Irish Taxation Institute

Educating, Developing & Representing

# Mandatory Disclosure of Certain Transactions

## Irish Taxation Institute Response to the Revenue Commissioners' Consultation Documentation

**September 2010**

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## Introduction

The Irish Taxation Institute (ITI) is writing in response to the publication by Revenue of its Consultation Document "Mandatory Disclosure of Certain Transactions" in June 2010.

The comments that are contained in this submission are based on our collective experience of operating the Irish taxation system and on our understanding of reporting regimes in other jurisdictions. Our members work every day to ensure that the tax compliance rates in this country are at levels of up to 96% for Large Cases and we are well placed to comment on the practical implementation of a reporting regime.

We welcome the opportunity to participate in this consultation process. However, we also believe that a broader tax policy discussion needs to take place between all interested parties on government's tax avoidance policy objectives and where these sit in terms of our overall tax strategy for the next ten years.

70% of GDP in the Irish economy relies on foreign direct investment (FDI). Any reporting regime which is introduced must strike the right balance between targeting aggressive tax avoidance and allowing business the freedom to manage their taxes with certainty in an open environment of support and encouragement. We already have a complex general anti-avoidance provision (GAAR) and protective notification system enshrined in the legislation and Revenue can challenge transactions under this regime at any time. We must be very clear of the costs and benefits of adding an additional layer of administrative complexity and uncertainty on to business and investors when we are striving as a nation to remain competitive and win projects and jobs against strong international competition.

## General comments

The OECD provides useful guidance to tax administrations globally on best practice when introducing a mandatory reporting scheme[1]

> *"Depending on the design, advance disclosure rules can provide revenue bodies with valuable information prior to lodgement of the tax return – for example: the types of tax planning occurring; the identity of the designers; the identity of the intermediaries (if any) who advise on its legality; and the identity of the taxpayers who implement it. However, taking into account the key considerations for any revenue body designing an advance disclosure regime, revenue bodies generally need to:*
>
> - *Be clear about the objective of the advance disclosure regime and the risk the regime is intended to address;*

[1] Tax Intermediaries Study; Working Paper 6 – The Enhanced Relationship

- *Consult with taxpayers and tax intermediaries in developing the legislation - particularly its scope of reportable transactions – in order to ensure it will achieve these objectives without creating unnecessary compliance burdens; and*

- *Ensure the operational implications of the regime have been fully considered to that adequate support and administrative systems are in place to respond to the information received..."*

We consider each of these points below in the context of the proposed Irish regime.

## *The policy objective and the risk being addressed*

The Minister clearly set out the purpose of the regime in his comments at Committee Stage to the Finance Bill 2010.

> *"The primary purpose of the new disclosure regime is to constitute what can be regarded as an effective early warning system by obtaining information on aggressive tax avoidance schemes at an early stage before a loss of taxation becomes apparent....Let us be clear, it is not the intention of the rules to prevent tax advisers advising clients in the normal way about their tax affairs and the various legitimate tax incentives provided for in the tax code. That is entirely acceptable tax planning and will remain so....It is not the intention that ordinary everyday tax advice will come within the regime, nor will the legitimate use of tax reliefs and incentives be jeopardised. To this end the regulations will include clear guidance so that normal tax advice planning and tax mitigation activities will not be affected by the disclosure rules."*[2]

If this reporting regime is to meet the policy objectives then it must be very clear to all concerned, exactly what these objectives are. The information which the Minister has stated he wants relates to aggressive tax avoidance. Normal tax planning and tax mitigation is accepted as a fundamental taxpayer right and is not the intended target of this regime. ITI believe that a very clear articulation of this position in any launch of the scheme would be essential for the avoidance of doubt on the matter and we will be making this request of the Minister directly.

We must then consider whether the proposed structure of the scheme meets the policy objective of only capturing "aggressive tax avoidance".

The Finance Act 2010 provisions and the draft Regulations that have been published create a reporting regime which prima facie, requires taxpayers and/or promoters to report on a very broad range of transactions. In our view, the scope of the reportable transactions that fall within the legislation and Regulations is much broader than was anticipated by the Minister in his Dail comments.

