point in the context of Question 6 above, we cannot see how HMRC would be able to design rules that promoter organisations could not abuse, without including criteria referring to material that would typically be covered by legal professional privilege (and we strongly believe that there should be no lifting of privilege in these or other circumstances). Equally, we cannot see how a safeguard could otherwise be framed broadly enough to prevent abuse by disreputable promoters without at the same time making the safeguard unreliable for reputable taxpayers and advisors.

Q18: How should the government approach defining whether a service or product provided to a suspected promoter is connected to the promotion of avoidance?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

For the reasons set out in our response to Question 12, there will in respect of most suppliers be intractable difficulties in defining which services or products are connected to avoidance. The possible exception is marketing or advertising services which consist of distributing content which refers to tax avoidance schemes.

Q19: Should the government exclude categories of products or services from the scope of the PAN, and if so, what would those be and why?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

In view of the difficulties described in our response to Question 12, we consider that it would be better to approach this matter not by excluding services from a wide initial definition, but instead by limiting PANs to a more narrowly-focused and specifically identified set of service types related to the production and dissemination of marketing materials.

Q20: Do you consider that a business would be able to comply with the obligations in a PAN? If not, please explain where you see the difficulties and challenges and what could be done to overcome these.

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

The Consultation does not make entirely clear whether a PAN would require the recipient to discontinue all services to the relevant promoter/enabler and their connected persons, even where

the recipient is obliged under an existing contractual commitment to provide those services. If the recipient were required to discontinue services which it is contractually obliged to provide, then the recipient of the PAN would be in breach of its contract and liable for damages. To protect the recipient, the "legal basis to take action" referred to in the Consultation would therefore need to include a statutory exemption from claims for damages from the promoter/enabler.

For some suppliers, what amounts to stopping providing services is not straightforward to define. And we cannot imagine that any supplier will be able to identify with clarity what amounts to stopping "any other activity that benefits" the promoter/enabler or their connected persons. Any PAN regime would need to be able to set this out clearly, in legislation, for recipients to be able to comply with confidence that they would not risk sanction. For example, would a bank be compliant with a PAN if it were to retain the promoter/enablers funds on deposit even if it discontinued all other services? Would the bank be in breach of the PAN if it were to credit the account with interest? Would the bank be in breach if it were to transfer the funds to another bank on the promoter/enabler's instruction? (And if yes, would that not be, *de facto*, a freezing order over the promoter/enabler's assets of far wider scope than anything currently available to HMRC as a means of civil enforcement?) Would an insurer be obliged to terminate existing long-term insurance contracts, or keep contracts in suspense in case the PAN is later lifted? Banks and insurers are of course only two examples. We are concerned that, given the vast range of business activities that could potentially fall into the scope of a PAN, compliance with a PAN would become a deeply complex and onerous exercise for the recipient.

Q21: What level and type of information do you consider would a business need to comply with a PAN?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

A PAN would need to be highly prescriptive and clear with regard to both the identity of the persons to whom the recipient must stop providing services, and the nature of the services that must be stopped. It would be unreasonable to expect recipients to verify themselves, for example, who might be connected to, or agents of, the alleged promoter/enabler, or whether the recipient's activities "benefit" such other persons. Most businesses will simply not have the resources to carry out any such exercise. Even for better-resourced businesses, it is likely to be impossible in practice to obtain sufficient information from public sources to carry out such an exercise independently.

Please see also our response to Question 20.

Q22: Are the safeguards for USNs and PANs likely to be effective? If not, please state what could be done to enhance them.

Our response to this question is subject to the overarching concerns in respect of the USN and PAN proposals set out in our response to Question 12,

We do not believe that the proposed safeguards for USNs and PANS are sufficient or likely to be effective. We have set out in our response to Question 12 a number of further safeguards that we believe would be required in order for the proposed regimes to operate fairly, workably in practice, and with an appropriate balance of rights and powers between HMRC and citizens.

Q23: Do you agree that these safeguards provide the right level of protection for those who may face potential criminal prosecution? If not, what additional safeguards could be introduced?

We do not agree. Please see our responses to Questions 12 and 22.

Q24: Are there any other safeguards that HMRC should consider to ensure the proposed power is only used in appropriate cases?

Yes. Please see our responses to Questions 12 and 22.

Q25: Do you consider the proposed sanctions for a USN are proportionate? If not, what sanctions should be applied in these circumstances?

Our response to this question is subject to the overarching concerns in respect of the USN proposals set out in our response to Question 12.

On the basis of the USN proposal as framed in the Consultation, we do not believe that the proposed sanctions for a USN are proportionate. The proposed regime would threaten to penalise and criminalise citizens who have behaved innocently, and for many citizens who are engaged in entirely harmless activities the only way to avoid the risk of sanction would be to incur the cost and inconvenience of constantly monitoring for the potential publication of USNs.

Please see our response to Question 12 for the range of further restrictions and safeguards that we believe would be required for the proposed regime to operate fairly, workably in practice, and with an appropriate balance of rights and powers between HMRC and citizens. We would only agree with the imposition of severe financial penalties and criminal sanctions if those restrictions and safeguards were fully reflected in the USN regime.

Q26: Do you have any suggestions regarding the basis for determining a financial penalty for a USN? What scale of penalty would you consider proportionate?

Our response to this question is subject to the overarching concerns in respect of the USN proposal set out in our response to Question 12.

