Introduction

1.1 This consultation document seeks comments on: (i) whether to introduce new measures for ‘serial users of tax avoidance schemes’; (ii) how to introduce specific penalties for cases where the General Anti-Abuse Rule (GAAR) applies; (iii) the detail of how both these should be implemented.

Executive summary

2.1 The Chartered Institute of Taxation (CIOT) restates its support for action to stop abusive tax avoidance. While we have concerns about the scope of some of the legislative changes that have recently been introduced, we agree that the Government, and HM Revenue and Customs (HMRC), should be tackling this area. However, we are not convinced that further legislation is justified or necessary at the moment, either in relation to ‘serial users of tax avoidance schemes’ or the GAAR. We would want to reserve judgement on this until we have seen firm evidence that the legislation introduced in Finance Act 2014 regarding Promoters of Tax Avoidance Schemes, accelerated payment notices and follower notices is not working as intended. In addition, changes to the Disclosure of Tax Avoidance Scheme (DOTAS) rules, which are intended to tighten up the reporting of schemes, are still in the process of being introduced, and should be given time to take effect before further legislation is enacted.

2.2 In our view, it is also too early to introduce a specific GAAR penalty. The GAAR has only been in place for 18 months and there have so far been no actual cases and no actual opinions issued by the GAAR Advisory Panel. We see the introduction of a further set of measures to deter taxpayers from entering into abusive arrangements as premature.
2.3 Broadly, we feel that current legislation is more than adequate to achieve the Government’s objectives, and that those objectives would be better achieved by prompt, accurate and proportionate action by HMRC to apply current law.

2.4 We do not therefore support the proposals. However, we have gone on to consider the specific consultation questions below.

3 Q1. What should be the starting point for identifying those who should be the subject of new legislative measures? Should it, for example, be based on the number of schemes used over a certain period or in any one period or are there other criteria that could be used?

3.1 The first and perhaps biggest problem is to define what is meant by ‘tax avoidance scheme’. Some cases appearing before the courts and tribunals are on any reasonable view ‘tax avoidance schemes’. However, we expect that in many other cases a wide variety of views are possible even about ordinary business or financial transactions, such as incorporating a business or taking out an ISA.

3.2 The consultation document does not attempt to define ‘tax avoidance scheme’, so the scope of the proposal is potentially very extensive. If tax avoidance is going to be defined in the same way as under the DOTAS legislation in Finance Act 2004 then this is problematic, as we have commented on before, because the definition of ‘tax advantage’ is very wide.

3.3 However, if the proposal is limited to schemes disclosed under DOTAS there is a risk that its effect will be limited, particularly as the introduction of the accelerated payment notice may increase non-compliance with DOTAS obligations amongst a determined ‘hard core’ of promoters and tax avoiders. In this regard, we strongly support HMRC action to enforce compliance with DOTAS. But we can see that this still might not be enough to deter some promoters and introducer networks from operating ‘under the radar’.

3.4 The document does, on page 7 say; ‘It is important not to consider the avoider in isolation because: a person may control or be associated with a number of partnerships, companies, or other entities, any of which may facilitate tax avoidance or be involved in avoidance in its own right …’ We are concerned that care needs to be taken here because there is a risk that ‘tax avoidance schemes’ entered into by entities over which the taxpayer has no real element of control or even influence, could lead to the taxpayer being brought within the scope of the provisions.

3.5 Another problem we can envisage with identifying serial avoiders is whether ‘tax avoidance schemes’ entered into before the new legislation comes into force are to be included.

3.6 We are concerned that sanctions such as a surcharge might be applied to past events. Many taxpayers who have taken part in the past in ‘tax avoidance schemes’ will have changed their behaviour over the years and this needs to be taken into account.

3.7 A middle-ground might be that ‘tax avoidance schemes’ entered into before or after the new legislation comes into force are taken into account in determining whether a taxpayer is a serial avoider. However the sanctions might only apply prospectively to future ‘tax avoidance schemes’.
4 Q2. To what extent would a surcharge be a deterrent to taxpayers who repeatedly use tax avoidance schemes that are shown not to work?

4.1 We do not support the introduction of a surcharge for repeated use of schemes that fail.

4.2 A surcharge can only act as a deterrent to taxpayers who are thinking about entering into tax avoidance schemes in the future. It will have no effect on past actions.

