HM Revenue & Customs

Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion

Consultation document
Publication date: 16 July 2015
Closing date for comments: 8 October 2015

Scope of this consultation:	The purpose of this consultation is to find appropriate, proportionate ways of levying civil sanctions against those who deliberately enable offshore tax evasion. We welcome views on defining “enabler”, as well as comments on the design of the proposed sanctions.
Subject of this consultation:	The Government wants to tackle those people and businesses who help UK taxpayers to use another jurisdiction’s systems with the objective of evading UK tax.
Who should read this:	We would like to hear from anyone who deals with tax evaders to understand the potential impact of these sanctions, as well as those who believe they or their members will be adversely or disproportionately affected by them.
Duration:	The consultation period runs from 16 July to 8 October 2015.
Lead official:	Jen Knowlson, HMRC Centre for Offshore Evasion Strategy
How to respond or enquire about this consultation:	Responses can be submitted via email to: consult.nosafehavens@hmrc.gsi.gov.uk Or via post to: Jen Knowlson HMRC Centre for Offshore Evasion Strategy Room 1C/26 100 Parliament Street London SW1A 2BQ
Additional ways to be involved:	Please contact the lead official if you are interested in meeting to discuss this paper.
After the consultation:	We aim to publish a response document and draft legislation for further consultation at Autumn Statement 2015.
Getting to this stage:	This consultation takes forward HMRC’s strategy for tackling offshore evasion, *No Safe Havens*. An update on this strategy was published in April 2014. There is no current regime which seeks to tackle the actions and behaviours of the full range of potential enablers, although a review of legislation which could be used to tackle the problem has been carried out for the purposes of this consultation.
Previous engagement:	None.

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Foreword

Tax evasion is a crime which deprives the Government of much needed funds to run our public services, unfairly placing a greater burden on the vast majority of people who pay their fair share of tax. This Government is committed to cracking down on tax evasion and will be relentless in its pursuit of evaders.

For too long it has been too easy for people to hide their money overseas to evade tax. We have changed that. Over the last two years the UK has led the drive in Europe, in the G20 and through its G8 Presidency to revolutionise international tax transparency. We now have agreement, reached among 94 countries, to exchange information on financial accounts automatically every year. Under these agreements, starting in 2016 for our Crown Dependencies and Overseas Territories, HMRC will receive a wide range of information on offshore accounts held by UK tax residents, including names, addresses, account numbers, interest and balances. This will be an unprecedented step change in HMRC's ability to tackle offshore tax evasion.

HMRC has given people ample opportunity to regularise their affairs. In advance of HMRC receiving this new data there will be one last chance for evaders to come forward and put their affairs in order. If they choose not to, it is right and fair that we make sure that the penalties they face, and the penalties for those who help them, reflect the wider harm caused by their actions and act as an effective deterrent to others.

HMRC are today publishing four consultations on new tougher penalties before they are introduced. These cover:

- A new criminal offence for corporations that fail to take adequate steps to prevent the facilitation of tax evasion by their agents;
- Tougher financial penalties for offshore evaders, including the possibility of a penalty based on the value of the asset on which tax was evaded as well as wider public naming of offshore evaders;
- A new penalty regime for those who enable tax evasion, based on the tax they have helped taxpayers to evade and naming of enablers;
- A new simpler criminal offence to make prosecution of offshore evaders easier.

The vast majority of people and businesses in the UK pay the tax they owe on time and do not attempt to dodge their responsibilities. Our message to evaders is clear and simple – HMRC is closing in on you, so come forward now or face tougher sanctions, both civil and criminal.

David Gauke

Financial Secretary to the Treasury

1. Executive summary

The structure of this consultation document

1.1 This consultation document sets out the Government's plans to introduce new civil sanctions for enablers of offshore tax evasion.

1.2 This is the first time that HMRC has set out its views on the subject of enablers of offshore tax evasion. We have structured this document as follows:

- Chapter 2 sets out what we mean by "offshore tax evasion".
- Chapter 3 sets out what we mean by "enabler" of offshore tax evasion.
- Chapter 4 sets out the range of options already available to HMRC for enablers who exhibit either "careless" or "deliberate" conduct, and asks for your views on what gaps exist.
- Chapter 5 brings together the thinking set out in Chapters 2 to 4. HMRC will first need to establish that a taxpayer has been involved in offshore tax evasion, before we can consider the position of those who helped the evader. Chapter 5 discusses how we might do this, and sets out what sanctions we consider are appropriate to deal with those who deliberately enable offshore evasion. The Chapter also details how these might operate in practice.
- Chapter 6 asks for your views on the public naming of deliberate enablers as a potential sanction.

1.3 For the avoidance of doubt, options for criminal sanctions for enablers are not considered as part of this consultation. However, HMRC is currently conducting a separate consultation, '*Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion'*, which considers a new criminal offence to apply to corporations who fail to prevent their agents from criminally facilitating tax evasion.

2. Introduction

HMRC's offshore evasion strategy

2.1 Offshore evasion is illegal and harmful. It reduces revenue available for funding public services and increases the burden on honest taxpayers. A small minority of taxpayers fall short of meeting their obligations to society by taking advantage of offshore jurisdictions and exploiting complex structures to evade tax.

2.2 HMRC's strategy for tackling offshore evasion, No Safe Havens, sets out five key objectives:

- there are no jurisdictions where UK taxpayers feel safe to hide their income and assets from HMRC;
- would-be offshore evaders realise that the balance of risk is against them;
- offshore evaders voluntarily pay the tax due and remain compliant;
- those who do not come forward are detected and face vigorously-enforced sanctions; and
- there will be no place for the facilitators, or enablers, of offshore evasion.

