



Response from ICAS

Tackling offshore tax evasion: A requirement to notify HMRC of offshore structures

27 February 2017

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS welcomes the opportunity to contribute to the consultation "Tackling offshore tax evasion: A requirement to notify HMRC of offshore structures", issued by HMRC on 5 December 2016.
3. ICAS supports efforts by the government and HMRC to tackle tax evasion. However, we are concerned that these proposals will not achieve the desired outcome and will only succeed in imposing an inappropriate burden on compliant, regulated UK advisers. Offshore and unregulated advisers promoting arrangements to facilitate evasion will ignore the new requirement.
4. As the introduction to the consultation notes many measures have been introduced in recent years to tackle offshore evasion (and avoidance). Further measures are in the process of implementation, including the Common Reporting Standard (CRS). We consider that time needs to be allowed for the existing measures to take effect. They should then be evaluated for effectiveness, before any further measures are introduced.
5. We understand that HMRC would like to receive reports only (or largely) of those structures or arrangements which will be used for evasion. Unfortunately, due to the nature of many of the arrangements concerned, which also have acknowledged legitimate uses, we cannot see how hallmarks could be designed to achieve this outcome. Nor do we believe that those involved in evasion will comply with the proposed requirement to notify.
6. ICAS already has concerns about HMRC's ability, given its resources, to analyse and use the data it will be receiving under CRS and the new Requirement to Correct regime in a timely and effective manner. If it also receives large numbers of reports under these proposals – many of which are likely to relate to structures which will not be used for evasion – we question how it could identify the small number which might relate to evasion and follow them up effectively.

Specific questions

Q1: Should the proposal apply only to UK-based persons/businesses who create offshore arrangements, or should offshore persons/businesses also be in scope?

7. Many of the arrangements used for evasion are likely to be created by offshore advisers. If they are excluded from the scope it is also likely that anyone seeking to evade tax will ensure they use an offshore adviser. They should therefore be included within the scope of the rules.
8. However, it is very hard to see how the rules could be enforced in relation to offshore persons and businesses. As noted in our general comments we have serious concerns that the overall effect of the proposed requirement will be to impose a burden on compliant, regulated, UK advisers – where the arrangements will usually only be used for legitimate purposes. Those who are unregulated and based offshore, who are more likely to set up arrangements for evasion, will not report. The requirement and the proposed sanctions will be unenforceable against them.

Q2: How should HMRC define the scope according to which both UK-based and non-UK-based persons/businesses would be liable to report?

9. As set out in paragraphs 4.5 to 4.7 of the consultation, promoters of arrangements which are intended to provide a UK tax advantage are already required to report under DOTAS so the scope of the present proposals would need to be wider.
10. HMRC recognises (paragraph 4.7) that "arrangements which distance legal and beneficial ownership do have legitimate uses. In addition, the person/business designing and implementing these

arrangements may well believe that they are being used for legitimate purposes whether that is the case or not.”

11. We do not believe it would be possible to define the arrangements which would need to be reported in a way that would only impose a reasonable reporting burden on compliant, regulated UK advisers but would also allow HMRC to identify the cases where the arrangements were used for evasion.
12. HMRC indicated in the earlier consultation on the new Requirement to Correct that it had insufficient resources to analyse the CRS data in a timely manner – the original consultation proposed an extension of the assessing time limits by five years to allow HMRC to analyse the data. The current proposals would involve many reports from compliant UK firms of structures which were being used legitimately; we doubt that HMRC has the resources to investigate all the reports rigorously enough (on top of the CRS data it will also be receiving) to identify the small number which might relate to arrangements which are ultimately used for evasion.
13. As noted above we do not believe that most enablers setting out to create structures for evasion will report at all and we doubt that the proposed regime, or associated sanctions, will be enforceable in relation to offshore advisers.
14. Given the acknowledgement in the consultation that some of the structures HMRC are interested in have legitimate uses we are also concerned that legitimate advisory and planning work will move to offshore advisers (particularly lawyers) because clients wish to avoid even the risk of a report being required. We appreciate that HMRC is not seeking to attach a stigma to all offshore arrangements but that is likely to be the perception of the reporting regime.