4.3 There is therefore a difficulty with timing here. A scheme will not have ‘failed’ typically until it has been tested in court and found not to work and all appeals have been exhausted. A taxpayer will not know that the scheme they entered many years ago is not effective until many years in the future. In the meantime, they may have entered other similar schemes believing that would be effective. Imposing a surcharge on such a taxpayer because of actions they took in the past introduces a significant element of retrospection. As a result, we do not believe that a surcharge should be imposed on the failure of any scheme that was entered into before this legislation comes into effect.

4.4 We also note that, more often than not, cases do not progress to court and a settlement is reached. We think it should be clear that a without prejudice negotiated settlement should be regarded as an indication that the arrangements were not effective for this purpose.

5 Q3. Use of how many tax avoidance schemes, over what period, should trigger the surcharge?

5.1 We infer from the wording of this question and the preceding one that it is intended that the proposed surcharge is only charged when a tax avoidance scheme fails, not merely because one has been used.

5.2 As noted above, a key point here is whether historic activities should be taken into account, or just activities after the new rule comes into force.

6 Q4. What level of financial sanction would best deter the sorts of negative behaviour described here?

6.1 We would think that the financial sanction would need to be quite high to act as an effective deterrent to the sorts of taxpayers at which these proposals are targeted.

6.2 However, as noted above, we consider that HMRC already have adequate and significant legislation at their disposal to use in cases such as this.

7 Q5. Could subjecting a serial avoider to special measures, such as additional reporting requirements, conduct notices, or restricting access to reliefs be an effective and proportionate approach to encouraging less risky behaviour?
7.1 No, we do not think this would be an effective or proportionate approach to take. We would expect that taxpayers who have used multiple avoidance schemes should already be under very close scrutiny from HMRC through the normal tax enquiry process. We cannot see what HMRC will gain from introducing some of these suggestions, and believe that it would be resource intensive for HMRC to administer.

7.2 When a taxpayer uses a tax avoidance scheme that has been disclosed under DOTAS, HMRC already have provisions at their disposal to request information and documents about the scheme. Similarly, HMRC already have wide information powers at their disposal under current legislation in Finance Act Schedule 36 to obtain documents and information from a range of sources.

7.3 The idea of restricting access to certain legitimate reliefs whilst a serial avoider is in special measures strikes us as excessively punitive.

8 Q6. What sort of special measures would best positively influence the behaviour of serial avoiders?

8.1 We would first like to see evidence that the recent avoidance provisions introduced by Finance Act 2014, and the changes currently being made to DOTAS, are not already working positively to change the behaviour of taxpayers who might consider using avoidance schemes before we suggest any other special measures that might be needed.

9 Q7. What threshold conditions should trigger entry into special measures?

9.1 If special measures are really needed (and we are not convinced that they are), then the suggested threshold conditions seem reasonable provided they are not retrospective.

10 Q8. What consequences should follow from failure to comply with special measures?

10.1 No comments.

11 Q9. In particular, would the prospect of publicly naming serial avoiders be an effective and proportionate approach to encouraging behaviour change?

11.1 Firstly, we would point out that participants in avoidance schemes that end up in the Tribunal will often be publicly named once litigation has commenced. Secondly, the names of high-profile individuals or celebrities who have allegedly used avoidance schemes have recently tended to appear in the press anyway. We would have thought that this sort of negative publicity is already acting as a significant deterrent to future involvement in high risk schemes.

11.2 As a matter of broad principle, we think that HMRC should approach publishing names with caution, and, on balance, we do not think it is a proportionate response.
12 Q10. Should special measures be imposed for a set period of time or lifted only when the avoider has demonstrated objectively a change in behaviour?

12.1 No comments. As mentioned, we are not convinced that special measures are required.

13 Q11. What safeguards do you think would be necessary and proportionate to ensure the fair application of each of the proposed measures?

13.1 There will need to be very strong safeguards, including unrestricted rights of appeal against the imposition of a surcharge, designation as a serial avoider, the imposition of special measures and publicly naming in order to ensure the integrity of the process.

14 Q12. The Government would welcome views on whether and how such a threshold condition might work, and in particular what proportion and/or how many adverse decisions should trigger the threshold condition.

14.1 We do not disagree that this proposal might be an appropriate basis for a new threshold condition, if HMRC believe that another threshold condition is actually needed. The POTAS legislation has only been in place for a few months, so we do not think there has been time to assess its effectiveness yet.