2.3 Our ability to achieve these objectives and tackle offshore tax evasion will be significantly enhanced by the Common Reporting Standard (CRS). More than 90 countries have committed to the CRS and will automatically exchange taxpayer information from 2017. HMRC will have access to greater levels of information about accounts, trusts and shell companies held offshore by UK resident taxpayers than ever before. In addition to CRS, we will also be receiving data under the central register of beneficial ownership.[1] These are game changers – HMRC will be able to detect offshore tax evasion much more easily than in the past. The days of hiding money offshore are coming to an end.

2.4 In preparation for the CRS, we are bolstering our approach to tackling offshore tax evasion. Evaders are on notice that our existing disclosure facilities will close at the end of 2015 and be replaced by a final, stricter worldwide disclosure facility in advance of the first data exchange under CRS in September 2017. Those who do not take these opportunities to come forward will be caught and will face tougher sanctions, both criminal and civil. As well as tougher sanctions for evaders, we are also strengthening our approach to those who enable or facilitate evasion with the introduction of new civil sanctions to tackle enablers and a new corporate criminal offence of failure to prevent the

[1] From January 2016, the Small Business, Enterprise and Employment Act 2015 will require UK companies to create and maintain a register of people who have "significant control" over the company. For more information, click here.

facilitation of evasion. These actions shift the balance of risk against evaders and those who enable them and ensure HMRC can tackle offshore tax evasion much more effectively.

2.5 Accordingly, at Budget 2015 and in its publication "*Tackling Evasion and Avoidance*", the Government announced a further package of measures to tackle offshore tax evasion. These will ensure that those who do not come forward face rigorous sanctions and **will confirm that there is no place for facilitators, or enablers, of offshore evasion**. That package includes four consultations:

- Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders.
- Tackling offshore tax evasion: Civil sanctions for enablers of offshore evasion.
- Tackling offshore tax evasion: A new corporate criminal offence of failure to prevent the facilitation of evasion.
- Tackling offshore tax evasion: A new criminal offence for offshore evaders.

What is offshore evasion?

2.6 *No Safe Havens* explains that HMRC sees offshore tax evasion as using another tax jurisdiction with the objective of evading UK tax. This includes:

- moving UK gains, income or assets offshore to conceal them from HMRC;
- not declaring taxable income or gains that arise overseas, or taxable assets kept overseas; and
- using complex offshore structures to hide the beneficial ownership of assets, income or gains.

2.7 Offshore tax evasion is distinct and separate from both tax avoidance and organised crime.[2]

Existing civil sanctions for offshore evaders

2.8 Those who evade UK tax using offshore structures are liable to civil penalties. These can be charged in relation to "offshore matters", "offshore transfers", or "relevant offshore asset moves", although the offshore aspect is limited to matters involving income tax (IT), capital gains tax (CGT) and, in most cases, inheritance tax (IHT). Please see Annex A for details. Therefore, in line civil penalties for offshore, this consultation does not consider penalties charged with reference to taxes other than IT, CGT and IHT.

2.9 In all cases, these offshore penalties can be charged where the action taken by the taxpayer is *deliberate, whether or not concealed*. In some cases, penalties can also be charged where there is a failure to take reasonable care. We

[2] Although evasion may sometimes be a by-product of organised crime or, in rare cases, avoidance.

discuss the link between the taxpayer's behaviour in civil cases and action against the enabler in more detail in Chapter 5.

Existing criminal sanctions for offshore evaders

2.10 There is no general criminal offence of committing offshore tax evasion. Prosecutions for direct tax non-compliance are usually brought under:

- the common law offence of cheating the public revenue;
- the Fraud Act 2006, which introduced criminal offences of fraud by representation and fraud by failing to disclose;
- section106A of the Taxes Management Act 1970, which introduced an offence of fraudulent evasion of income tax; and
- money laundering offences under Proceeds of Crime Act 2002.

2.11 Such prosecutions may, either wholly or in part, involve matters which, under civil law, would constitute an offshore matter, an offshore transfer, or a relevant offshore asset move.

2.12 HMRC is currently also consulting on a new criminal offence for offshore evaders. The implications of this prospective offence are not considered as part of this consultation.

Evaders and enablers: making the connection

2.13 The above sanctions reflect HMRC's deep-rooted commitment to punish those who evade paying their fair share of tax by using offshore means. However, very few evaders work alone in their efforts to withhold tax from the Exchequer. As detailed in our No Safe Havens strategy, we now want to go further and focus on the 'enablers' who help those evaders to hide income and gains offshore.

2.14 We will next consider what we mean by an enabler of offshore evasion.

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3. What is an enabler?

3.1 This section sets out the different services we believe an enabler may provide, then considers the various behaviours and levels of knowledge an enabler may exhibit. This provides the context to the proposed sanctions, as detailed in later Chapters.

3.2 For the avoidance of doubt, HMRC is using the term "enabler" to describe any person (whether natural or legal) who, whether knowingly or unknowingly, provides services which assist a UK taxpayer to evade UK tax. Our aim is to deal appropriately with the broad range of behaviours and services associated with enablers.

How might an individual or business enable offshore evasion?

3.3 There are a number of ways in which an individual or business might knowingly or unknowingly enable someone to evade tax through the use of offshore structures.[3] They are:

1) **Acting as a "middleman"**– arranging access and providing introductions to others who may provide services relevant to evasion.

2) **Providing planning and bespoke advice** on the jurisdictions, investments and structures that will enable the taxpayer to hide their money and any income, profit or gains.

3) **Delivery of infrastructure** – including setting up companies, trusts and other vehicles that are used to hide beneficial ownership; opening bank accounts; providing legal services and documentation which underpin the structures used in the evasion such as notary services and powers of attorney.

4) **Maintenance of infrastructure** – providing professional trustee or company director services including nominee services; providing virtual offices, IT structures, legal services and documentation which obscures the true nature of the arrangements such as audit certificates.