[2] Select Committee on Finance and the Public Service, 24 February 2010

The Guidance Notes contain a proposed exclusion for day to day tax advice but this exclusion is not contained in the legislation or draft Regulations. Our concern is that Revenue Guidance Notes do not have the force of law. A statement in the Revenue's Guidance Notes does not provide sufficient safeguard for taxpayers and advisers on day to day tax advice, when the scope of the reporting requirement in the primary legislation and regulations is so broad.

The Minister gave an undertaking in the Dail that the Regulations would contain clear guidance on this matter. The Regulations themselves should contain a statement to the effect that normal tax advice planning and tax mitigation activities are "entirely acceptable" and are not the target of these disclosure rules.

### *Advance consultation*

Whilst consultation on the Regulations and Guidance Notes is welcome, it is consultation after the scheme has been introduced and the legislation has been published. What the OECD recommends as best practice is consultation in **developing** the legislation. Consultation at this stage of the process makes meaningful change difficult. If any further legislative amendments are proposed to this regime, ITI urges advance meaningful discussion with interested parties **before** any further legislation is published.

### *Adequate support and administrative systems*

Proper Revenue support and information systems must be in place to respond to information reported under the new regime. This will require significant Revenue resources to review material submitted, deal with it and respond accordingly. As well as responding to Government on the information received, we also believe that Revenue must provide information to taxpayers and promoters on the type of transactions which, in their opinion, do not require to be reported. Revenue authorities such as the UK and Australia publish lists of indicative items which they consider "aggressive" tax avoidance and which they would seek to challenge. This helps provide certainty on the scope of the regime and ITI would like to see publication of such information by Revenue here on a regular basis, as the reporting system becomes bedded in.

It would also be helpful if the Guidance Notes were expanded to contain examples of the types of common transactions which, in Revenue's view, do not constitute reportable transactions for the purposes of this regime for example, the buy-back of shares, the incorporation of a business, inversions etc

## Practical issues which affect the operation of the scheme

In our view, a number of practical issues need to be addressed if this reporting regime is to be operated effectively by practitioners

### *The specified descriptions*

Reference is made here to Questions 1-6 of the consultation material.

## 1. Confidentiality hallmark

***Confidentiality from other promoters***

The scope of the confidentiality hallmark is very broad, particularly in relation to confidentiality from other promoters, which is a hypothetical test. It is going to be very difficult in practice to judge whether:

*"..it might reasonably be expected that any promoter would wish the way in which that transaction gives rise to a tax advantage to be kept confidential from any other promoter.."*

The Canadian reporting regime provides much more certainty for promoters by basing the reporting requirement on the existence of an actual confidentiality agreement. This would be a much more objective test than the broad subjective measure that is proposed here.

In the absence of an objective test, it is essential to include an exception in the Guidance Notes, so that information which is in the public domain through seminars, articles etc is excluded from the reporting requirement.

***Confidentiality from Revenue***

The UK Disclosure of Tax Avoidance Schemes (DOTAS) Guidance from HMRC on confidentiality provides:

*"7.4.2 Confidentiality from HMRC*

*Promoters will answer the relevant questions in one of the following ways:*

- *"I wish to keep an element of the scheme confidential from HMRC in order to facilitate repeated or continued use of that element, or substantially the same element, in future";*
- *"I do not wish to keep any element of the scheme confidential in order to facilitate repeated or continued use of that element, or substantially the same element, in the future but, and disregarding any obligation of confidentiality, I nevertheless wish to keep it confidential from HMRC for other reasons"; or*
- *"I do not wish to keep any element of the scheme confidential from HMRC"*

*A promoter is not required to make disclosure under this hallmark where the answer falls within the second or third bullet."*

It would be useful to replicate this wording in our Guidance as it provides clarity and certainty for promoters.

### 2. Premium fee hallmark

The definition of a premium fee in Regulation 6(2) could be interpreted very widely, particularly the wording

*""premium fees" means a fee…to a significant extent attributable to the tax advantage".*

It would be very difficult to apply this concept of a premium fee in practice, with any degree of certainty. The concept is subjective and will vary between advisers and clients. In most situations, scale rates are applied and it is difficult to see how scale rates could be considered a premium fee. Clarification should be included in the Guidelines that fees which are calculated based on scale rates are not premium fees.

The UK premium fee test refers to being able to obtain a premium fee from a person "experienced in receiving services of the type being provided". Wording such as this is required in Revenue's Guidance Notes.

