INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES (ICAEW) - WRITTEN EVIDENCE (DFE0022)
Draft Finance Bill 2020-2021 inquiry

Summary

1. **New proposals for tackling promoters and enablers of tax avoidance schemes:** These measures should help to address the problems that HMRC faces in tackling these schemes. In principle ICAEW supports any new measures introduced to disrupt this type of activity, provided they are managed with appropriate safeguards to ensure such measures cannot unduly affect professional tax advisers. Given these rules are not aimed at professional advisers, we do not have much practical experience of how either of the existing rules are operating. The key concern is to ensure that these measures are properly targeted and do not impact upon bona fide tax advisers complying with the PCRT. We have two particular concerns. The first is a concern about the interaction with the DAC 6 rules, where a failure to disclose under DAC 6 could contribute towards inclusion in the extended POTAS regime. Given that some of the hallmarks for disclosure within DAC 6 do not even require a tax avoidance motive, this looks unreasonable. Second, we are concerned about potential retrospection. This could potentially include anyone who made a DOTAS disclosure since 2004.

2. **New tax checks on licence renewal applications:** The proposals are aimed at tackling the tax gap in the areas of the hidden economy and evasion and are based on similar provisions, known as tax clearances, in the Irish tax system. We understand that the Irish provisions are effective in helping to improve tax compliance. The draft legislation published on 21 July 2020 appears to achieve its objectives but will need further, detailed, review. The system will need to be thoroughly tested and working well in advance of the proposed start date of April 2022.

3. **Amendments to HMRC's civil information powers:** We are concerned that the measure will also extend to UK third-party information requests, in effect removing a major safeguard in Schedule 36 of the FA 2008 that such notices require tribunal approval. The Schedule 36 powers and associated safeguards were agreed after extensive scrutiny, which involved detailed discussions with the tax community. The result was a proportionate and fair set of provisions. We do not think that a justified case has been made for changing the existing Schedule 36 safeguards to remove the requirement to obtain tribunal approval for UK third-party information requests. The proposed safeguards in the draft legislation are insufficient. One of the conditions is that a notice can be issued if the reasonable opinion of the officer giving the notice is that it would not be onerous for the institution to provide or produce. This is a very low bar and there appears to be no right of

appeal against it or, even, the ability to make representations to HMRC. The financial institution would only be able to argue the point following the imposition of a penalty, which is far too late. Another internal safeguard could be that, when HMRC wants to use these powers for a domestic matter, they must get sign off from HMRC's tax dispute resolution board.

4. **Notification of uncertain tax treatments:** The policy objective is to improve HMRC's ability to identify issues where the largest businesses have adopted a different legal interpretation to HMRC's view. The feedback from our members is that most large businesses and their advisers already have a good working relationship with their customer compliance manager (CCM) and will raise concerns and uncertainties with their CCM regularly, often in real time. Accordingly, members think that the regime should be more targeted so that it applies only to those large businesses that have demonstrated high-risk behaviours.

Answers to specific questions

New proposals for tackling promoters and enablers of tax avoidance schemes

5. ICAEW's response to the HMRC consultation document and draft legislation published on 21 July 2020 was published as Representation 69/20

How effective are the existing powers of HMRC in tackling promoters and enablers of tax avoidance schemes?

6. The consultation document acknowledges that professional tax advisers are not the target of this measure. HMRC already has quite extensive powers to tackle abusive behaviour of promoters and enablers of tax avoidance schemes. However, the 'promoters' that this regime is targeting are abusing the tax system and should not be considered as bona fide tax advisors – for example they will usually make it clear that they are not offering tax advice and accept no responsibility in that regard. They are effectively mis-selling schemes aimed at unsuspecting taxpayers, or those who know that the schemes are likely to fail when challenged but are willing to take the risk. Their activities damage the reputation of the vast majority of professional advisers who abide by the ethical principles and standards set out in the professional conduct in relation to taxation (PCRT).

7. Given that these 'promoters' are clearly adept at abusing the tax system and the processes and safeguards that underpin it, we can understand why the existing powers of HMRC may not be sufficient. In principle, therefore, ICAEW supports any new measures introduced to disrupt this type of activity, provided they are managed with appropriate safeguards to ensure such measures cannot unduly affect professional tax advisers who comply with the PCRT.

What has been your experience of the Promoters of Tax Avoidance Schemes (POTAS) rules and the enablers rules in practice?

8. Given these rules are not aimed at professional advisers, we do not have much practical experience of how either of these rules are operating. In respect of the latter, we understand that HMRC is progressing on issuing some penalties to enablers, but the numbers are low. Given the comments made in the consultation about enablers seeking to sidestep the provisions, this is therefore not surprising. Further, as with any new measures of this nature, it will take some years for them to bed in and for cases to be identified and pursued.

Are HMRC's communications likely to be effective in informing potential scheme users about schemes, and so deter them from participating?