5) **Financial assistance** – helping the evader to move their money or assets out of the UK, and/or keep it hidden by providing ongoing banking services and platforms; providing client accounts and escrow services; moving money through financial instruments, currency conversions etc.

6) **Non-reporting** – not fulfilling their reporting, regulatory or legal obligations, which in itself helps to hide the activities of the evader from HMRC.

[3] We recognise that the use of offshore structures can be legitimate.

Q1. What are your views on the use of the term "enabler" to describe any third party who provides such services, whether or not they are aware that they are doing so?

Q2. Does the list above reflect your experience, from dealing with disclosures for example, of the ways in which evaders have been assisted by third parties? If not, how has your experience differed?

What behaviours might an enabler exhibit?

3.4 Broadly speaking, in our view an enabler can exhibit one of three behaviours in relation to offshore tax evasion:

Unaware[4]

3.5 There may be those who are genuinely and reasonably unaware that they have enabled tax evasion. Despite having taken reasonable care (e.g. by conducting thorough due diligence and reacting to, or investigating, anomalies to a reasonable level), they have been misled by the evader.

Careless

3.6 Those who fail to implement and enforce adequate policies and procedures that would highlight the evasion could be careless. This could include failure to conduct appropriate due diligence (either at initial client acceptance stage or as an ongoing requirement), failure to identify or escalate concerns that tax evasion may be taking place (e.g. inadequate whistleblowing procedures) or failure by a corporation to take reasonable steps to prevent the officers and employees who act on its behalf from enabling offshore tax evasion.

3.7 Though the enabler may not have acted knowingly, their failure to take reasonable care makes them careless.

Deliberate

3.8 Finally, there are those enablers who are willing to act dishonestly, for example, in return for money or personal gain. The difference between careless and deliberate behaviour is one of knowledge of, and intent to enable, the evasion.

[4] It is very rare for HMRC to be presented with a case involving offshore evasion where the evader has duped everyone involved in creating and maintaining the structure used to evade. However, the extent of an enabler's knowledge of the evasion, and their motivations for involvement in the evasion, vary widely from case to case.

We acknowledge that there may be evidential difficulties in proving this difference.

3.9 This category primarily includes those who are knowingly involved in and provide direct assistance to enable the evasion. These enablers may make a business out of tax evasion, insofar as they generate revenues from the services they provide to those seeking to hide monies from HMRC. They may create or provide access to a network of other deliberate enablers, or provide dubious due diligence assurances to unaware enablers.

3.10 The deliberate category may also include an enabler who knowingly turns a blind eye to evasion in order to retain or attract business. Although the enabler may not directly or actively provide actual assistance to the evader, they may have knowledge that the evasion is taking place and choose deliberately to do nothing about it.

Bringing behaviour and activity together: examples of enablers

3.11 Boxes 1 to 5 below provide illustrative examples of offshore evasion cases where enablers are involved.[5] We use these examples to highlight the types of services enablers provide and the behaviour and level of knowledge exhibited by the enabler when providing those services.

3.12 Our focus will be on the services that an enabler provides to an offshore evader, and the behaviour/level of knowledge of the evasion that they demonstrate when carrying out those services. Though illustrative, these examples reflect genuine activities and behaviours that HMRC has seen in the past and seeks to tackle more effectively in the future.

Q3. What are your views on our approach to using behaviours and services, as outlined in this Chapter, to define an enabler?

Q4. Do you find this categorisation of behaviours and services clear and comprehensive? Please explain your answer.

[5] We acknowledge that in some cases the jurisdictions quoted in these examples have since taken steps to work with international partners in becoming more transparent and are assisting global initiatives to crack down on tax evasion. However, jurisdictions of risk continue to exist.

Example 1: Sarah

In 2003, Sarah was introduced to Malus GmbH, a Swiss adviser, to create a tax efficient structure for potential future investment into UK property. Malus was an approved intermediary of a UK high street bank (after they carried out appropriate due diligence on Malus with a view to forming that relationship), and Sarah planned to put her post-tax employment earnings into this structure.

Sarah had a relative, Maisie, who was neither resident nor domiciled in the UK. Malus advised Sarah that she should set up a Swiss trust using Maisie as the settlor. This happened, although Maisie was never asked to sign anything and was not even aware that a trust was being set up with her named as the settlor. Sarah was advised that she retained beneficial ownership of all the assets despite the trust arrangement.

The trust had bank accounts with Lunar Bank in Monaco.

Sarah admitted her actions following initial contact with Malus were deliberate.

HMRC's view of the above, in relation to the behaviour of an enabler, is:

The *UK high-street bank* did not know that Malus would help Sarah to evade tax and had referred Sarah to them in good faith: **Unaware**

Malus provided structuring advice which they knew was not legal, as well as professional trustee services to Sarah's trust which they knew was not properly constituted and would be used by Sarah to hide her assets: **Deliberate**

Lunar Bank's anti-money laundering checks were inadequate and did not highlight the illegality of the trust arrangement: **Careless**

Example 2: John

John ran a UK business. In the mid-1970s, he opened a Channel Islands bank account in which he could hide untaxed business income from HMRC.

John took his untaxed funds on a regular basis to a business contact, Michael, who often travelled to the Channel Islands. Michael would take the money in a suitcase to the Channel Islands and deposit it in John's bank account.

In 2004, following unsolicited advice from the Channel Island bank, John transferred the bank accounts to a nominee Foundation in Panama to avoid reporting under the EU Savings Directive and retain secrecy over his funds. The Foundation was operated by Channel Island professionals.