### 3. Employment Schemes Hallmark

One other particular area of concern with the scope of "Specified Descriptions", relates to Specified Description 10 "Employment Schemes".

Employment schemes can take many different forms, by their nature. As currently drafted, the scope of the hallmark is very wide and a Schedule of exclusions is used to eliminate certain types of basic arrangement from the reporting requirement. Our hallmark is based very closely on the original drafting of a similar UK hallmark some months ago. The breadth of that original hallmark caused considerable concern in the UK at the time, to such an extent that HMRC recognised in their response to the consultation that the hallmark was too widely drawn. We understand that it is now being rewritten so that the scope is narrowed to specific types of schemes for which disclosure is sought.

ITI believes that this hallmark should be reconsidered. A hallmark which is too widely drawn will lead to excessive compliance costs for business and could bring a huge number of transactions which are not "aggressive tax avoidance" transactions within the regime, unnecessarily. It is not clear how this meets the policy objective and we would ask that the Regulation be revised to address the risk in a more focussed way.

## *The specified information*

Reference is made here to Questions 7 and 8 of the consultation material.

Regulation 13(2)(b) sets out the detail of what constitutes "specified information" for the purposes of the reporting regime. The definition is very detailed but in essence requires:

- Full references to the Acts...
- Full details of the transaction explaining each element ...

- A copy of any document...relating to the transaction and...any document or material used in marketing the transaction.

This contrasts with HMRC's requirement for:

- The statutory provisions...on which the tax advantage is based

- Information explaining each element of the arrangements ...from which the tax advantage...arises

HMRC's experience of operating a reporting regime over the past six years would seem to demonstrate that identification of the relevant legislation and an explanation of the tax advantage is sufficient to enable them understand the transaction and take further steps if necessary.

The difficulty with framing the information requirement so that any document, material etc has to be provided, is that it is potentially impossible to satisfy, particularly in light of the five day turnaround period. There could always be some piece of related documentation that is not filed, no matter how minor, and this could technically put the promoter in breach of the Regulations, with the attendant penalties. If a tighter focus was placed on explaining the arrangement it would make the section more workable in practice.

### *The time period for providing specified information*

Reference is made here to Question 9 of the consultation material.

Regulation 14 provides a specified period for providing information, of five days.

ITI considers that this period is unnecessarily short to meet the policy objectives of the reporting regime, particularly in light of the extensive amount of information that is being sought for provision by this date.

The scale of Irish firms is much smaller than their UK counterparts and a five day turnaround will be very difficult for them to comply with. UK firms have built up a wealth of experience in identifying potentially disclosable transactions as the UK DOTAS regime has been expanded incrementally over the past six years. In these circumstances, the same five day time period is not appropriate in Ireland.

A specified period of one month would be more than adequate for these purposes and more realistic for promoters.

At a very minimum, whatever period is included in the final Regulations should be a period of working days rather than calendar days.

### *Client lists*

Reference is made here to Question 14 of the consultation material.

Section 817M and Regulation 15 set out the requirements for promoters to provide client lists to Revenue.

The main concern we have on the provision of client lists is the period which is provided for in Regulation 15(2)(a)(i)(I) i.e.

"within the period of 30 days beginning on the day after the day on which –

(I) The promoter first makes the disclosable transaction available to a person for implementation..."

The effect of this requirement is that Revenue are expecting to see the names of all clients who received detailed information on marketed schemes and, arguably bespoke planning, regardless of whether or not the clients choose to proceed with them. This will provide Revenue with information about marketing efforts but not with information about usage, which would appear to be where the tax risk lies.

Again this differs from the UK proposals for client lists. Under the UK reporting regime, client lists will be based on clients who actually implement a scheme.

This raises a real practical difficulty for taxpayers, particularly FDI investors. To be included on a "tax avoidance" list for a transaction that may not be implemented will create very significant difficulties for taxpayers. To the best of our knowledge, no tax administration in any jurisdiction seeks information about transactions that have not even happened and consequently, this client list requirement will be the most onerous such regime in any jurisdiction in the world.

If Revenue require client list details then the information must be based on schemes that are actually implemented.

### *Trigger point for marketed schemes*

Reference is made here to Question 15 of the consultation material.