If the USN proposal remains as broadly-framed as it is in the Consultation, the range of persons potentially within the scope of penalties would include those whose behaviour is, on any reasonable view, much less culpable than the behaviour of a person who would typically be subject to a stop notice. It would be appropriate in view of this for the penalty regime to impose penalties that are significantly lower than those applicable for stop notices.

Except for those proven to have been involved in phoenixism in order to circumvent a stop notice, we can see no principled basis for penalties under a USN regime being more severe than those applicable under the stop notice regime. HMRC state in the consultation that stop notices have to date been a "powerful and important" tool in disrupting promoter activities, but that promoter organisations have been able to circumvent stop notices through phoenixism. That implies that the sanctions for non-compliance with the stop notice are themselves sufficient to stop the undesirable behaviour on the part of the recipient of the stop notice itself, and do not need to be any more severe. The issue is instead how to prevent those sanctions being circumvented by phoenixism.

For those proven to have been involved in phoenixism in order to circumvent a stop notice, we would acknowledge that, in principle, higher penalties than those under the stop notice regime may be appropriate, in order to create a clear disincentive to phoenixism where a stop notice has been issued.

Q27: Do you agree that failure to comply with a USN should be a criminal offence? If not, what sanction should there be and how would this deter those that are currently promoting tax avoidance schemes?

Our response to this question is subject to the overarching concerns in respect of the USN proposals set out in our response to Question 12,

On the basis of the USN proposal as framed in the Consultation, we do not agree that failure to comply with a USN should be a criminal offence. The proposed regime would threaten to penalise and criminalise persons who have behaved innocently

We would only agree with the imposition of severe financial penalties and criminal sanctions if the restrictions and safeguards that we have described in our response to Question 12 above were fully reflected in the USN regime. We believe those safeguards are necessary to ensure that any criminal offence is appropriately targeted at phoenixism without also catching innocent activity, and operates on the basis of clear, objective criteria subject to effective judicial oversight.

Q28: In addition to publication, financial penalties and criminal offences, are there any other sanctions or restrictions that could be applied to promoters/enablers including those who have control or significant influence over them?

We do not believe that any such further sanctions or restrictions would be appropriate. In our view, financial penalties are already an adequate measure, and those available to HMRC are already of a large scale. It appears to us that HMRC's principal difficulty in dealing with disreputable promoters is how to attach penalties to the persons responsible, and that difficulty would not be solved simply by changing the nature of a penalty.

Q29: Which sanctions do you consider to be proportionate for non-compliance with a PAN? If penalties were applied, what scale would you consider proportionate?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

Financial penalties should be the only type of penalty required. Recipients of a PAN would typically be reputable businesses for whom financial penalties should be assumed to be an adequate deterrent. For the same reason, any such financial penalties should not, and need not, be of a punitive amount (and should certainly be far lower than the penalties potentially applicable to a promoter). It would appear reasonable to set a penalty as a fraction of income derived from work for the promoter/enabler which is connected to the relevant tax avoidance activity, and for there to be a mitigation scale depending on the degree of the recipient's culpability in failing to comply with the PAN.

Q30: Under which circumstances do you consider that these sanctions should be applied?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

This would depend on how broad the terms of a PAN are permitted to be under the implementing legislation. If the terms of a PAN are required to be highly prescriptive (see our response to Question 21), setting out by name a comprehensive list of the persons and types of service covered, then carelessness would appear to be a reasonable minimum standard for a penalty. However, if a PAN could be issued in very broad terms (for example, covering activity "for the benefit of" the named persons, or including named persons by category such as "persons acting on behalf of" a named person) such that it would be very onerous for the recipient to establish whether their day-to-day activity was compliant, then a much higher standard of culpability, such as deliberate non-compliance, would be appropriate.

Q31: Where a business fails to comply with a PAN, do you consider they should be named publicly as a consequence?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

We do not. This would be highly disproportionate and punitive. It must be recognised that recipients of a PAN will generally be compliant businesses who have been drawn into the scope of the PAN regime by the misconduct of others, and we would presume that any non-compliance with a PAN is likely to be inadvertent. As stated previously (see our response to Question 27), limited financial penalties should be an adequate deterrent for the types of business that would be the likely recipients of PANs. The potential reputational (and therefore, indirectly, financial) damage from being "named and shamed" could significantly outweigh a proportionate financial penalty.

Q32: Are there any circumstances where you consider a failure to comply with a PAN should be a criminal offence?

Our response to this question is subject to the overarching concerns in respect of the PAN proposals set out in our response to Question 12.

No. Our comments in response to Question 31 apply equally here. Moreover, as we have said in our response to Question 12, HMRC would (we hope) only consider it necessary to issue a PAN where HMRC had been unable to enforce a serious penalty against the promoter organisation itself. There would be an obvious unfairness in criminalising a business that has been involved innocently and lawfully with the promoter organisation, while the promoter organisation goes unpunished.

Consultation Section 5: Stronger information powers to effectively investigate those who own and control promoter organisations

Q33: Do you have any views on who should or should not be covered by the CPIN proposal?

In principle, we support HMRC's objective of ensuring that the persons ultimately responsible for promoting mass-marketed tax avoidance schemes in the UK market cannot avoid the application of normal UK rules by using complex ownership arrangements to obscure the ownership and control of the organisations involved.