HMRC's view of the above, in relation to the behaviour of an enabler, is:

Michael was knowingly helping John to physically move funds offshore for tax evasion purposes. Michael was happy to do this because it fostered good continued business relations with John: **Deliberate**

The Channel Island bank initially opened the account for John knowing that he wanted his activities to remain hidden from HMRC. Many years later it actively advised John on how he could continue hiding his money: **Deliberate**

The Channel Island professionals helped John to maintain a structure which facilitated his evasion activities. These professionals were asked by the bank to assist others in John's position and knew they were assisting people to evade UK tax: **Deliberate**

Example 3: Manjit

Manjit was the owner and Director of a UK-based interior design business. He generated false invoices and drew cheques with fictitious payee details logged in the company records in order to divert proceeds offshore and reduce taxable profits in the UK. These cheques were, in fact, made payable to an extensive network of offshore discretionary trusts and corporate vehicles in Gibraltar, Belize, Seychelles, and the British Virgin Islands ("BVI"). These were managed by a professional trust company.

In particular, the trustees invested the funds in a portfolio of bank accounts and investment properties held in the name of "off the shelf" corporate vehicles in the Seychelles and BVI. The properties, acquired with the proceeds of tax evasion, were then rented out commercially with UK taxes paid on the rental income under the non-resident landlord scheme ("NRLS") to give the appearance of a genuine offshore ownership arrangement. The NRLS arrangement had been accepted by HMRC, being the only information that was available at the time.

HMRC's view of the above, in relation to the behaviour of the enabler, is:

Although *the trustees* claimed that they believed everything they were doing was "above board" and stated that "the affairs of their clients were none of their business", in reality the trustees turned a blind eye to the true beneficial ownership of the structure in order to retain Manjit's business: **Deliberate**

Example 4: Paula

Paula was domiciled in Australia, but had been resident in the UK since the 1970s. In 2012, Paula wanted to regularise her affairs and disclosed to HMRC that she had been hiding substantial UK taxable income for a prolonged period. She had been using companies in Bermuda and the Bahamas to hide both business and private assets and to facilitate the movement of funds through a variety of jurisdictions.

The network of companies had been set up by Paula's lawyer, a partner in a Guernsey-based legal partnership, in total secrecy, meaning that Paula had never contributed to UK taxes during more than 30 years of UK residence.

HMRC's view of the above, in relation to the behaviour of the enabler, is that:

The lawyer in Guernsey actively assisted Paula, knowing that the structures would enable her to evade UK tax: **Deliberate**

Example 5: Christoph

Christoph was a wealthy non-domiciled individual who was a long-term UK resident. His job entitled him to significant bonus payments, related to duties performed wholly in the UK, on which he did not want to suffer UK tax. His self-employed UK accountant put him in touch with an adviser in Israel. The Israeli adviser set up a number of bank accounts in Singapore in the names of BVI-registered companies, under the control of a discretionary trust. Christoph arranged for his bonus payments to be lodged in the accounts operated in Singapore. As well as evading income tax on his employment income over a number of years, Christoph's settlements also attracted significant Inheritance Tax liabilities.

HMRC's view of the above, in relation to the behaviour of the enabler, is that:

The *UK accountant* understood what Christoph was trying to achieve, and for many years acted as a conduit through which Christoph contacted the Cayman adviser: **Deliberate**

The *Israeli adviser* also understood Christoph's aims, and knew that secrecy was key to achieving those aims. He provided advice, and also set up and maintained the structure: **Deliberate**

The *Singapore bank* did not know that the structure was being used to evade UK tax. **Unaware**

4. Current civil sanctions available to HMRC – their scope and limitations

4.1 As explained above, the term “enabler” covers the entire spectrum of people and organisations that enable offshore evasion. However, HMRC believes that enablers who fall within the category of “unaware” deserve assistance, not punishment. We want to take positive action to educate those whose professional skills are exploited by evaders, such that evasion can be more easily identified by those people in the future. We would seek to work with representative bodies and others in this regard, although this is not the subject of this consultation.

4.2 While we continue to seek opportunities to use our existing powers to tackle “careless” and “deliberate” enablers, we do not believe that current legislation is as comprehensive as it could be. This chapter considers the scope of existing offences and sanctions in relation to those who carelessly or deliberately enable offshore tax evasion. These are described in full in this chapter and summarised in the following table:

Legislation	Section	Applies To	Does not apply to	Behaviour	Civil sanctions	Scope
Finance Act 2007	Schedule 24, Paragraph 1A	Natural and legal persons who *deliberately* provide false information in taxpayer documentation	Those who enable other than by providing information, e.g. service providers, trustees	Deliberate	Up to 100% of lost revenue	**Limited scope of activities**
Finance Act 2012	Schedule 38	Tax advisers who are individuals (see appendix for details)	Corporate bodies and any enabler not providing tax advice	Deliberate (dishonest)	Maximum £50,000 penalty, public naming of offenders	**Limited scope in application, behaviours, activities and sanctions**
Money Laundering Regulations 2007	Regulations 7-13, 20, 23, 24 and 42-44	Individuals and corporate bodies supervised by HMRC	Focuses on due diligence and reporting. Limited HMRC oversight	Careless[6]	Warning letters, removal of ‘fit and proper’ person status, unlimited penalties	**Limited HMRC oversight and scope of behaviours**

[6] The MLR are not behaviour specific, though we believe they cover primarily careless enablers as defined in Chapter 3.

Paragraph 1A of Schedule 24 to Finance Act 2007

4.3 A penalty is chargeable, under this legislation, where a taxpayer's documentation contains an inaccuracy and the inaccuracy is attributable to another person who **deliberately supplied false information or deliberately withheld information**, intending for the document to contain that inaccuracy.

4.4 Those who enable in other ways, as detailed in Chapter 3, e.g. professional service providers who set up a sham trust and directors of a corporate vehicle used to hide beneficial ownership, would not be covered.

4.5 In terms of the behaviours set out in Chapter 3, it could not be used against those enablers whose actions were careless rather than deliberate.