Our mandatory disclosure regime provides a trigger point for disclosure of "marketed schemes" which is earlier than the implementation date applicable to bespoke advice i.e. the date on which the promoter has specified information relating to the disclosable transaction and first **makes a marketing contact** in relation to the disclosable transaction,

HMRC in the UK have recently published proposed changes to their date for reporting marketed schemes. However, their proposals provide that the trigger point will arise on the date on which the promoter first **makes a firm approach** to another person in relation to a notifiable proposal

HMRC had originally used the wording "makes a marketing contact" which is also being used in our reporting regime. However, strong representations were made to them that this test was drafted too widely and would capture arrangements that were not actively marketed.

As a consequence of these representations, the legislation in the UK is being changed to the "firm approach" test set out above.

In our view, the "firm approach" test would make our reporting trigger point for marketing contacts more realistic and closer to what the policy objective seems to be.

### *Introduction date/transitional arrangements*

Reference is made here to Question 16 of the consultation material.

The current legislation and draft consultation material proposes commencement of the legislation from 3 April 2010 with the first reports being made from 30 October 2010.

While consultation is ongoing on all aspects of the reporting scheme, ITI does not believe it is appropriate to "back-date" to 3 April the transactions which have to be reported. Promoters currently have no certainty as to what has to be reported and when it has to be reported. Until that consultation is complete and the Regulations are finalised, this uncertainty will continue and that does not form a good basis for the launch of a new reporting initiative.

In our view the reporting regime should be commenced from a date some weeks following the publication of the final Regulations and Guidance Notes and only transactions arising after this date can be included in the reporting regime. This will also allow time for the introduction of procedures to facilitate compliance with the scheme and time for training of staff.

### *De-minimus limit*

In its current form, the reporting regime applies to any transaction, irrespective of its materiality level.

In order to assist smaller taxpayers and promoters with the administrative burden and the risk that undoubtedly arises under this reporting regime, we suggest that a de-minimus level be included for small transactions, below which a reporting obligation does not arise. The de-minimus could be set with reference to the tax advantage resulting from the transaction. For example, a transaction would not be a disclosable transaction where the tax advantage obtained or expected to be obtained has a value less than €10,000.

If it is not possible to apply a de-minimus limit to all the hallmarks, then perhaps it could be introduced in certain circumstances e.g. for employment schemes.

If there is a concern about the tax risk associated with linked transactions, then anti-avoidance wording could be included in the legislation to deal with this.

## Comments on other provisions

We understand that the overall reporting framework and much of the detail for our regime has been based on the UK DOTAS rules. However, in developing an Irish model, many of

the provisions adopted impose significantly broader obligations on the promoter/taxpayer than the UK equivalents.

Some of the key differences are outlined above as part of our response to the specific consultation questions. However, a full list of the provisions which cause us concern is set out in the attached matrix, highlighting the differences in scope between the UK DOTAS regime and the Irish model. Issues contained on the matrix which are not specifically discussed above include:

- Revenue's power to obtain additional information on disclosures without any recourse to appeal
- The need for stream-lining multiple disclosures
- Penalty proceedings to be held in open court

## VAT

When the equivalent mandatory disclosure rules were introduced into the UK it was decided to exclude VAT from the promoters' reporting obligation. Our understanding is that the position was reached after a Queen's Counsel opinion was provided indicating that this step was required in order to avoid a breach of the Sixth VAT Directive. It is our further understanding that Queen's Counsel advice may have centered on the provisions of Article 273[3]. Accordingly there appears to be very strong grounds for believing that the application of the mandatory disclosure rules to promoters in respect of VAT would result in a breach of European law.

## Legal Professional Privilege

The introduction of the mandatory reporting regime, as currently drafted, could create a distortion in the market place for the provision of tax services. Taxpayers who can claim legal professional privilege (LPP) may find that their affairs are subject to a less onerous reporting regime than those who cannot.

All taxpayers should be in a position to avail of the best possible taxation advice without any impediment. Taxation is one of the few areas of law where advice can be obtained from both lawyers and professional tax consultants who are not lawyers. It would be unfair and inequitable to put any form of impediment on taxpayers as to where they seek to obtain professional tax advice and thereby distort the market.

