The Information Commissioner's Office (ICO) response to Her Majesty's Revenue and Customs (HMRC) consultation on Strengthening tax avoidance sanctions and deterrents: discussion document ('the consultation')

The ICO has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003 (PECR). We also deal with complaints under the Re-use of Public Sector Information Regulations 2015 (RPSI) and the INSPIRE Regulations 2009. We are independent from Government and uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The ICO does this by providing guidance to individuals and organisations, solving problems where we can, and taking appropriate action where the law is broken.

The stated scope of this consultation is to seek views on proposals for sanctions against those who enable or use tax avoidance arrangements which are later defeated. We welcome the opportunity to respond to this consultation. The ICO would not want data protection law to be seen as a barrier to HMRC's efforts to tackle tax avoidance. An approach that considers data protection early in the design process is less likely to lead to complaints to the ICO in future regarding the lawfulness and fairness of HMRC's sanctions and deterrents.

We have confined our comments to the aspects of the proposals that raise data protection issues. These do not necessarily match up with the 15 consultation questions, but we have in all cases linked our comments back to the specific consultation sections which have raised our interest.

Chapter 2 – Penalties for enablers of tax avoidance which is defeated.

Chapter 2 sets out proposals for 'raising the stakes' for those who design, market, or facilitate the use of avoidance by introducing sanctions when the avoidance they have enabled is defeated by HMRC.

Section 2.7 states that:

> *The word enabler encompasses more than those who design, promote and market avoidance. It includes anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements and without whom the arrangements as designed could not be implemented.*

Section 2.9 provides some further elaboration on this and suggests that the enabler descriptor could include independent financial advisors (IFA), accountants, company formation agents, lawyers, and other parties.

It is clear from the above that many sole traders and partnerships are likely to fall under the definition of enabler. It is a well-established view of the ICO that information relating to sole traders and partnerships are the personal data[1] of that individual/individual partners. Information about the business of a sole trader will amount to personal data, as information about the business will be about the sole trader. Therefore whenever personal data is being processed, the requirements of the DPA must be considered.

The DPA should be a relevant consideration for HMRC when considering the proposal in Section 2.19 of the consultation. Section 2.19 states that:

> *The government also proposes to include the option of naming enablers who are subject to this new penalty [of enabling tax avoidance] in the interest of alerting and protecting taxpayers who play by the rules and to deter those who might otherwise be tempted to engage in enabling tax avoidance.*

This proposal has two objectives – firstly to act as a warning system to compliant taxpayers who may engage the services of an enabler; and secondly to act as a deterrent to other enablers not yet engaging in tax avoidance enablement.

We know that HMRC intend to name enablers, but it is not yet clear what form this naming exercise might take, or what data fields would be included in the naming exercise. By naming enablers, and to do so in a suitably disambiguated format, HMRC are likely to be publishing personal data where those enablers are sole traders or partnerships. Naming would therefore constitute processing under the DPA. In general, we recognise the importance of transparency and understand HMRC's view in the consultation that the prospect of being named as an enabler would act as

[1] DPA section 1(1): "Personal data means data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

an incentive to change behaviour. The DPA does not act as a barrier to proposals such as this, so long as sensible and appropriate safeguards are put in place.

Before engaging in any processing of personal data for the purposes of naming enablers, HMRC must satisfy themselves that they have relevant conditions for processing as set out in Schedule 2 and 3 of the DPA. HMRC must also consider whether this processing would be fair and lawful and within the expectations of sole trader/partnership enablers, and if any exemptions to the requirements of the DPA may apply to the naming regime. Consideration should also be given to the amount of time the information about such enablers would remain in the public domain, and in what format the information would be published, e.g. a downloadable format may hinder future suppression or removal.

Section 2.32 states that:

> *The government favours developing a definition of an enabler based on the broad criteria used for the offshore evasion measure in Finance Bill 2016 but tailored to the avoidance supply chain and ensuring that appropriate safeguards are included to exclude those who are unwittingly party to enabling the avoidance in question.*

It is encouraging to see that HMRC recognise that the definition of enabler must be clearly established and safeguards considered for those unwittingly caught up in avoidance enablement. We acknowledge that some safeguards are proposed from Section 2.28 onwards. However there is at present no mention of how an enabler might appeal against HMRC's decision to name them prior to the naming actually taking place. For some sole trader/partnership enablers there may be genuine privacy risks to their information being published via a naming regime depending on what data fields are involved. HMRC would have to consider a means of evaluating these concerns against their own legitimate objective of deterring enablement, especially where there is a risk of accidental naming of unwitting enablers. At present there is no indication in the consultation that this would be done.