4.6 This penalty does not apply to tax agents, as this is covered in Schedule 38 to Finance Act 2012 (below).

Schedule 38 to Finance Act 2012

4.7 This offence was introduced to penalise tax agents for dishonest conduct. This schedule notes that an individual 'engages in dishonest conduct' if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss in tax revenue.

4.8 Paragraph 2 of Schedule 38 defines 'a tax agent' as an individual who, in the course of business, assists other persons ('clients') with their tax affairs. Individuals can be tax agents even if they (or the organisations for which they work) are appointed (a) indirectly; or (b) at the request of someone other than the client. Assistance with a client's tax affairs includes (a) advising a client in relation to tax; and (b) acting or purporting to act as an agent on behalf of a client in relation to tax.

4.9 The term 'tax agent' can therefore be seen as wider than a tax agent in the traditional sense. 'Advising a client in relation to tax' is a wide term and would include those enablers who are directly providing tax advice. However, **it could not be used against those who enable evasion in other ways** e.g. by providing banking services, or by drafting false legal agreements. It can also only be used to sanction individuals.

4.10 In addition, it can only apply to those whose behaviour is "dishonest" – careless conduct or poor quality work is not covered by this legislation.

Money Laundering Regulations 2007

4.11 The Money Laundering Regulations 2007 (MLR) are designed to implement, in part, Directive 2005/60/EC of the European Parliament and of the Council on the use of the financial system for the purpose of money laundering and terrorist financing (the Third Directive). Tax evasion, including offshore tax evasion, is a form of money laundering.

4.12 The MLR (managed by HM Treasury) apply to the financial, accountancy, legal and other sectors, including trust and company service providers offering company formation, nominee, registered office and mail forwarding services. The MLR require persons undertaking those activities to apply risk-based customer due diligence measures, report suspicious transactions or activity, and take other steps to prevent their services being used for money laundering or terrorist financing.

4.13 HMRC recognises that this requirement to have adequate due diligence policies and procedures should, in most cases, cover careless enablers.

An enabler would act carelessly by:

a) not enforcing adequate policies and procedures; or

b) failing to report the offshore tax evasion.

However, we believe the MLR's focus on due diligence procedures does not fully encompass the deliberate activities as highlighted in Chapter 3 and within the illustrative examples.

4.14 Furthermore, HMRC has limited oversight to supervise the various individuals and legal persons that could enable offshore tax evasion, being one of 27 UK supervisory authorities of the MLR (for a full list of supervisors, please see https://www.gov.uk/anti-money-laundering-registration). We will continue to work with other supervisors to ensure they can identify and sanction enablers as appropriate.

4.15 For more details on the MLR's coverage, HMRC's role and what supervisory authorities can do, please see Annex B.

Conclusion

4.16 In light of the activities and behaviours in Chapter 3, HMRC believes that the current legislation does not comprehensively cover all circumstances where an individual or legal person may **deliberately** enable tax evasion. We do, however, consider the MLR to cover adequately instances where an enabler **carelessly** enables the offshore tax evasion by ensuring they implement and enforce adequate due diligence policies and procedures.

Q5. Do you agree that these are the relevant civil sanctions that apply to enablers?

Q6. Do you agree with our conclusions on the scope of existing sanctions? Please state your reasons.

We will now explore how HMRC might identify and penalise those enablers who are not caught by existing legislation.

5. Proposed sanctions – a penalty for deliberate enablers

5.1 HMRC's compliance strategy is based on three basic principles: Promote, Prevent and Respond. The proposed sanctions support both the Prevent and Respond principles.

5.2 The implementation of these sanctions will act as a deterrent to prevent non-compliance by potential enablers.

5.3 Respond is about tailoring our compliance activities and interventions to address specific behaviours and risks. The sanctions proposed in this consultation will support the respond aspect of the strategy by imposing costs, both financial and reputational, on those who continue to enable offshore tax evasion after any new sanctions become law.

5.4 The proposals in this Chapter follow the five principles set out in our publication "*HMRC Penalties: a discussion document"*[7], which we consider should underpin our penalty regimes. These principles are:

1) The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.

2) Penalties should be proportionate to the offence and may take into account past behaviour.

3) Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.

4) Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.

5) Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.

The following paragraphs describe our proposed approach.

Who should be liable to a penalty?

5.5 We have identified two conditions, both of which would need to be met, for determining whether an enabler who acted deliberately should be liable to a penalty:

[7] Published on 2 February 2015. Responses will be published in due course.

Condition 1: The enabler must have deliberately enabled a UK taxpayer to evade income tax, capital gains tax and / or inheritance tax by utilising structures in offshore jurisdictions.[8]

Condition 2: HMRC must either:

(i) have secured a conviction against the evader;

(ii) have charged the evader an offshore penalty as set out in Annex A; or

(iii) hold sufficient proof of the evader's culpability to secure either (i) or (ii) above if the appropriate procedures had been pursued.

Condition (2) (iii) would apply where the evader had passed away but HMRC considered it still appropriate to apply a sanction against the enabler.

As stated in Chapter 3, the term "enabler" would include both natural persons and legal entities.

Q7. What are your views on these conditions? Should any be removed or changed, or further conditions added, and if so why?

5.6 We are not proposing to charge the penalty on enablers whose behaviour was careless, since we consider they can be adequately dealt with under Money Laundering Regulations. However, we consider it would be straightforward to widen the scope of this proposed sanction to include careless behaviour if this was deemed appropriate, and would refer respondents to question 6 posed in Chapter 4 in this regard.

Level of penalty

Standard amount

5.7 We propose that the standard amount of the penalty will be 100% of the revenue loss to which the enabler's actions contributed. This level is consistent with the penalty applied to third parties under Paragraph 1A of Schedule 24 to Finance Act 2007.