9. Given the difficulty in getting to this group and that they now operate under the radar, it is not clear whether HMRC's communications could ever be completely effective in deterring scheme users from participating. HMRC has stepped up its efforts to identify those who market such schemes and is making contact with the users at a much earlier stage, for example by making early interventions as a result of using PAYE data through RTI.

How effective will the proposed measures be against those who promote aggressive tax avoidance schemes, and in informing and deterring potential scheme users? What else could HMRC be doing in this area?

10. Our view is that these measures should help to address the problems that HMRC faces in tackling these schemes. A key difficulty is that many of these schemes are being promoted by offshore providers, which makes tackling the promoter more difficult. We wonder whether pressure could be brought to bear on the UK's dependent territories to stop such activity in their jurisdictions, although that may drive the problem further offshore.

Are the safeguards being proposed sufficient to ensure an appropriate balance is struck between HMRC and taxpayer?

11. The key concern is to ensure that these measures are properly targeted and do not impact upon bona fide tax advisers complying with the PCRT. We recognise that extended safeguards could merely play into the hands of these 'promoters', so a balance needs to be struck which scopes out professional advisers as above who in principle support measures to remove these 'promoters' from the market place. This approach could involve, for example, some form of 'hallmarking' or other methodology to exclude compliant advisers. Further, this should be considered alongside the objectives of the Call for Evidence for Raising Standards Across the Tax Advice Market and potentially tailoring these proposed measures to follow on

from those conclusions. Our response to the Call for Evidence was published as Representation 45/20.

12. The main concern about these provisions raised by members is the low threshold for their application which, combined with an absence of clear definitions, could make their application particularly subjective in the absence of appropriate statutory safeguards.

13. We have two particular concerns. The first is a concern about the interaction with the DAC 6 rules, where a failure to disclose under DAC 6 could contribute towards inclusion in the extended POTAS regime. Given that some of the hallmarks for disclosure within DAC 6 do not even require a tax avoidance motive or, indeed, any tax advantage, this looks unreasonable. We question whether DAC 6 should interact with POTAS at all. If there is a desire to retain some interaction, we would advise scoping out certain hallmarks: for example, those where there is no main benefit test and ensuring there is some flexibility to exclude omissions made in oversight.

14. Secondly, we are concerned about potential retrospection. In para 236A(3)(b) of the draft legislation, Condition A includes provisions that the arrangements are like arrangements previously notified under the DOTAS provisions set out in FA 2004. This could potentially include anyone who made a DOTAS disclosure since 2004. This could include cases where protective disclosures were made where the actual arrangements were not tax avoidance. The legislation should make it clear that condition A will not be applied retroactively.

New tax checks on licence renewal applications

Are the proposals for tax checks on licence renewal applications fair and proportionate? How effective is the legislation likely to be, and is any amendment needed?

15. In principle the draft legislation published on 21 July 2020 appears to achieve its objectives but will need detailed review. We presume that an electronic system will be developed, and this will need to be thoroughly tested and working well in advance of the proposed start date of April 2022. HMRC has also announced proposals to extend MTD to income tax, so there will need to be a substantial extra investment into developing these digital services. The measure will increase administration and costs for HMRC, the licensing authorities (who may seek to recover it) and the taxpayer, so it is essential that HMRC has the resources to deliver the system and that it operates quickly and effectively.

What is your view of the principle of conditionality and its use in the tax system?

16. The measure is designed to help tackle the hidden economy and, we presume, evasion. According to the 2020 edition of HMRC's Measuring Tax Gaps report, the hidden economy costs £2.6bn of the tax gap and evasion £4.6bn, nearly a quarter of the total estimated tax gap of £31bn. The proposals appear to be modelled on similar provisions, known as tax clearances, found in the Irish tax system. We understand that the Irish provisions have been in place for many years and are more far-reaching in terms of the licences covered which require a tax certificate, for example licences to sell alcohol and tobacco are covered by the measure. Further details of the measure can be found on the website of Irish Tax and Customs. We understand from our Irish counterparts that the provisions are effective in helping to improve tax compliance and there seems no reason to think that they would not also be effective in the UK.

How do you view the Government's stated intention to extend conditionality to Scotland and Northern Ireland, as well as to other trades?

17. In principle it makes sense to extend the measure to the whole of the UK, otherwise it could create distortions in the marketplace, eg taxi operators might register in Scotland even though they operate mainly in England. We appreciate that this may need legislation at the devolved level.

18. As for extending it, as noted above the requirement to obtain a tax certificate is far more extensive in scope in Ireland as compared to the current UK proposals. The measure could be seen as an initial 'toe in the water'. Once HMRC gains experience in the application of these provisions and that it proves successful in its policy objective at a reasonable cost, we expect that consideration will be given to extending the scheme to other licence renewals. But the system needs to work effectively and efficiently first and be shown to reduce the tax gap.

Could the problems this measure is designed to address have been tackled effectively by other means? If so, what are they?