Q3: Are there any key circumstances missing from the proposed concept and can you see any opportunities to improve on this basic concept?

15. Paragraphs 4.10 to 4.16 seem to some extent to contradict the statements made in the earlier section of the consultation about legitimate uses of the arrangements being targeted. These paragraphs refer to creators using arrangements for lists of clients – and to promoters and marketers of the arrangements. This seems to suggest that the creators, promoters and marketers are well aware that the arrangements are not to be used for legitimate purposes and indeed are being sold on that basis.
16. We believe that such businesses/firms will not comply with any reporting requirement, particularly if they are based offshore.

Q4: Do respondents have any concerns about this approach?

17. We consider that the proposals, if implemented, will place an inappropriate burden on compliant, regulated UK firms which are members of professional bodies. They will take care to analyse their work and report anything which could arguably fall within the rules. Those creating and promoting the arrangements HMRC are interested in will ignore the requirement.

Q5: Are there any other approaches we could consider?

18. As set out in the introduction to the consultation many measures have been taken in recent years to tackle offshore avoidance and evasion. There have also been measures – including the GAAR and POTAS - to tackle aggressive avoidance schemes and their promoters. HMRC already has the option of prosecuting those involved in offshore evasion.
19. To date HMRC has not used the GAAR to counteract any arrangements and it has not so far used the POTAS regime to name promoters. Promoters who might be named in relation to aggressive avoidance schemes, could also potentially be involved in setting up arrangements used for evasion and would fall within the current proposals. Publicity around the use of GAAR and POTAS might have a deterrent effect on those who might be tempted to become involved, not only in aggressive avoidance, but also evasion.
20. Penalties for enablers of avoidance are also being introduced so this will be another power which HMRC can use to tackle those enablers who might be involved in promoting, not only the type of aggressive avoidance schemes which are likely to be defeated, but also evasion.

21. HMRC will be receiving information under the CRS and it will receive disclosures under the new Requirement to Correct. Information about beneficial ownership of offshore structures will also be available to HMRC.
22. HMRC should devote its resources to making use of all this information effectively and actively using powers it already has. We consider that all measures already introduced should be allowed to run for at least three years, with the outcomes and effectiveness being properly evaluated. Only then should consideration be given to the introduction of further measures.

Q6: Can you suggest any hallmarks to identify which arrangements would be subject to notification?

23. We do not believe that it will be possible to design hallmarks sufficiently targeted to produce the reports HMRC want ie only, or largely, reports of arrangements which will be used for evasion.
24. If detailed proposals on hallmarks are put forward for a second consultation, we will consider them and give a response based on specific proposals.

Q7: Do respondents have any concerns about the use of hallmarks to identify which arrangements would be subject to notification?

25. Two of the hallmark proposals outlined in the consultation relate to arrangements which have the effect of moving money outside of CRS reporting and arrangements which have the effect of obscuring or distancing legal and beneficial ownership (for example through the use of a power of attorney or nominees).
26. In the case of arrangements to avoid CRS reporting it seems likely that most of these would have been set up deliberately, with the explicit intention of evading (or continuing to evade) tax. It is therefore highly unlikely that the enablers or clients involved will report them, regardless of any new requirement. If the evasion is discovered they will already be subject to potential prosecution and severe penalties; adding another penalty for failing to report is unlikely to make any difference.
27. There are likely to be numerous legitimate arrangements which obscure or distance beneficial ownership. Powers of attorney are widely used for reasons which have nothing to do with tax evasion. It is hard to see how the hallmark could be framed to keep the numbers of reports to a level where they could be adequately investigated by HMRC.
28. We understand that HMRC may be considering some form of 'points' system under which points would be allocated to particular features which might be present in arrangements. Reporting would be required once a specified number of points was reached. We are sceptical that this would be effective and concerned that it would be onerous for compliant, regulated firms to assess, particularly as arrangements like powers of attorney are widely used. We would need to see detailed proposals in order to comment further.
29. The third possible hallmark mentioned relates to arrangements which, if defeated, would incur an increased penalty. This appears to relate to avoidance, rather than evasion, so does not seem relevant to these proposals. It is also likely that many arrangements which would fall within this hallmark would already be reportable under DOTAS.