ITI has identified at least five differences between the scope of the current reporting regime as it would operate for LPP and non-LPP taxpayers and advisers. This causes us some concern.

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[3] Council Directive 2006/112/EC

## 1. Determining when a report is required

Sections 817D and 817H have different definitions for defining when a report is due in non-LPP and LPP cases. If LPP is available, the transaction does not have to be reported unless and until it is implemented. If LPP is not available, a report will be due when a marketing contact is made or where a transaction is made available for implementation, assuming either of these dates arise before the implementation date.

Revenue appear to take the view that this distinction in the legislation will not affect the reporting regime in practice as it could only arise in marketing contact cases - they do not believe that LPP applies to marketing contacts. However, the taxpayer may take a different view in a case and claim LPP, thereby availing of the more beneficial different treatment under the legislation. A dispute over privilege such as this would likely have to be decided by the courts. It could be a very costly and complex process for all parties and is likely to take considerable time to be brought to a conclusion.

## 2. Detail of the transaction to be reported

Regulation 13 defines the "specified information" that must be submitted to Revenue under the mandatory reporting regime. The definition is very broad in that all related documentation must be submitted. Our fundamental concerns over the definition of "specified information" are explained in full above. However, the broad scope of the requirements could also lead to differences in practice between the amount and type of information being submitted in LPP as distinct from non-LPP cases.

The UK disclosure regime takes a different approach. HMRC simply require an explanation to be provided of how the arrangements are to operate, which would reasonably enable them to understand the transaction.

In its practical implementation, the Irish reporting regime must ensure that the same information is required from all parties regardless of the LPP status of the taxpayer, as happens in the UK.

## 3. Client lists

A promoter whose clients are claiming LPP has no obligation to provide client lists to Revenue under section 817M and Regulation 15. However, all other promoters must provide lists of clients to whom they have made a transaction available for implementation, even if they do not actually implement it.

Taxpayers who do not wish to have their details submitted to Revenue under this regime will, no doubt, be influenced by this distinction in treatment, when they are selecting an adviser.

## 4. Information to be provided by the promoter

Where LPP is not available, the duties to report a transaction under this regime all fall upon the promoter. In an LPP scenario, the promoter is required to advise the taxpayer of

their (the taxpayer's) obligation to make a report and must "inform the Revenue Commissioners accordingly". It is unclear how much information the LPP promoter is required to provide and indeed, is able to provide, in a situation where LPP applies. The promoter whose client cannot avail of LPP clearly has a far greater onus of responsibility for reporting these transactions and a much higher penalty (see below), for any relevant failure.

5. **Promoter penalties**

Where LPP applies, the promoter's personal penalty is subject to a maximum level of €4,000. If the courts find against the promoter, the penalty will be €100 per day for any period after this judgement, during which the penalty remains unpaid. These penalties rise to €500 a day (uncapped) for promoters in a non-LPP situation and €500 per day if the court finds against them. After 8 days of non-compliance the promoter of the non-LPP client will be paying a higher personal penalty than his legal counterpart, advising on the same transaction.

The way this mandatory reporting regime is structured is going to create significant differences between taxpayers who can avail of LPP and those who cannot. Taxpayers who cannot avail of LPP will be significantly disadvantaged by the regime. This impacts fundamentally on taxpayer choice and the right of the taxpayer to select the adviser that best suits their particular needs and is an issue which must be addressed as a matter of priority.

## Conclusion

ITI acknowledges the government's objectives in introducing a mandatory reporting regime. However, there are certain fundamental aspects of the regime which we believe need to be considered further so that it can be operated fairly and with some certainty of what is required.

1. The carve-out for day to day tax advice needs to be enshrined in the body of the Regulations and a focus given to the messaging on what is being sought under the regime.

2. Specific issues on the "workability" of the scheme, as set out above, need to be addressed including the scope of the hallmarks, the timing of reports made, client lists etc. The Canadian model is an example of a regime that provides much more certainty as to what must be reported and when.

3. The framework of the scheme needs to be revisited to ensure that taxpayers who use non-legal advisers are not placed at a disadvantage to taxpayers using legal advisers and availing of LPP.

4. Reporting can only take place on a "going forward" basis once the Regulations are finalised – reports required on transactions which have happened in the past, without any clear guidance of the rules at that time, are unworkable.