Although we have doubts as to whether CPINs will be effective in delivering direct evidence to HMRC of the identity of the persons behind promoter organisations, because of the difficulties HMRC will face in obtaining information from persons outside the UK, we agree that certain aspects of the CPIN proposals would give HMRC a valuable tool with which to "close in" on those persons.

However, there are aspects of the CPIN proposals which the Consultation does not express clearly and which could, if interpreted widely, be a cause for serious concern, both in terms of who might potentially be covered by the proposal, and in terms of what information might be requested and in what circumstances. In particular:

- The Consultation indicates in places that the proposals would apply to "marketed" tax avoidance schemes, but does not consistently make clear whether only "marketed" schemes would be targeted by the CPIN proposal. In our view, so that the proposals target only the egregious behaviour that HMRC described in the Consultation, the proposals should only be applicable to "relevant persons" in respect of tax avoidance schemes which have been mass-marketed by way of unsolicited communications. We do not believe there is a sound policy justification for permitting HMRC to issue CPINs to (or in respect of) the full range of persons who might be considered "promoters" under the DOTAS definition,

such as a tax advisor providing tax advice to an existing client in respect of a unique transaction; as stated in our introductory comments the DOTAS regime is predicated on an assumption that promoters in general are acting lawfully, and in our view it would be disproportionate to permit CPINs to be issued in respect of all promoters. For the same reason, in our view CPINs should only be capable of being issued to "enablers" who are "marketers".

- The Consultation is unclear as to whether it is proposed that CPINs could be issued only to "relevant persons", or also to other persons but "in respect of" relevant persons". If CPINs are to be capable of being issued to such other persons (who, by definition, would not be involved in or benefit from the promotion arrangements), we believe that (in recognition of the fact that the receipt of a CPIN may be an onerous and disconcerting matter for the recipient) this should only be with the prior approval of the Tribunal where the Tribunal is satisfied that there are reasonable grounds to believe that the other person in question has information that HMRC can lawfully request through the CPIN.

- We are concerned at the breadth of the information that HMRC proposes could be covered by a CPIN. The introduction to the CPIN proposal in Section 5 of the Consultation frames the proposal in terms of making it easier for HMRC to identify and sanction the individuals who are behind a promotion, and we support that objective in principle. However, Consultation goes on to propose far wider information powers (to require information and/or documents in the possession or power of the recipient of the CPIN "that are reasonably required by HMRC for the deployment, monitoring and enforcement of its anti-avoidance powers" within a specified timeframe). This could, we suggest, be capable of encompassing almost any information about a "relevant person" whatsoever, whether business-related or personal, especially when considered in view of HMRC's contemplated proposals regarding lifestyle restrictions, as set out later in the Consultation. We could not support such a wide proposal, which we believe would be out of keeping with the general balance of powers and rights in the UK between the government and citizens. In our view, the information that can be sought through a CPIN should generally be limited to information with regard to the identity of persons who control or financially benefit from promoter organisations.

- CPINs should not in our view be capable of being issued to legal professionals. This is because of the invidious position into which legal professionals would be placed if issued with a CPIN. The reasons are the same as set out in more detail in our response to Question 44, but our concerns are essentially that: (i) it may be inherently impossible for a legal professional to comply with a CPIN without infringing legal professional privilege; and (ii) a legal professional issued with a CPIN would be at risk of being in breach of either their obligation to comply with the CPIN or their professional obligations with regard to legal professional privilege; there would be no scope for a legal professional to err on the side of caution in either direction.

- The CPIN proposal contains a brief comment, with no further related discussion, that: "*The government is considering an extension to the current categories of persons treated as a promoter to better capture controlling minds and others within the promoter structure*." It is unclear whether the contemplated change would be solely for the purposes of CPINs, or would apply more widely. As will be apparent from our previous responses, we would oppose any general broadening of the "promoter" definition, which would have enormous scope for unintended consequences and compliance difficulties. If the proposal were to broaden the definition solely for the purposes of CPINs, we would need to see a more detailed proposal before we could comment any further.

Q34: Do you agree that a criminal offence should be a potential consequence for failure to comply with a CPIN or providing false or misleading information?

We agree that a criminal penalty could in certain circumstances be an appropriate consequence for failure to comply with a CPIN or providing false or misleading information, but only if the CPIN proposals are narrowed in key areas as we have suggested in our response to Question 33, and subject to appropriate safeguards (including as to the threshold for an offence to be committed, which should not be a matter for HMRC's discretion) as we have suggested in our responses to Question 37.

Q35: Do you have any views on how to set civil penalties at a level which would encourage compliance from parties connected to the promotion of marketed tax avoidance schemes?

No response.

Q36: Do you have any suggestions for alternative or additional proportionate potential consequences for non-compliance with a CPIN?

No. A combination of criminal penalties (subject to the reservations we have expressed regarding those in our responses to Questions 33, 34 and 37) and civil penalties would in our view be an adequate deterrent.

Q37: Do you agree that these safeguards provide the right level of protection for recipients of the notice? If not, what additional safeguards could be introduced?