14.2 There is a similar problem here to the one we have identified in relation to the serial avoider proposals ie should the proposal apply to historic activities or only future activities?

14.3 Whether it is applied to historic or future activities, we can envisage that it could take many years for such a threshold condition to be breached, given how long it takes for cases to find their way through the court process. Therefore, we question how effective this proposal could be at present.

14.4 The problems of definition are also much more acute here. A large firm of accountants will give thousands of pieces of advice every year covering a range of issues, and applying a threshold test based on DOTAS activities only would be completely unrepresentative of the overall activities of the firm.

14.5 The proposal also fails to take account of avoidance schemes that are not notified under DOTAS (whether they should have been or not) and which are eventually found not to work.

15 Q13. To what extent would a GAAR penalty act as an effective deterrent?

15.1 As already stated, we do not agree that the time is right to reconsider the introduction of a GAAR specific penalty. The Aaronson report concluded that surcharges and penalties were inappropriate, and we have not seen any clear evidence since its introduction that the GAAR is not having the desired deterrent effect. We think it is
premature to introduce penalties for a scheme caught by the GAAR until we have some experience of the sorts of things that are regarded as abusive.

15.2 If there is still a ‘hard-core’ of tax avoiders who are determined to continue to enter avoidance schemes in spite of all the anti-avoidance legislation now in place, we doubt that the prospect of a GAAR penalty will stop them.

15.3 Nothing in our answers to this question and those following should therefore be read as indicating our agreement to the introduction of a GAAR specific penalty.

16 Q14. Do you think an alternative sanction such as a surcharge might act as a more appropriate deterrent? What form might such a sanction take?

16.1 No.

17 Q15. Do you agree that it would not be appropriate to charge a penalty when a taxpayer has correctly included a GAAR adjustment on their return?

17.1 Yes, we agree with this. It would clearly not be right to impose a penalty on a taxpayer who self-assessed that the GAAR applied. We would add that this seems like a very unlikely scenario.

18 Q16. Should a GAAR-specific penalty apply when the GAAR applies, without exception?

18.1 No. We do not think a penalty should apply, for example, if at least one member of the GAAR advisory panel thinks that the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the appropriate tax provisions.

18.2 We do not think it would be appropriate to impose a penalty where someone entered into a transaction without knowing if the GAAR would apply or not. Unless a transaction is identical to one of the examples in the GAAR guidance, there will be no certain way of knowing if it will be caught by the GAAR until after it has been entered into and the GAAR panel has given its opinion.

19 Q17. Do you agree that submission of the taxpayer’s return ought to be the trigger point for a specific GAAR penalty to become chargeable?

19.1 Yes.

20 Q18. Are there any other points at which you think a GAAR penalty or other sanction could become chargeable?
20.1 No comments.

21 Q19. Should a GAAR-specific penalty be tax-geared? If so, what do you consider would be an appropriate rate of penalty?

21.1 It would be simpler to calculate a GAAR specific penalty on the same basis as penalties are calculated under the existing Finance Act 2007 regime (ie based on the amount of potential lost revenue), rather than introduce a new method of calculation.

22 Q20. If you consider that a fixed penalty would be more appropriate, why do you think this is? How much would you consider to be an appropriate fixed penalty?

22.1 No, we do not agree that a fixed penalty would be more appropriate.

23 Q21. Should the normal penalty mitigation rules apply? Should it be possible to levy higher penalties according to taxpayer behaviour?

23.1 Yes.

24 Q22. Should it be possible to charge a GAAR penalty in addition to a penalty under Schedule 24 to the Finance Act 2007?

24.1 No, we do not think there should be any duplication of penalties. That would be unreasonable. It could then become possible for higher penalties to be imposed for avoidance than for deliberate and concealed evasion, which would be a bizarre outcome.

24.2 It would make sense to integrate a GAAR penalty into the Finance Act 2007 Schedule 24 penalties regime, rather than introduce it as a stand-alone sanction.

25 Q23. Do you agree that existing rights of appeal would be appropriate for a GAAR penalty?

25.1 Yes.

26 Q24. Do you think either of these measures would impact disproportionately on those with protected characteristics (as defined under the Equality Act 2010)?

26.1 No comments.
27 The Chartered Institute of Taxation

27.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.