5. Any future changes to the "hallmarks" or any other significant aspect of the regime should apply prospectively and not retrospectively.

6. This additional reporting responsibility focuses attention more than ever on the need to provide advisers and promoters with a properly resourced Revenue clearance system. This is one of the key components to a co-operative based tax compliance system recognised by the OECD and it is not available to taxpayers in Ireland.

7. An overall review of the mandatory reporting regime should be undertaken within a 12 month period of its introduction. This will identify whether it is meeting the policy objectives set out by the Minister and what, if any legislative or practical refinements are required.

8. It is now timely to have a full and frank discussion on our anti-avoidance strategy in this country. This would include a review of all aspects of legislation and practice - section 811, 811A and protective notifications, all the specific anti-avoidance legislation that exists and now the mandatory reporting regime. In our opinion, this layered approach to "aggressive tax avoidance" is not the best policy solution within the context of our economic direction and our overall tax strategy.

**Appendix**

**Mandatory Disclosure Regime Ireland/UK Comparison**

| **Issue** | **Irish approach** | **UK approach** | **Difference in approach and impact thereof** |
|---|---|---|---|
| Taxes covered | VAT is included in the main scheme | VAT is not included in the main scheme | • Irish scope is much broader.<br>• Significant impact on workability for promoters especially in light of commencement on 3 April 2010.<br>• EU considerations are important. |
| Period of introduction | Full regime to be effective from 3 April 2010 i.e. Big Bang approach | Regime was initially very focused and built up gradually, allowing time for promoters to develop reporting systems etc | • Reasonable commencement date required to deal with the significance of the change involved.<br>• OECD requires tax administrations who are introducing reporting regimes to do so without "creating unnecessary compliance burdens" * |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| Transparency | No proposals for Revenue to publish information on the types of transactions they want to see disclosed | HMRC publish "spotlights" on their website which highlight the types of activity they believe does not work and which will be challenged by them www.hmrc.gov.uk/avoidance/spotlights.htm | • Transparency is required in the Irish regime to demonstrate Revenue's views on what type of planning does not work and what they would be likely to challenge.<br><br>• In addition, we now urgently need a responsive clearance system to assist taxpayers dealing with the disclosure requirements - s811, s811A, s896A, s817 and now mandatory reporting |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| Amount and type of information to be disclosed | Reg 13(2)(b)(iii)<br>"full references to the provisions of the Acts that are…relevant to the disclosable transaction"<br><br>Reg 13(2)(b)(iv)<br>"full details of the disclosable transaction explaining each element of the transaction (including the way in which it is structured) from which the tax advantage expected to be obtained under the transaction arises and how in the person's opinion each provision of the Acts referred to in clause (iii) applies, or as the case may be, does not apply to the transaction."<br><br>Reg 13(2)(b)(v)<br>"a copy of any document, contract prospectus, and diagram relating to the transaction and, where relevant, any document or material used in marketing the transaction" | "the statutory provisions, relating to any of the prescribed taxes, on which that tax advantage is based"<br><br>"information explaining each element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained under the arrangement arises"<br><br>No "catch all" information requirement in UK regime | • Irish regime requires very detailed analysis of the transaction.<br>• All Irish documentation to be provided within 5 days of the trigger point.<br>• The UK regime simply requires an explanation of the advantage.<br>• Current UK rules have been in place since 2006 and seem to be sufficient for HMRC.<br>• Irish information requirements need to be focused so that the reporting requirement is capable of being fulfilled within 5 days. |
| Incomplete disclosures | s817K TCA 1997<br>Revenue have the power to require further information and documents in the case of suspected incomplete disclosure | HMRC must apply to the Independent Tribunal that hears tax appeals for such a notice | • No safeguards here for the Irish promoter.<br>• To ensure independence is maintained, any Revenue application for further information should be made to the Appeal Commissioners |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| Trigger point for marketing contacts | (a) The date on which the promoter has specified information relating to the disclosable transaction and first makes a marketing contact in relation to the disclosable transaction (817D(1) TCA 1997)<br><br>You are a promoter under the Irish regime if you have specified information and you make a "marketing contact".<br><br>"marketing contact" ...means the communication by a person of the general nature of the disclosable transaction to another person with a view to that person or any other person considering whether to ask for further details …<br><br>The Guidance Notes state that a marketing contact is made when the scheme has been substantially designed. However, this is not included in the Regulations. | "the date on which the promoter first makes a firm approach to another person in relation to a notifiable proposal"<br><br>You are a promoter under the UK regime if you make a firm approach to another person with a view to you making the proposal available for implementation.<br><br>The UK makes statutory provision that a firm approach arises if you make a marketing contact at a time when the arrangements have been substantially designed. | • The UK "firm approach" trigger point meets the policy objective without generating disclosures of transactions that may never be implemented.<br><br>• A firm approach model is required here and the test for marketing contact must be enshrined in legislation and/or regulations. |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| Client lists | Lists must be provided within 30 days (and quarterly), of all clients to whom a disclosable transaction has been made available for implementation<br><br>Para 6.3.2 of the Guidance provides that "the requirement to include a client on the list applies whether or not the client actually goes ahead and implements the scheme" | The obligation to report a client arises when the promoter is required to give the client a Scheme Reference Number (SRN), which in turn, arises when the promoter first becomes aware that the client has commenced implementation. HMRC are proposing quarterly reporting of clients to whom SRNs have been given. Client lists therefore would only include clients who implement the arrangements. | • Revenue will be obtaining information on clients who may not have implemented transactions.<br>• This will cause difficulties particularly for FDI clients.<br>• HMRC have accepted that it would be counterproductive to receive lists of clients to whom an idea is simply introduced. They want usage, not marketing activity. |
| Confidentiality hallmark | The test applies to confidentiality from other promoters (hypothetical) and from Revenue(not hypothetical)<br>The promoter test is particularly broad | Legislative tests are very similar. There is guidance that anything in articles, text books etc, is excluded from the promoters test<br><br>There is also HMRC guidance noting that wishing to keep something confidential from them other than to facilitate repeated or continued use will not result in a disclosure obligation | • Clearer guidance on exclusions is required as provided in the UK. |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| Premium fee | Regulation 6 …. "Where it might reasonably be expected that a promoter… would be able to obtain from or charge a person implementing such a transaction, a premium fee” | The UK test refers to a person experienced in receiving services of the type being provided. This excludes the hypothetical naïve client Indications are provided in guidance where a fee is not a premium fee i.e. advisor location, urgency skill of advisor etc An exclusion applies if there is no promoter and the user is an individual or SME. | • Clearer guidance is required as provided in the UK. |
| Specific hallmarks (especially employment schemes) | Very broad "catch all" specified class of disclosable transactions subject to a White List | The HMRC introduced this draft employment hallmark together with 2 other drafts - income into capital and offshoring schemes. The Irish hallmarks on employment and income to capital mirror the UK drafts.<br><br>Following a consultation process the UK have accepted that they will need to revise their draft regulations so that they target the "mischief more narrowly". In particular, the employment scheme hallmark will be a positive list of schemes to be disclosed.** | • A positive list of employment schemes to be disclosed is required |