As a general matter, we strongly oppose the proposal that it would be a matter for HMRC's discretion as to whether a criminal offence has been committed in a particular case. The Consultation appears to suggest that that would be the case where a recipient of a CPIN fails to comply with the CPIN, provides false or misleading information, or conceals, destroys or otherwise disposes of documents required by the CPIN. We believe that any proposed offence should have a *mens rea* set out in legislation, and would suggest that as a minimum there should be a requirement for intent or recklessness. We do not believe that any of the foregoing circumstances would be inherently criminal in nature such as might justify the creation of a strict liability offence which HMRC could choose to enforce at its discretion.

We are also concerned that the threshold for the issue of a CPIN, that HMRC merely suspects a person of being connected to the promotion of a marketed tax avoidance scheme, is a subjective test and a very low bar, particularly if HMRC are to be empowered to issue CPINs without the prior approval of the Tribunal. If HMRC were ever to issue a CPIN on the basis of an unreasonable suspicion, it would be very difficult, as the proposal is currently framed, for the Tribunal to find against HMRC on appeal. The recipient's only remedy in such a case would appear to be in public law such as through judicial review. For many citizens, pursuing such a remedy would be prohibitively expensive. We believe that the threshold for HMRC to issue a notice should be higher, and objective in nature; for example, that HMRC has "reasonable grounds to believe" that the person in question is engaged in the relevant activity. This would make it easier for the Tribunal to hear any appeals against the issue of a CPIN, without unduly limiting HMRC's ability to seek relevant information.

As noted in our response to Question 33, if HMRC's proposal is that CPINs could be issued not only to "relevant persons" but also to other persons "in respect of relevant persons", then we believe that the issue of a CPIN to such an other person should require the prior approval of the Tribunal.

Q38: Are the safeguards for this measure likely to be effective? If not, please state what could be done to enhance them.

This is addressed in our response to Question 37.

Q39: What are your views on extending obligations under information powers as indicated by the PFIN proposal?

As previously stated, in principle, we support HMRC's objective of ensuring that the persons ultimately responsible for promoting mass-marketed tax avoidance schemes in the UK market cannot avoid the application of normal UK rules by using complex ownership arrangements to obscure the ownership and control of the organisations involved.

As with CPINs, although we have doubts as to whether PFINs will be effective in delivering direct evidence to HMRC of the identity of the persons behind promoter organisations, because of the difficulties HMRC will face in obtaining information from persons outside the UK, we agree that certain aspects of the PFIN proposals would give HMRC a valuable tool with which to "close in" on those persons.

However, we do have some reservations with regard to the PFIN proposals:

As with the CPIN proposals, we believe that the PFIN proposals should target only the egregious behaviour that HMRC described in the Consultation, and should accordingly apply only to persons in respect of tax avoidance schemes which have been mass-marketed by way of unsolicited communications. We do not believe there is a sound policy justification for permitting HMRC to issue PFINs in respect of the full range of persons who might be considered "promoters" under the DOTAS definition, or "enablers" who are not "marketers".

It appears that HMRC envisages that a PFIN could be issued without the person(s) whose affairs are the subject of the PFIN being notified, without permission from the Tribunal being required. This is an important difference from the position for Financial Institution Notices (**FINs**), in relation to which HMRC must provide a copy of a FIN to the taxpayer in question unless HMRC has obtained permission from the Tribunal not to do so. While we agree that there may be good reasons why HMRC may need to issue a PFIN without notice to the persons who are the subject of it, we believe that it is important that HMRC's exercise of this power is subject to the oversight of the Tribunal, given that those persons would, clearly, be unable to take any action themselves to challenge any PFIN that may be invalidly issued;

Q40: Are issues envisaged around defining FIs – for example, in relation to alternative 'payment platforms'? How might HMRC overcome such problems?

So far as the proposal would involve adopting the definition of "financial institution" used for the purposes of Financial Institution Notices (**FINs**) as set out in paragraphs 4A and 61ZA Schedule 36 Finance Act 2008, which adopts the definition used for the purposes of the common reporting standard (**CRS**) we believe the scope of the definition to be reasonably well understood by organisations that would fall into its scope, and therefore a reasonable definition for use in relation to PFINs.

To the extent HMRC wishes to extend the "financial institution" concept to include other types of organisation such as "payment platforms", we believe that it is essential that the definition used is clear and framed in objective terms. Any organisation in receipt of a PFIN will need to determine for itself whether the PFIN has been validly issued, because providing information to HMRC in response to an invalidly issued PFIN would (in view of both general data protection law and the normal terms of commercial contracts in most sectors) be likely to result in that organisation breaching its data protection and/or confidentiality obligations to its customers. The organisation will therefore need to be able to determine clearly and objectively for itself whether it falls into any "financial institution" definition that may be adopted.

Q41: Should this power be subject to any additional restrictions or safeguards? If so, please state the restrictions or safeguards.

This is addressed in our responses to Questions 39 and 40.

Q42: Do you have any other ideas for options that could deliver both the objective of speeding up the process for obtaining promoters' financial information and providing appropriate safeguards?

No response.

Q43: Do you have any views on the requirement described above that aims to prevent the third party from notifying the promoter of the information request as described? Do you have any suggestions about any other ways that this aim could be achieved?

This question raises similar issues to the question of whether PFINs should be capable of being issued without notice to the persons who are the subject of it, which is addressed in our response to Question 39. As with our response to Question 39, although we agree that there may be good reasons why HMRC may need to issue a PFIN without the persons who are the subject of it becoming aware of it (or the requirements set out in it), we believe that it is important that HMRC's exercise of this power is subject to the oversight of the Tribunal, given that those persons would be unable to take any action themselves to challenge any PFIN that may be invalidly issued. However, where a PFIN is issued with the permission of the Tribunal, we believe it would be reasonable to impose a prohibition, on pain of a penalty, on the financial institution from disclosing the requirements in the PFIN, subject to the following point.

