



Information Commissioner's Office

The Information Commissioner's Response to HM Revenue & Customs (HMRC) consultation 'Strengthening Sanctions for Tax Avoidance – A Consultation on Detailed Proposals' ('the consultation')

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

The stated primary objective of the proposals in the consultation is to change the behaviour of those who repeatedly engage in tax avoidance and to discourage them from using avoidance schemes in future. We welcome the opportunity to respond to this consultation. We have confined our comments to the consultation questions that raise information rights issues and have chosen to answer the questions together as the issues we raise are relevant to both.

Q9. Do you agree that public naming of the most persistent users of tax avoidance schemes which HMRC defeats would be a fair and effective deterrent? How many schemes should be defeated before it is possible to name a serial avoider?

Q10. Do you agree that this would provide sufficient safeguards for naming serial avoiders? If not, what further safeguards do you suggest?

We have no comment on the number of schemes that should be defeated before it is possible to name a serial avoider. The information rights concerns we raise remain valid regardless of the number that is eventually agreed upon.

On the question of fairness and effectiveness, the ICO's view on this is informed solely by the concept of fairness as set out in the DPA. This interpretation of fairness may be distinct from that used by other respondents to this consultation; HMRC should bear this in mind.

In general, we recognise the importance of transparency and understand HMRC's view in the consultation that the prospect of being named as a tax avoider would act as 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.

The consultation makes several references to the Publishing Details of Deliberate Defaulters (PDDD) regime as a model for how the naming of serial avoiders would operate in practice. Based on the information available on HMRC's website and in the HMRC Compliance Handbook about the operation of PDDD, and assuming the naming of serial avoiders would work similarly, we have made the following observations.

The consultation states that 'Under the 2014 Promoters of Tax Avoidance Schemes legislation HMRC may publish the fact that a person is a monitored promoter and require that monitored promoter to include that fact in their own published literature.' In order to satisfy the fair processing of personal data, individuals who enter schemes of this type should be made aware by their promoter that if the scheme is defeated that individual's details may subsequently be published by HMRC as a serial avoider. In order to ensure a consistent approach, we would advise HMRC to provide guidance to promoters on fulfilling their fair processing obligations under the DPA. As part of that guidance, it may be helpful to direct promoters to the ICO's privacy notices code of practice¹.

In the safeguards section, the consultation states that 'The avoiders would also be offered the opportunity to make representations that they should not be named, for example that it would result in a risk to their safety.' We note that HMRC have issued a factsheet² that outlines how a safeguard of this type operates under the PDDD model. We welcome the considerate approach taken under the PDDD model, which involves writing to all individuals who are due to be named seeking reasons why their details should not be published, and a senior civil servant then making a decision on whether to publish on an individual case-by-case basis. We hope this is the type of model that would be adopted for the naming of serial avoiders.

¹ https://ico.org.uk/media/for-organisations/documents/1610/privacy_notices_cop.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367393/cc-fs13_1_.pdf

Section CH191100³ of the HMRC compliance handbook states that 'the law allows us to publish the details of deliberate tax defaulters in any manner we consider appropriate. For now, we will publish details on the GOV.UK website.' We observe that at present the PDDD list of defaulters is presented as a regular HTML webpage. This format would facilitate HMRC in making changes to and removing the information available on serial avoiders if a risk of harm arose. If in future HMRC decided to publish the details of serial avoiders in a downloadable format, this may hinder the ability to suppress the details of an individual who is at risk of harm by having their personal data available.

Section CH191030⁴ of the compliance handbook sets out the time limit of one year for the publication of deliberate defaulters' details. In this consultation, HMRC state that 'As with PDDD, serial avoiders would be named by having their details published on HMRC's website for a maximum period of time.' We are therefore unsure if the same time limit of one year would apply to the publication of serial defaulters' details. If a longer time limit is envisaged, this may raise data protection concerns which the ICO would wish to revisit with HMRC.

Section CH190880⁵ of the compliance handbook sets out how the PDDD regime complies with the Human Rights Act and the DPA. One of the justifications provided is that 'only the necessary amount of information will be published.' We would hope that the same approach will be adopted in relation to the naming of serial avoiders, as data minimisation is an important privacy protection principle.

Finally, we see that Section CH191080⁶ of the compliance handbook includes a list of what data fields HMRC may publish about an individual under the PDDD regime. This consultation does not include a proposed list of data fields that could be published about an individual under the naming of serial avoiders scheme. As such, it is not possible for the ICO to give an opinion as to whether the data that can be published about a serial avoider is likely to be in compliance with the DPA. It would be helpful for HMRC to keep the ICO informed as to when a list of data fields for publication under the naming of serial avoiders regime is available.

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³ <http://www.hmrc.gov.uk/manuals/chmanual/CH191100.htm>

⁴ <http://www.hmrc.gov.uk/manuals/chmanual/CH191030.htm>

⁵ <http://www.hmrc.gov.uk/manuals/chmanual/CH190880.htm>

⁶ <http://www.hmrc.gov.uk/manuals/chmanual/CH191080.htm>