5.8 An alternative approach could be to apply a scale of fixed monetary amounts. However an enabler could be anything from a sole trader to a multinational corporation, so it may be difficult to achieve proportionality balanced with sufficiently punitive sanctions if fixed amounts are used.

[8] Other taxes, including corporate tax, and indirect taxes, such as VAT, are outside the scope of the proposed sanctions, in line with our civil penalties regime for offshore evasion.

5.9 We consider that:

a) a penalty based on the amount of lost revenue would be proportionate, as it would reflect the seriousness of the evasion to which the enabler contributed;

b) the standard amount of 100% is sufficiently punitive; and

c) a penalty should be applied in respect of each separate taxpayer whose evasion they have enabled.

Q8. What are your views on the standard penalty amount being 100% of revenue loss to which the enabler contributed? Do you have any alternative suggestions?

Multiple enablers

5.10 A single evader could have been assisted by more than one enabler. Where we establish that multiple enablers have contributed to the same occurrence of evasion we propose to calculate the penalty to be charged against each in their own right rather than apportioning one penalty calculation between them all. There are several reasons for this:

1) in our view the existence and involvement of other enablers does not lessen the fact that each contributed to the evasion;

2) any reduction given to an enabler in recognition of their disclosure will need to be determined separately; and

3) in extreme cases, an apportionment of a single penalty between multiple enablers would give rise to situations where an appeal by one enabler over the penalty charged would affect the penalty situation of all other enablers in that particular case, which could take a disproportionate amount of time and resource to resolve.

Q9. What are your views on the suggested approach where multiple enablers are involved?

Reduction for disclosure

5.11 Whilst any penalty needs to be sufficiently punitive to deter potential enablers and appropriately respond to those who have enabled evasion, we want to ensure we do not discourage enablers who want to change their behaviour and become compliant. For that reason we may want to give penalty reductions for disclosure. We believe these reductions would encourage enablers to help us to identify evaders and the amounts of tax involved. This is consistent with the approach taken for third parties falling within Paragraph 1A of Schedule 24 to Finance Act 2007.

5.12 The amount of any reduction would take account of whether the enabler came to us entirely on their own initiative or only after prompting from HMRC, and the extent and quality of the disclosure. We consider that 30% of the revenue loss might be the appropriate “minimum penalty level” following a full and unprompted disclosure. This is consistent with penalty reductions for inaccurate returns concerning deliberate taxpayer behaviour.

Q10. What are your views on a provision to reduce the amount of the penalty to recognise any assistance the enabler gave us to put things right, and the quality of that assistance? Is a 30% lower limit appropriate, and why?

5.13 Setting a single percentage for the standard amount of penalty, and only providing reductions for disclosure, treats all forms of deliberate enabling as being equally serious. In our view this is the right approach since the amount of revenue lost is not necessarily affected by the nature of the action or inaction of the enabler.

5.14 Alternatively, we could treat some enabling actions or inactions as either more or less serious than others, and provide for different standard amounts of penalty according to the nature and extent of the enabling.

Q11. What is your view on treating all forms of deliberate enabling as equally serious?

Q12. If we were to treat various forms of deliberate enabling differently, what could the relevant criteria be?

5.15 HMRC is alert to the inherent potential for a conflict of interest between the enabler and the evader. Both parties will wish to minimise their exposure to penalties for deliberate behaviour. This may cause the enabler to block attempts by the evader to put their affairs in order – for example, by refusing to provide certain information – because of the impact that the information may have on determining the enabler’s own culpability.

Q13. To what extent do you think a reduction for disclosure will minimise that conflict of interest?

Q14. What other factors should we take into account in order to determine the amount of any reduction?

Upper and lower limits

5.16 Since there is no de minimis value for recovering the tax evaded in offshore cases, we propose setting a lower monetary limit of £1,000 to the penalty (after any reductions), to ensure all enablers liable to a penalty are charged a meaningful amount.

Q15. Do you agree that there should be a lower limit and is £1,000 an appropriate amount? Please give reasons for your answer.

5.17 As noted above, enablers may range from sole traders to multinational corporations. Given this, and in order to avoid disproportionate outcomes, we consider that there may be a case for setting a fixed monetary upper limit to the penalty, with the total amount owed by the enabler being the lower of:

a) The penalty **before** reduction or a fixed amount (£X); OR

b) The penalty **after** reduction or a fixed amount (£X).

Q16. Do you agree that there should be an upper limit to the penalty or should it be an unlimited fine?

Q17. Which of a) and b) in 5.17 above is your preferred option for setting the limit and why?

Q18. Do you consider there are other, better options for setting the upper limit, e.g. as a percentage of turnover?

Safeguards

5.18 The conditions for determining whether a person is liable to a penalty, set out at the beginning of this chapter, provide the first level of safeguarding to ensure that no-one who is deceived into helping an evader, or who acts carelessly rather than deliberately, will be charged a penalty under the proposed sanction.

5.19 In addition, anyone charged a penalty would have the right to appeal against it to an independent tribunal on the grounds that:

a) the conditions determining liability were not met; and/or

b) the amount of reduction given for disclosure was inappropriate.

5.20 There will be no provision to challenge a penalty on the grounds of reasonable excuse, because we do not consider there can be any reasonable excuse for behaviour that was deliberate.

Q19. Do you agree that these safeguards are sufficient? Are there any others you consider to be appropriate?

Geographical scope

5.21 Generally, the scope of HMRC's civil powers covers any enabler who has a presence in the UK. We recognise the difficulties in applying civil sanctions to those enablers who operate offshore. Where we identify an enabler based entirely overseas, we endeavour to work closely with relevant authorities to bring the enabler to account. **We would welcome your views on other ways in which we might tackle enablers who are based offshore.**

5.22 Conversely, we consider it may be appropriate to penalise individuals and businesses based in the UK that have enabled the evasion of another

jurisdiction’s taxes. We will consider what, if any, changes to the regime proposed above might be needed to enable the penalty to operate for evasion of non-UK tax. In this case, we would put forward proposals to extend the penalty regime accordingly, following discussions with our international counterparts.