It is easily foreseeable that a financial institution would, by not notifying a client of the existence of the PFIN, find itself in breach of its professional or contractual obligations to the client. If the PFIN regime is to include such a prohibition on notification, we believe it is essential that the regime also includes a statutory defence against any claims against the financial institution for breach of any such obligations to its clients.

<u>Consultation Section 6: Legal professionals</u>

Q44: Should Regulation 6 be repealed?

CLLS believes that Regulation 6 should not be repealed. Regulation 6 was introduced, as a modification to the original DOTAS rules, in response to concerns of the legal profession that compliance by lawyers with disclosure obligations under the DOTAS regime could not practically be balanced with lawyers' professional obligations to preserve their clients' legal privilege, even after taking account of section 314 FA 2004. Those concerns remain equally valid today.

LPP is a fundamental right which Parliament and the courts have on many occasions chosen to protect above competing policy considerations, on the basis that it is essential for the rule of law for clients to be able to communicate freely and honestly with lawyers without fear of communications being disclosed to others. This applies to tax matters as much as any other legal matters. The principal concern in the context of DOTAS is that the required contents of a disclosure under the DOTAS rules may by their nature reveal the contents of privileged communications. For a lawyer, LPP will extend to the contents of communications between lawyer and client which form part of a continuous sequence of communications made for the dominant purpose of obtaining legal advice (*Balabel v Air India* [1988] Ch 317). LPP is the client's right and the lawyer is not free to waive it. There is therefore an inherent possibility that, in disclosing to HMRC the principal features of a contemplated arrangement, and a description of how the arrangements are expected to be treated under the tax legislation, a lawyer would be disclosing information which is subject to LPP.

Moreover, even a partial disclosure under DOTAS of information which does not attract LPP would be likely to constitute a breach of LPP, by implicitly indicating that the lawyer has been advising the client on a notifiable arrangement, which would itself be privileged information.

In view of the above concerns, a statutory exemption that extends only to information that is itself privileged (as in section 314 Finance Act 2004) would not remove the risk of lawyers being in breach of their professional obligations by making DOTAS disclosures, and would create great uncertainty. We are particularly concerned that, without Regulation 6, any lawyer advising on a notifiable arrangement would be in the invidious position of being at risk of breaching either a legal professional obligation or a DOTAS obligation on any occasion when they have to make a judgment as to the privileged status of a document; there would be no scope for the lawyer to err on the side of caution in either direction. As well as that difficulty of principle that lawyers would face, it would also be highly burdensome for lawyers (and indirectly therefore for clients) to have to carry out privilege reviews of documents in order to determine where the disclosure obligation falls in any case where there it appears there is a notifiable arrangement.

Concerns such as these appear to have been acknowledged by HMRC and the government in 2004. The Explanatory Memorandum to SI 2004/2613, the SI that introduced Regulation 6, noted (at paragraph 4.3) that no consensus had been reached on this point between HMRC and representatives of the legal profession, but that [the SI] was "*needed to ensure the rules work as they were originally intended*". The concerns expressed on behalf of the legal profession in 2004 are equally valid today, and the need for the protection afforded to lawyers by Regulation 6 remains.

We believe there is a legitimate concern that lawyers may consider themselves unable to advise clients in respect of whether arrangements are notifiable without the protection of Regulation 6, for fear of breaching professional obligations. We hope that the government would agree that that would be an undesirable policy outcome.

Accordingly, although CLLS agrees with HMRC that it is undesirable for abusive promoters who are legal professionals to use that status to avoid DOTAS obligations by relying on Regulation 6, CLLS does not agree that repealing Regulation 6 is an appropriate solution to that problem. CLLS would urge HMRC to consider other approaches instead, particularly whether to take up the matter with the SRA, as it appears there could be an abuse of privilege by the legal professionals involved. (It appears to CLLS that none of the activities of those legal professionals might in fact attract privilege, in which case it would be abusive for those legal professionals to assert that they are protected by Regulation 6.)

Q45: Are there any risks in making such a change? For example could the change bring into scope those that we might not wish to include?

There would be risks in repealing Regulation 6. The question asks whether the change could bring persons "into scope" that HMRC might not wish to include. The change would by its nature affect only lawyers, but clearly all lawyers advising on potentially notifiable arrangements would be brought "into scope" by the change (see our response to Question 44 for how such lawyers would potentially be put into an invidious position) and not just the tiny number of abusive promoters engaged in the activity that HMRC is concerned with. We also doubt that the change, if implemented, would enable HMRC to act swiftly against the organisations that it wishes to target. CLLS would not be surprised to see the same abusive promoters seeking to make greater use of the section 314 exemption, by making spurious claims of LPP over documents which, while bound to fail in court, would take significant time for HMRC to deal with. As noted above, we would suggest that, if HMRC suspects an organisation of abusing LPP, it would be better for HMRC to address this with the SRA rather than through repealing Regulation 6.

Q46: Does the government's proposal to retain the statutory protection for LPP material in primary legislation provide an adequate safeguard?