HMRC may also want to consider whether the first objective of their proposal in Section 2.19 – whereby naming would act as a warning system to compliant taxpayers who may engage the services of an enabler – would be better achieved by another means other than a HMRC naming regime. Many of the enabler types listed in Section 2.9 are subject to oversight and regulatory action within their profession. Regulators for many of the professions already maintain public registers of member professionals, both individual and corporate. It may be more useful for a prospective customer of say an IFA to be alerted to the enabler status of that IFA via a register of recognised IFAs. This objective-versus-outcome balance may be a relevant consideration for HMRC when

weighing up the data protection implications of naming sole trader/partnership enablers.

Chapter 5 – Further ways to discourage avoidance

Chapter 5 sets out proposals for influencing behaviours away from tax avoidance at all stages of the life cycle of avoidance arrangements. Whilst the policy objectives set out in this chapter are clear, the descriptions of the interventions in Section 5.8 are not particularly well-drawn or defined. On the basis of what is set out in Section 5.8, it seems likely that some of the intervention types outlined would engage data protection concerns. However, due to the lack of clearly defined terms, these concerns may be unfounded in part. As such, some of the ICO's concerns set out below may turn out to not be applicable, or not applicable to the extent we envisage, once HMRC have provided further elaboration and clear definitions to support these intervention proposals. We would be happy to revisit these proposals with HMRC in future once this work has taken place.

Under the marketing/firm offer interventions list in section 5.8, HMRC propose, amongst other things, that:

> *To ensure users understand what is being marketed, the government could:*
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> 1. *Require the promoter to provide a list of all those to whom the arrangements are being marketed, so that HMRC can send them real-time warnings and alerts.*

Arrangement is clearly defined in the consultation as "any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

Similarly, promoter is defined in the consultation by way of reference to the definition used under the existing Disclosure of Tax Avoidance Schemes (DOTAS) legislation – "DOTAS describes a promoter as a person who is responsible for the design, marketing, implementation, organisation or management of avoidance arrangements, in the course of a business which includes the provision of services relating to taxation."

We understand user to refer to those individuals or organisations that decide to enter into an avoidance arrangement. In the case of individuals and, as stated earlier in this response, organisations such as sole traders and partnerships, the information about them which is compiled in a list would include their personal data. The DPA regulates the use of personal data, and it is here that the ICO's interest lies. Therefore our use of the term user henceforth refers to these classes of arrangement user.

Marketing is a broad term that we acknowledge can be challenging to define categorically. However, an attempt at defining must be made in this case so that all parties to this consultation can understand who may be subject to a HMRC intervention. It is not clear from Intervention 1 what HMRC envisage as constituting 'being marketed.'

The ICO is a regulator for direct marketing, which is one element of the wider marketing concept. We have published guidance[2] on this subject which is widely recognised and used. This guidance may soon be replaced by a statutory direct marketing code of practice[3]. Our interests are therefore engaged whenever direct marketing is taking place.

Direct marketing is defined in section 11(3) of the DPA as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals." This definition covers any advertising or marketing material, not just commercial marketing. All promotional material falls within this definition, including material promoting the aims and ideals of the sender.

The key element of the definition is that the material must be directed to particular individuals. Considering that any HMRC warnings and alerts would be sent to users based on those users' inclusion on a list provided to HMRC by a promoter, it is hard to see how the HMRC communications would not be directed to particular individuals.

The definition of direct marketing in the DPA applies to any means of communication. Therefore the direct marketing requirements of the DPA are not limited to traditional forms of marketing such as telesales or mailshots; they can extend to online marketing, social networking or other emerging channels of communication. The PECR will additionally apply to any HMRC alerts or warnings that fall under the definition of direct marketing and are sent via electronic communications channels. The ICO has also published guidance on the PECR[4].

We suggest that HMRC consult the ICO's guidance on direct marketing, and the guide to the PECR if applicable, to:

- Determine whether their real-time warnings and alerts to users would be likely to constitute direct marketing as defined by the DPA; and if so
- Ensure the compliance steps outlined in the ICO's direct marketing guidance and guide to the PECR are followed from the outset.