6. Proposed sanctions – naming deliberate enablers

6.1 In the course of carrying out its functions HMRC receives and holds information about its customers. The Commissioners for Revenue & Customs Act 2005 imposes a duty of confidentiality on officials that applies to the full spectrum of information that HMRC holds in connection with its functions. Like other data holders, HMRC must also comply with the Data Protection and Human Rights Acts.

6.2 Set in that context, HMRC regards publicly identifying a person who is non-compliant as an extremely serious step. While charging a penalty carries a financial cost to the recipient of the penalty, publicly identifying a person involves a cost to their reputation, which could have a greater impact than the penalty alone. However, it may be appropriate in the case of enablers who are subject to a penalty to make their names publicly available as a further deterrent.

6.3 The provisions currently in place that give legislative authority for the publication of the names of serious defaulters (section 94 of Finance Act 2009) contain robust safeguards. Furthermore, each prospective publication requires authorisation at a senior level within HMRC. We would similarly seek to legislate for the publication of the names of enablers of offshore evasion in particular defined circumstances.

6.4 Alongside this consultation document we have published a separate consultation ("Tackling offshore tax evasion: Strengthening civil deterrents for offshore evaders") exploring the scope for extending the sanction of publishing the names of deliberate defaulters where those defaulters are offshore evaders.

Which enablers would be liable to having their details published?

6.5 A number of options are available. We could publish the details of:

a) All enablers who are charged a penalty as described in Chapter 5;

b) Enablers who are charged one or more penalties, as described in Chapter 5, where the aggregated lost revenue relating to those penalties exceeds £25,000 (being the threshold used in section 94, Finance Act 2009); or

c) Enablers who are charged one or more penalties and who enabled, say, 5 or more UK taxpayers to evade tax through the use of offshore arrangements.

Options b) and c) could be combined to make the liability criterion stricter.

Q20. Which of the options for naming deliberate enablers do you consider to be best, and why?

Additional criteria

6.6 We propose that enablers who have been given the maximum penalty reduction for a full unprompted disclosure would be protected from publication in order to provide a further incentive for them to come forward and help us to put things right.

Q21. Do you consider this additional criterion for naming enablers appropriate? Are there any others that should be taken into account?

Practical issues

What are the details that would be published?

6.7 The details we propose should be published are:

- the enabler's name (including any trading name, previous name or pseudonym);
- the enabler's address (or registered address);
- high-level information on the general actions the enabler took to enable someone to evade UK tax, including timescales and years involved;
- the number of people the enabler helped;
- the total amount of penalty(ies) charged on the enabler; and
- the total amount of revenue loss related to the penalty(ies) charged on the enabler.

When would HMRC publish these details?

6.8 Publication would not occur before:

- the time for making any appeal or further appeal against the penalty had expired; and / or
- any appeal made had been finally determined and upheld HMRC's decisions:
  - to treat the enabler's behaviour as deliberate; and
  - not to give the maximum reduction for full unprompted disclosure.

For how long would the details be published?

6.9 We intend to follow the practice already established for publishing the details of serious defaulters, and remove published details when one year has elapsed. This follows existing practice as set out in section 94(8) Finance Act 2009.

Where would HMRC publish the details?

6.10 We intend to follow the practice already established for publishing the details of serious defaulters, and use gov.uk for publication.

Q22. What are your views on these proposed arrangements for naming enablers?

Safeguards

6.11 We do not propose a right of appeal against publication, since the enabler would already have the right to appeal against the penalty and the outcome of that appeal would have direct relevance on any decision to publish. However, before an enabler's details are published HMRC would inform them that we are planning to publish their details and give them the opportunity to make representations about whether publication should go ahead. In line with current practice, the details of each enabler would be considered individually, taking account of any representations received from them, and approval of publication given at a senior level in HMRC.

Q23. Do you agree that these safeguards, in respect of naming enablers, are sufficient?

7. Assessment of impacts

Exchequer impact (£m)	2015-16	2016-17	2017-18	2018-19	2019-20
	negligible	negligible	negligible	negligible	negligible
Economic impact	These civil sanctions are not expected to have any significant economic impacts.				
Impact on individuals and households	There are no expected impacts on tax compliant individuals and organisations. The sanctions will only affect individuals and organisations who enable offshore tax evasion.				
Equalities impacts	It is not expected that these civil sanctions have a differential impact on any group with protected characteristics.				
Impact on businesses and Civil Society Organisations	This measure will have no impact on business and civil society organisations who are undertaking normal commercial transactions; it will only impact on organisations which deliberately enable offshore tax evasion.				
Impact on HMRC or other public sector delivery organisations	A negligible impact on HMRC. Any HMRC IT or operational changes necessary are likely to be small scale. No impact on other public sector delivery organisations is expected.				
Other impacts	None.				

The policy will be monitored and assessed alongside other measures in the Government's package for tackling offshore evasion.

Q24. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

8. Summary of consultation questions

What is an enabler?

Q1. What are your views on the use of the term "enabler" to describe any third party who provides such services, whether or not they are aware that they are doing so?

Q2. Does the list above reflect your experience, from dealing with disclosures or via networks, of the ways in which evaders have been assisted by third parties? If not, how has your experience differed?

Q3. What are your views on our approach to using behaviours and services, as outlined in this Chapter, to define an enabler?

Q4. Do you find this categorisation of behaviours and services clear and comprehensive? Please explain your answer.

Current civil sanctions available to HMRC – their scope and limitations

Q5. Do you agree that these are the relevant civil sanctions that apply to enablers?

Q6. Do you agree with our conclusions on the scope of existing sanctions? Please state your reasons.