We do not believe that the statutory protection for LPP material in primary legislation (section 314 Finance Act 2004) would provide an adequate safeguard if Regulation 6 were repealed. This is addressed in our response to Question 44.

Q47: Should the rules on publishing be changed to allow HMRC to publish the names of legal professionals that design tax avoidance schemes, even when most of or all their activity is subject to legal professional privilege?

CLLS opposes this proposed change in the form framed in the Consultation, but would in principle support a more targeted change of this kind.

In the interests of the rule of law, legal professionals need to be able to advise clients on arrangements that may be notifiable under DOTAS, and are under a duty to act in the best interests of the client, which may involve pointing out potential modifications to the arrangements in a way that may amount to "design" under DOTAS. This legitimate activity should not be cause for "naming and shaming".

Moreover, legal professionals would generally not be able to defend themselves in respect of a publication, because the information that they would need to provide in support of a defence can be expected to be subject to LPP and confidentiality obligations which can only be waived by clients. CLLS understands this to be the reason for the inclusion of the restriction in section 86 Finance Act 2022 regarding naming legal professionals.

CLLS does not condone the activities of certain legal professionals who are involved in the creation and mass-marketing of abusive tax avoidance schemes that those legal professionals are aware will probably be ineffective. CLLS would, in principle, not object to HMRC having a more limited power to publish the names of legal professionals who are responsible for this activity, if this could be done in a way which: (i) confines the publication power to legal professionals who provide advice that they know, or ought reasonably to be aware, is intended to facilitate the unsolicited mass-marketing of tax avoidance schemes; and (ii) enables the legal professional to defend themselves appropriately without risking any breach of professional obligations.

However, it would in our view be more effective, and carry less risk of unfairly prejudicing legal professionals, for HMRC to raise any concerns about legal professionals engaged in such activities with the competent professional regulator, for the regulator to investigate under their existing powers (noting that CLLS would expect conduct of the kind HMRC have described to be in breach of professional standards for solicitors in England and Wales).

Q48: Could there be any unintended consequences from making this change?

We are concerned that there could be several, serious unintended consequences from this change. Some of these concerns are described in our response to Question 47 (namely, that legal professionals could be "named and shamed" for carrying on legitimate activity, and would be unable to defend themselves properly due to professional obligations restricting what information they could disclose). In addition, we are concerned that, if the proposed change is not narrowed so as to focus on legal advice knowingly provided in relation to mass-marketed schemes (as we proposed in our response to Question 47), this could deter reputable advisors from advising on any arrangements that could potentially be notifiable under DOTAS. We believe that that would be a highly undesirable policy outcome.

Q49: If the government does change the rules, as per question 47, how should HMRC utilise this information to assist taxpayers and representative bodies?

As previously stated, we generally oppose the proposed change to the rules referred to in Question 47. We would accordingly oppose HMRC using the publication of the names of legal professionals as a means of bringing information to the attention of regulators and taxpayers.

With regard to bringing information to the attention of regulators, as the Consultation acknowledges, if HMRC wish to draw the attention of a regulator to the conduct of a legal professional (presumably on the basis that HMRC consider that the legal professional is not upholding professional standards), then HMRC already have the ability to do so under the existing regulatory framework.

With regard to bringing information to the attention of taxpayers, we believe that HMRC's existing powers to publish details of tax avoidance schemes are sufficient. With the use of phoenixism and opaque structures by the perpetrators that HMRC are seeking to counteract, we doubt that a power to publish the names of legal professionals, in addition to details of tax avoidance schemes, would be an effective deterrent to those perpetrators. In our view, the potential adverse consequences of a "naming and shaming" regime for legal professionals that we have outlined above would outweigh any potential benefits of such a measure.

Q50: How should we deal with the issue of representations against publishing the details of a legal professional who has designed a scheme when LPP applies?

As set out in our response to Question 47, one of several reasons why we generally oppose the proposed change is that a legal professional who was threatened with publication would, for all practical purposes, be unable to defend themselves (whether under an internal HMRC process or pursuant to a public law right), because the information they would need to do so would be subject to legal professional privilege and their duty of confidentiality to their client. Although, in theory, a client might waive those duties, there is no good reason to think that a client would wish to do so.

Even if a narrower version of the change were introduced so as to apply only in relation to mass-marketed scheme (as we have suggested in our response to Question 47), this issue of principle would have to be addressed.

A similar issue has been addressed in the context of the "enablers of defeated avoidance" rules through the mechanism of a conclusive self-declaration by a legal professional that they do not meet certain conditions that, if satisfied, might expose the legal professional to sanctions under the rules (Finance (No.2) Act 2017, Schedule 16, paragraph 44, and SI 2017/1245). Whether such a mechanism could, in principle, be appropriate in the context of the publication proposal would depend partly on how HMRC would look to define the types of tax avoidance arrangements involvement in which would bring a legal professional into scope. In the context of the "enablers of defeated avoidance" rules, the declaration mechanism applies in relation to "abusive tax arrangements", and several "knowledge conditions" apply to exclude from the rules various persons who would otherwise be "enablers". These tests are in our view clearly enough focused to give legal professionals a reasonable level of confidence that they can, where appropriate, give an accurate declaration. If the bar were set lower in relation to the publication proposal, with more scope for reasonable disagreement on the scope, then legal professionals would be likely to feel less confident about making such a declaration, leaving them at greater risk of being unfairly prejudiced by a publication.