19. We have no suggestions to make.

Amendments to HMRC's civil information powers

What is your view of the removal of the requirement to obtain tax tribunal approval before issuing a Financial Institution Notice? Are the safeguards promised instead adequate and, if not, what more should be done?

20. The policy purpose of the changes is to facilitate speedier exchanges of information with overseas tax authorities which will, apparently, bring the UK into line with the approach in all other G20 countries. However, we are concerned that the measure will also extend to UK requests, in effect

removing a major safeguard in Schedule 36 of the FA 2008 that third-party information notices require tribunal approval.

21. We are concerned that, if the existing Schedule 36 safeguard for a third-party information notice to have tax tribunal approval is removed, this power would be used routinely as a way of obtaining information, so that the number of domestic information requests will far exceed the number of times they are used for international information exchanges. The existing Schedule 36 powers and associated safeguards were agreed after extensive scrutiny which involved detailed discussions with the tax community. The result was a proportionate and fair set of provisions and we do not think that a justified case has been made for amending the Schedule 36 safeguards extending this provision to include domestic information requests.

22. The proposed safeguards in the draft legislation are insufficient. One of the conditions is that a notice can be issued if the reasonable opinion of the officer giving the notice is that it would not be onerous for the institution to provide or produce. This is a very low bar and there appears to be no right of appeal against it or, even, the ability to make representations to HMRC. The financial institution would only be able to argue the point following the imposition of a penalty for non-production. This is far too late in the process.

23. We welcome the proposal that HMRC will be required to produce an annual report on this measure. This should include information on the number of international and domestic information requests made. Another internal safeguard could be that, when HMRC wants to use these powers for a domestic matter, they must get sign off from HMRC's tax dispute resolution board.

24. However, and for the reasons noted above, we do not think that the case has been made for this measure to be extended to include domestic requests for information, and this aspect should be removed from the draft provisions. Failing that, HMRC should provide a detailed analysis as to why it is considered that the rule would have to extend to domestic third-party information requests.

Is the scope of the new power in terms of the information to be reported to HMRC appropriate and sufficiently clear?

25. It is unclear how these provisions will operate where, for example, a bank account is held in one or more joint names, or perhaps is held on trust for beneficiaries. There appears to be considerable scope for mistakes to be made, although the financial institutions concerned are likely to have experience in reporting information of this kind.

How can the need for adequate taxpayer safeguards and timely international exchange of information be balanced? What steps should be taken to ensure

that taxpayer safeguards are not treated as dispensable when they make it more difficult to meet other obligations?

26. This is a difficult balancing act. As noted above, we support the proposal in para 16 of the draft legislation for an annual review to be prepared and submitted to Parliament, but the extension of the measure to domestic third-party requests should be removed.

Notification of uncertain tax treatments

27. ICAEW's response to the consultation document released on 19 March 2020 was published as Representation 56/20

28. ICAEW understands the overriding principle behind the policy objective is to improve HMRC's ability to identify issues where the largest businesses have adopted a different legal interpretation to HMRC's view. We appreciate that, according to HMRC's latest tax gap report referred to above, the estimated tax gap for differing legal interpretation is £4.9bn (down from the £6.2bn quoted in para 2.2 of the consultation document for in 2019), but the impact assessment anticipates that the measure will only bring in £45m by 2023/24, less than 1% of that figure. It would therefore appear that this measure will make little difference to addressing the stated policy objective. Para 2.5 of the consultation document states that the US and Australia have had such measures for many years, but to know whether this comparison is justified we need a detailed understanding of how the large business tax arrangements work in those countries work. For example, do the approach and cultures of engagement with the revenue authorities in those countries on resolving areas of uncertainty differ to those generally adopted in the UK?

29. The feedback from our members is that most large businesses and their advisers already have a good working relationship with their customer compliance manager (CCM). The businesses concerned want a good working relationship with HMRC and will raise concerns and uncertainties with their CCM regularly, often in real time. Accordingly, members think that the regime should be more targeted so that it applies only to those large businesses that have demonstrated high-risk behaviours.

30. We have several major concerns with the regime. Given the other measures already in place around egregious planning such as DOTAS, DAC 6 (which will be very wide ranging and not limited to tax avoidance), accelerated payment notices and follower notices amongst other anti-avoidance provisions, it is not clear what types of arrangements are being targeted by the new regime. Further, these businesses will also be subject to the Senior Accounting Officer regime and other large business compliance initiatives such as Business Risk Review.

31. What will be an uncertainty for these purposes is also far from certain. It needs to be clear what types of arrangements are being targeted which

HMRC do not consider would be already caught under existing legislation and practices. Without this clarity, over reporting and unnecessary compliance burdens will be imposed on compliant businesses. This will be even more problematic for those businesses that do not have a CCM, so do not have an HMRC officer with whom they can raise concerns.

32. Our conclusion is that the case for this measure has not been made and that the proposals should be put on hold. We would be happy to consider further how the existing regimes can be improved if they are shown to be falling short.

7th October 2020