Q8: Are there any other approaches we could consider?

30. HMRC already have information about many businesses involved, or likely to be involved, with offshore evasion. They and their clients should be tackled using existing information powers, penalty provisions and prosecution in appropriate cases.
31. As noted in our response to question 5 HMRC should actively use its existing powers. It should also ensure that resources are devoted to effective analysis of CRS data and information disclosed on beneficial ownership to identify arrangements being used for evasion.

Q9: Should the requirement be limited to offshore?

32. Paragraph 4.24 of the consultation envisages that the requirement would apply to arrangements with an offshore element and that the scope should only be extended to cover onshore arrangements if there is evidence that these are used to facilitate tax evasion. If the proposals are implemented, we believe that such evidence should be made available before considering any extension.

Q10: Should the requirement be limited to individuals?

33. Yes. We do not consider that the proposals will be effective, even if restricted to individuals. An extension to corporates would exacerbate both the compliance burden for advisers and the difficulties for HMRC arising from the volume of reports to be dealt with by limited HMRC resources.

Q11: Are there any further opportunities to change the scope of the measure in order to maximise its effectiveness?

34. We have no comments on this question.

Q12: In your view, what impact will issues of Legal Professional Privilege have on the effectiveness of the requirement?

35. The Law Society recently commented (<http://www.lawsociety.org.uk/news/stories/beneficial-ownership-of-offshore-companies-and-trusts-hmrc-data-holder-notices-to-firms/>) on HMRC information notices relating to the disclosure of information on the establishment of offshore companies and trusts. It disagreed with HMRC's view that the information could be supplied without breaching LPP. We consider that similar objections would be raised to the present proposals.
36. We are concerned that this would exacerbate the unfair competition issues which already exist between lawyers and tax advisers (in relation to professional conduct guidance).

Q13: How might HMRC address the issue of Legal Professional Privilege?

37. We have no comments on this question.

Q14: In your view, what impact will this measure have on UK resident but non-domiciled individuals?

38. As the consultation notes (paragraph 4.29) non-domiciled individuals frequently use complex offshore structures to remain compliant with UK tax law or for non-tax reasons, such as privacy.
39. Whilst we appreciate that HMRC is not seeking to attach a stigma to all offshore arrangements non-domiciled individuals are likely to perceive the reporting regime in this light, with undesirable consequences for HMRC and professional firms in the UK.
40. As noted in our response to Question 2 we are concerned that legitimate advisory and planning work will move to offshore advisers (particularly lawyers) because clients wish to avoid even the risk of a report being required. This is particularly likely to be the case with non-domiciled individuals.

Q15: How might HMRC address the impact on UK resident but non-domiciled individuals?

41. We have no comments on this question.

Q16: Do you agree the measure should apply to existing arrangements and not just new ones?

42. If introduced the measure should only apply to new arrangements – not those set up in the past. ICAS does not support retrospective legislation. Firms might no longer have the necessary information to provide reports on arrangements set up for clients in the past, or it would involve unreasonable amounts of work to produce it. If the measure is introduced any requirement to report existing arrangements should only apply to the users of the arrangements – not to advisers.

Q17: In your view, are there any other considerations that HMRC should take into account when considering the feasibility and design of a requirement to notify HMRC of offshore structures?

43. We have no comments on this question.