We would also anticipate that abusive promoters would seek to exploit any self-declaration mechanism by claiming the benefit of it on tenuous grounds. In that case, the question of how the matter could be resolved would naturally return to the contents of privileged communications, with the associated difficulties already discussed.

The difficulty of making any publication regime difficult for abusive promoters to avoid, while also maintaining fairness for reputable advisors, is considerable, and in our view may be an intractable problem. We would therefore question whether the risk of prejudice to reputable advisors, which the publication proposal would bring, outweighs the perceived benefits to HMRC of having this additional power.

Q51: Would you support the introduction of a deemed waiver of LPP?

We would not support the introduction of a deemed waiver of LPP in any circumstances.

Although we agree with HMRC that the misrepresentation of the strength of legal advice by organisations marketing tax avoidance schemes is undesirable and likely to be abusive, in our view this should be addressed through other measures available to the government.

Parliament and the courts have on many occasions decided that LPP, where it is not disapplied on grounds of iniquity, is a fundamental right, and the importance of LPP is only exceptionally outweighed by other policy considerations. As Lord Taylor said in *R v. Derby Magistrates' Court, Ex parte B. Same v. Same , Ex parte Same* [Consolidated Appeals] [1996] A.C. 487 at 508:

> *"Apart from Reg. v. Cox and Railton, Mr. Goldberg submitted that in other related areas of the law, privilege is less sacrosanct than it was. He points to the restrictions recently imposed on the right to silence, and the statutory exceptions to the privilege against self incrimination in the fields of revenue and bankruptcy. But these examples only serve to illustrate the flaw in Mr. Goldberg's thesis. Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), as to which we did not hear any argument. Mr. Goldberg's difficulty is this: whatever inroads may have been made by Parliament in other areas, legal professional privilege is a field which Parliament has so far left untouched."*

The importance that Parliament and the courts have consistently attached to LPP is based on the understanding that it is strongly in the public interest for persons to seek and receive legal advice for the orderly management of their affairs, and essential in a society with a framework built on the rule of law for clients to be able to communicate freely and honestly with lawyers without fear of communications being scrutinised by others (see for example Lord Scott's authoritative judgment in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48).

In CLLS's view, it does not trivialise the harms caused by the abusive promotion of tax avoidance schemes to say that those harms are no more serious (and in many cases they are, on any reasonable view, less serious) than those considered by Parliament and the courts in the many previous instances where LPP has been decided to be inviolable, so as to override other competing policy considerations.

In any circumstances, therefore, we would strongly oppose the proposed deemed waiver of LPP. Our view is further reinforced by our belief that there are other potential courses of action available to HMRC in this area, as discussed in our response to Question 55.

Q52: In which circumstances should LPP be waived?

For the reasons set out in our response to Question 51, we believe that there are no circumstances in which there should be a deemed waiver of LPP as proposed in the Consultation.

Q53: Could a deemed waiver of LPP have any unintended consequences?

As set out in our response to Question 51, we believe that a deemed waiver of LPP would contravene a fundamental right and should not be considered in any circumstances.

Q54: If you support a deemed waiver, do you consider that it should be a waiver for all purposes or only limited ones? If the latter, what purposes?

We do not support a deemed waiver of any kind, for the reasons set out in our response to Question 51.

Q55: Are there other things HMRC should do to address instances where promoters rely on dubious legal advice to market avoidance schemes, or use legal advice to market avoidance schemes to persons to whom the advice was not given?

As the Consultation notes, LPP is subject to the so-called "iniquity exception". We would question whether this exception might apply in the case of a promoter marketing a scheme while misrepresenting the strength of legal advice they claim to have received, so as to disapply LPP in respect of that advice. As Popplewell J in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) said at [68] in respect of the iniquity exception:

> *"The principle is not confined to criminal purposes but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice."*

Such a promoter might well be engaged in fraud, but if not would (by misrepresenting to potential customers the strength of the advice in question) appear to be engaged in "equivalent underhand conduct … which is contrary to public policy". Accordingly, we would urge HMRC to consider further whether there is scope under the law as it stands to achieve the desired objective.

As set out in our response to Question 1, we would also urge HMRC to explore regulating the contents of unsolicited marketing promotions for tax avoidance schemes by, among other things, requiring such communications to contain a description by the promoter of the intended tax treatment, accompanied by a prominent disclaimer stating that the product is a tax avoidance scheme which has not been approved by HMRC and that the recipient is strongly urged to obtain independent tax advice. We believe that (similarly to health warnings on cigarette packets) this would assist in counteracting the misrepresentation of tax advice by promoters.

Q56: Is there any further action that HMRC should be taking to tackle those legal professionals that are involved in the promotion of tax avoidance?

The Consultation did not specifically invite responses to HMRC's proposal to publish guidance in order to make clear HMRC's position on when LPP does not apply, which we will address here. In CLLS's view, it would not be appropriate for HMRC to publish guidance on a matter which falls outside HMRC's area of administrative responsibility. If HMRC were to proceed to publish such guidance, the guidance should in our view include clear statements that the published views are those of HMRC alone and that the scope of LPP is entirely a matter for the courts to decide, as well as indicating any instances where HMRC is aware that its interpretation of the law may not be one that is generally accepted.