Proposed sanctions – a penalty for deliberate enablers

Q7. What are your views on these conditions? Should any be removed or changed, or further conditions added, and if so why?

Q8. What are your views on the standard penalty amount being 100% of revenue loss to which the enabler contributed? Do you have any alternative suggestions?

Q9. What are your views on the suggested approach where multiple enablers are involved?

Q10. What are your views on a provision to reduce the amount of the penalty to recognise any assistance the enabler gave us to put things right, and the quality of that assistance? Is a 30% lower limit appropriate, and why?

Q11. What is your view on treating all forms of deliberate enabling as equally serious?

Q12. If we were to treat various forms of deliberate enabling differently, what would the relevant criteria be?

Q13. To what extent do you think a reduction for disclosure will minimise that conflict of interest?

Q14. What other factors should we take into account in order to determine the amount of any reduction?

Q15. Do you agree that there should be a lower limit and is £1,000 an appropriate amount? Please give reasons for your answer.

Q16. Do you agree that there should be an upper limit to the penalty?

Q17. Which of a) and b) in 5.17 above is your preferred option for setting the limit and why?

Q18. Do you consider there are other, better options for setting the upper limit, e.g. as a percentage of turnover?

Q19. Do you agree that these safeguards are sufficient? Are there any others you consider to be appropriate?

Proposed sanctions – naming deliberate enablers

Q20. Which of the options for naming deliberate enablers do you consider to be best, and why?

Q21. Do you consider this additional criterion for naming enablers appropriate? Are there any others that should be taken into account?

Q22. What are your views on these proposed arrangements for naming enablers?

Q23. Do you agree that these safeguards, in respect of naming enablers, are sufficient?

Assessment of impacts

Q24. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

9. The consultation process: how to respond

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the main questions in this consultation is included at Chapter 8.

Responses should be sent by 8 October 2015, by e-mail to consult.nosafehavens@hmrc.gsi.gov.uk or by post to:

Jen Knowlson
HMRC Centre for Offshore Evasion Strategy
Room 1C/26
100 Parliament Street
London SW1A 2BQ

Telephone enquiries can be addressed on 03000 579494 (from a text phone prefix this number with 18001)

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentially can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue and Customs (HMRC).

HMRC will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Principles

This consultation is being run in accordance with the Government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

If you have any comments or complaints about the consultation process please contact:

Oliver Toop, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.

Annex A: Existing civil sanctions for evaders

Legislation	Section	Applies To	Sanction	Coverage
Finance Act 2007	Schedule 24 (as amended)	Taxpayers who submit inaccurate returns. Defines “offshore matter” and “offshore transfer”	Maximum penalty of 200% of potential lost revenue depending on the jurisdiction involved in the offshore matter/transfer	Income tax, capital gains tax, inheritance tax
Finance Act 2015	Schedule 21	Expands scope of Finance Act 2007 sanction. Penalty where there is a relevant offshore asset move, which was done to avoid automatic exchange of information reporting	50% of amount of original penalty	Income tax, capital gains tax, inheritance tax
Finance Act 2008	Schedule 41, Paragraph 1	Failure in relation to Section 7, Taxes Management Act 1970 (failure to notify chargeability)	Maximum penalty of 200% of potential lost revenue depending on the jurisdiction involved in the offshore matter/transfer	Income tax, capital gains tax
Finance Act 2009	Schedule 55, Paragraph 6	Taxpayers deliberately withholding information from HMRC	Penalty of up to 200% of liability to tax which would have been shown in return. Maximum depends on the jurisdiction involved.	Income tax, capital gains tax, inheritance tax

Annex B: Money Laundering Regulations – further details

HMRC's role

As one of 27 supervisory authorities, HMRC supervises Money Service Businesses, High Value Dealers, Accountancy Service Providers (ASP) that are not supervised by another professional body, Trust and Company Service Providers (TCSP), Estate Agency Businesses, Bill Payment Service Providers and IT and Digital Payment Service Providers. Of these broad categories, ASPs and TCSPs are the most likely to have provided services as an enabler (akin to those described in Chapter 3).

HMRC oversees some 26,000 businesses in these sectors, so its anti-money laundering oversight, is limited.

What money laundering supervisors can do

If prosecution is seen as the most appropriate route, HMRC can investigate with a view to building a case under the Money Laundering Regulations (Regulation 46). However, most money laundering cases are prosecuted under the Proceeds of Crime Act 2002, Part 7, Paragraphs 327-334, which set out the primary offences relating to money laundering. These include:

- concealing, disguising, converting, transferring or removing criminal property from the UK
- entering into or becoming involved in an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person
- the acquisition, use and/or possession of criminal property

The primary money laundering offences apply to everyone. The Proceeds of Crime Act also creates offences of failing to make a report about suspicious activity, and tipping off any person about a report. This applies to businesses that are subject to MLR.

Professional bodies and regulators can use expulsion as a sanction, and both HMRC and other supervisors can use warning letters and fines. Such fines are not limited and significant fines have been levied in the recent past.[9]

Given HMRC only directly regulates a minority of third parties who may provide enabling services, we have a limited ability to influence their behaviour using the MLR. This matter will be reviewed in a future update of the Regulations by HM Treasury.

[9] For example, the FCA's £7.6 million fine to Standard Bank PLC in January 2014

Annex C: Relevant legislation

Sections 7 and 106A of Taxes Management Act 1970

Sections 327 to 334, Proceeds of Crime Act 2002

Sections 2 and 3 of Fraud Act 2006

Schedule 24 to Finance Act 2007

Money Laundering Regulations 2007

Schedule 41 to Finance Act 2008

Schedule 55 to and Section 94 of Finance Act 2009

Schedule 38 to Finance Act 2012

Schedule 21 to Finance Act 2015