[2] ICO direct marketing guidance - https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf
[3] Section 77 of the Digital Economy Bill makes provision for a direct marketing code of practice to be issued by the Information Commissioner - http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0045/17045.pdf
[4] https://ico.org.uk/for-organisations/guide-to-pecr/

When considering the wider data protection implications of Intervention 1, HMRC should pay particular attention to the first principle of the DPA. The first principle of the DPA says, amongst other things, that personal data shall be processed fairly and lawfully. It is certainly permissible from a lawfulness perspective to pass the personal data of a user from a data controller (in this case the promoter) to a third party (in this case HMRC) if the relevant provisions of the DPA have been satisfied.

However, to help satisfy the fairness aspect of the first principle, it is important that the user is made aware in a fair processing notice[5] that their personal data will be passed to a third party, and for what purposes. Intervention 1 raises particular uncertainty around how this might be achieved. As marketing is not clearly defined in the consultation, it is not clear if the promoter already has an existing business/advisory relationship with all the users who they are marketing, or if the marketing is taking place speculatively to build an initial user base for the promoter's arrangement.

If the former, then it is likely that a fair processing notice has already been provided by the promoter to the user at the outset of the business relationship. If the latter, then it is possible that not all users will have an expectation that a promoter is acting as a data controller for their personal data. This would need to be communicated to users, via a fair processing notice provided by the promoter to the user, prior to the outset of any marketing.

If Intervention 1 were to go ahead, then promoters would be obliged under the DPA to ensure that their fair processing notices explicitly state:
- that users' data will be passed to HMRC;
- the purposes for which this will be done; and
- the data fields which will be passed to HMRC.

This will ensure that users have a reasonable expectation that their data will be passed to HMRC. However it will still be incumbent upon HMRC to consider whether they have a legal basis for sending warning and alert communications, especially via electronic channels, to users. The rules around consent to market, and exemptions to these rules, are clearly defined in the DPA and the PECR and provide little room for interpretation.

[5] A fair processing notice, or privacy notice, is an oral or written statement that individuals are provided with by a data controller when information about them is collected. The fair processing notice should state the purpose or purposes for which a data controller intends to process the individual's information and any extra details a data controller needs to give that individual in the circumstances to enable them to process the information fairly.

We see that HMRC further propose in the marketing/firm offer interventions list in section 5.8 that:

> *To ensure users understand what is being marketed, the government could:*
> *5. Require promoters to provide users with HMRC information on the risks of avoidance alongside marketing material – including specific information where arrangements are already subject to HMRC enquiry or attention (as flagged through its Spotlight on Tax Avoidance publication).*

Whilst Intervention 5's form is different to that outlined in Intervention 1, the outcome appears to be the same – to allow HMRC to warn users about the risks of entering avoidance arrangements. Intervention 5 is far less privacy intrusive than Intervention 1 as it involves no transfer of users' personal data from promoters to HMRC.

Additionally the provision of HMRC information to users in Intervention 5 is unlikely to fall under the definition of direct marketing in the DPA as the HMRC information may not be directed at particular individuals – e.g. if the information took the form of unaddressed HMRC leaflets to include with a promoter's marketing material. It is a decision for HMRC as to which intervention is most appropriate in order to achieve their aims. However, in general, the ICO would encourage organisations to consider the use of a non-privacy intrusive measure, which minimises the processing of personal data, where such a measure would achieve the same goal as a more privacy-intrusive, data-intensive measure.

When considering the choice of intervention, the ICO would also encourage HMRC to consider the current problem of scam/fraud communications. The spoofing of government communications by fraudsters, often linking to copycat websites, is a significant element of online fraud and scamming. The implementation of Intervention 1 may result in HMRC sending emails, text messages and other electronic communications to users who will not necessarily expect to receive warnings and alerts of that nature from HMRC. It is likely that many users will mistake these communications for frauds or spam. Additionally, fraudsters may see the introduction of Intervention 1 as a fresh opportunity to scam users by sending fake warnings and alerts. Spoof emails and copycat websites do not fall under the remit of the ICO. However we do have a relevant interest whenever the security of personal data is likely to be compromised. We consider that Intervention 5 would be unlikely to create new opportunities for scammers and fraudsters, and would be less likely to cause concern for users over the veracity of any HMRC warning or alert communication they may receive.

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