More generally, as stated in our preliminary comments, CLLS supports the Government's broad objective to counteract the activities of the small group of abusive promoters who are responsible for the repeated mass-marketing of ineffective, possibly fraudulent, tax avoidance schemes, and who in doing so are not co-operative with HMRC.

CLLS does not believe that HMRC requires further powers directed specifically at legal professionals in order to take appropriate action against legal professionals. Legal professionals are regulated, and CLLS believes that engagement with the relevant regulators is the best approach for HMRC to take towards such legal professionals. It appears to CLLS that conduct of the kind described in Section 2 of the Consultation, if carried out by legal professionals, may be in breach of professional standards, in which case regulators could be expected to investigate, and take sanctions if appropriate. (Equally, if a regulator did not consider any particular conduct to be in breach of professional standards, then we cannot see why it would be appropriate HMRC to impose its own sanctions on the professional in question.)

For solicitors, as HMRC will be aware, the SRA published a "Warning notice" on 21 September 2017 (updated on 25 November 2019) regarding solicitors' professional obligations in relation to tax avoidance (https://www.sra.org.uk/solicitors/guidance/tax-avoidance-duties/), which made clear that inappropriate involvement in abusive tax arrangements could be the subject of enforcement action. Given that (as mentioned in our response to Question 49) it is open for HMRC to report any concerns about a solicitor or a firm to the SRA, CLLS considers that the existing framework provides HMRC with ample scope to instigate action against solicitors where appropriate.

Consultation Section 7: Future direction

Q57: Are there any existing powers targeted at promoters which could be strengthened with the addition of new criminal offences for non-compliance?

CLLS would not encourage HMRC to introduce further criminal offences. As noted in our introductory comments, we are already concerned at the proliferation of criminal offences in this area, given the risk (especially as the boundaries of the underlying legislation are expanded) of these applying to persons who have acted innocently and have nothing to do with the mass-marketing of tax avoidance schemes.

Q58: In what other situations would criminal sanctions be appropriate for undeterred promoters?

We do not currently envisage any such situations. Our response to Question 57 applies equally here.

Q59: What in your view are the type of sanctions that would deliver the aim of significantly disrupting the lifestyles of controlling minds?

CLLS does not agree with the proposal to develop novel measures aimed at disrupting the lifestyles of the individuals concerned. Our view is that financial and, in very limited circumstances, criminal penalties should be an adequate deterrent (and they are considered as such for the vast majority of serious criminal offences and civil wrongdoings in UK law). We believe that the primary difficulty that HMRC face is how to attach penalties to the persons in question, which is unlikely to be solved by changing the nature of the penalty. CLLS would urge HMRC to make use of existing powers, investing resource where necessary, and acknowledge that in the interests of justice this is necessarily not a rapid process.

Q60: What further changes could be made to DOTAS to capture a wider range of tax avoidance?

We do not believe that any such changes are appropriate. As the Consultation notes itself, activity in relation to abusive tax avoidance is almost entirely confined to disguised remuneration schemes, which are addressed in previous questions. Without any evidence of significant levels of other

activity taking place that amounts to "tax avoidance" as that term is currently understood, we see no principled basis for a further expansion of DOTAS.

Q61: How can HMRC ensure that it obtains information from third parties in a timely fashion?

We have no particular suggestions in response to this question. As a general matter, there is a difference between, on one hand, using channels that enable HMRC to access the information sooner than they otherwise would, and on the other hand, shortening the time available to recipients of third party notices to provide information. The former approach would in our view be reasonable provided that usual procedural safeguards apply. We would not agree with the latter approach.

Q62: How best do you think HMRC can use advances in technology including AI to aid its work tackling marketed tax avoidance?

In principle, we can see that the use of AI by HMRC in the course of HMRC's tax administration would potentially enable HMRC to operate more efficiently, especially in relation to the analysis of large volumes of data. This would be welcome.

We can also see that it might be beneficial for HMRC to use AI to assist in identifying taxpayers who are being approached by promoters mass-marketing avoidance schemes, with a view to facilitating targeted advertising campaigns to discourage the take-up of the schemes.

A further potential use would be to search the web for advertisements or marketing communications that breach prohibitions, should such prohibitions be introduced (see our response to Question 1).

Equally:

- it is well known that AI products can be fallible. We envisage risks from HMRC relying on AI-generated analysis as a means of deciding which taxpayers (or other citizens) are to be the subject of action by HMRC. We are concerned as to how any errors by AI, or decisions which are taken on the basis of AI where those decisions are unreasonable applying a "human" test of reasonableness, could be dealt with under public law; and

- it would be vital for HMRC to take the utmost care in ensuring the security of taxpayers' confidential information whenever HMRC use AI, taking into account that many AI applications will use "cloud" computing technology so would involve data leaving HMRC systems in order to be processed.

The term AI also encompasses a wide range of technologies, and different considerations are likely to apply to different technologies.

At this stage, we do not believe there is a clearly enough developed case for further legislation in this area.

Given the rapid development of AI, and the complexity of the legal, technical and ethical questions that it poses, we believe that it would be appropriate for any legislative proposals regarding HMRC's use of AI to be set out in detail in a specifically-focused consultation paper, rather than being briefly addressed in broad terms as the subject has been in the Consultation.

CONTACT DETAILS

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me by telephone on 020 7296 5783 or by email at Philip.harle@hoganlovells.com.

Yours faithfully

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