| Issue | Irish approach | UK approach | Difference in approach and impact thereof |
|---|---|---|---|
| De-minimus limit | No exclusion for SME's or a de-minimus limit on the tax advantage obtained | Hallmarked schemes with no promoter are subject to an exclusion for SMEs<br><br>Hallmarked scheme for use in house are subject to an exclusion for SMEs<br>Some UK hallmarks have a de-minimus limit e.g. leasing and pension | • There is scope for SME exclusion and de-minimus limits in Irish regime |
| Multiple disclosures of same scheme | No exemption for multiple disclosures | There is an exemption from disclosure where notifiable arrangements are substantially the same as those already disclosed. It is statute based. | • Need to avoid duplication by removing the requirement for multiple disclosures |
| Time limit | 5 days from trigger point | Limit of 5 days. Non business days are excluded. | • Non business days need to be excluded from time limit |
| Penalties in open Court | Under Section 817O Revenue can apply to a relevant Court i.e. District, Circuit or High Court to determine and collect a penalty i.e. cases held in open Court | Any penalty is determined by a Tax Tribunal | • There should be Safeguards for taxpayers/promoters that cases will be heard in private i.e. before the Appeal Commissioners |

*OECD Tax Intermediaries Study - Working Paper 6, The Enhanced Relationship

**HMRC Response to representations on proposed new hallmarks