HOUSE OF LORDS

Economic Affairs Committee

5th Report of Session 2019–21

Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020

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Select Committee on Economic Affairs Finance Bill Sub-Committee

The Economic Affairs Finance Bill Sub-Committee was appointed by the House of Lords in this session "to consider the draft Finance Bill 2021."

Membership

The Members of the Select Committee on Economic Affairs are:

Baroness Bowles of Berkhamsted
Lord Burns
Viscount Chandos
Lord Cunningham of Felling
Lord Forsyth of Drumlean (Chair)
Lord Fox
Baroness Harding of Winscombe
Baroness Kingsmill
Lord Livingston of Parkhead
Lord Monks
Lord Skidelsky
Lord Stern of Brentford
Lord Tugendhat

The Members of the Select Committee on Economic Affairs Finance Bill Sub-Committee are:

Baroness Bowles of Berkhamsted
Lord Bridges of Headley (Chair)
Lord Butler of Brockwell
Viscount Chandos
Lord Forsyth of Drumlean
Baroness Kramer
Lord Monks
Lord Rowe-Beddoe

Declarations of interests

A full list of Members' interests can be found in the Register of Lords' Interests:
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Publications

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All publications of the Sub-Committee are available at:
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Committee staff

The current staff of the committee are Simon Keal (Clerk), Adrian Hitchins (Clerk), Dr William Harvey (Policy Analyst), Mithula Parayoganathan (Committee Assistant) and Abdullah Ahmad (Committee Assistant). Robina Dyall and Sarah Squires are the specialist advisers to the Committee.

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Evidence is published online at https://committees.parliament.uk/committee/230/finance-bill-subcommittee/publications and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020 (SI 2020/1220)

Background

1. The Finance Bill Sub-Committee published its report *Off-Payroll working: treating people fairly* on 27 April 2020.[1] The report discussed the Government's further steps to ensure that off-payroll workers in the private sector who worked as employees were taxed as such.

2. Our report expressed concern that the off-payroll working rules built on the existing anti-avoidance legislation, which had proved difficult to operate over a 20-year period—and which we described in our report as "flawed". We argued that a new approach was needed in line with the findings of the Taylor Review of modern working practices, which would work across both tax and employment law. We also believed the Government had underestimated the potential cost to business and the impact on workers operating in sectors such as 'the gig economy', who do not have equivalent employment rights to directly employed workers but who will be taxed as such under the new rules.

3. The Government delayed the introduction of the rules for a year due to the COVID-19 pandemic. We argued that it should use this time to rethink the legislation. If the Government planned to go ahead, we said it should commission an independent review of how the rules had affected the public sector to assess how they might affect private sector labour markets. In response, the Government said it would commission independent research into the long-term effects of the public sector off-payroll working rules on the sector and publish the results prior to April 2021. It added that HMRC would look again at its assessment of the administrative costs to business and publish any revised costs at the next fiscal event.

The statutory instrument

4. We recently concluded our inquiry into the draft Finance Bill 2021, covering a range of new measures intended to tackle tax avoidance.

5. While our inquiry was ongoing, in implementing the off-payroll working rules the Government laid the *Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020 (SI 2020/1220)*.[2] This statutory instrument extends changes to income taxation rules for employment intermediaries under the off-payroll working rules to National Insurance Contributions (NICs). The income tax provisions are in the Finance Act 2020.

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1 Economic Affairs Committee, *Off-Payroll working: treating people fairly* (1st Report, Session 2019–21, HL Paper 50)

2 Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020 (SI 2020/1220)

6. Following the laying of the statutory instrument under the made negative procedure on 6 November 2020, we learned that the Government had been informed of concerns about its scope prior to it being laid, in conjunction with concerns about equivalent changes made in the Finance Act 2020. In particular, HMRC sent a 'stakeholder update' in October 2020 which acknowledged that the relevant provisions included an unintended widening of the definition of an intermediary. The update advised stakeholders that HMRC was "considering what action is required to ensure the off-payroll working rules apply as intended in order to provide certainty to those affected by the reform".[3]

7. This update was followed by a written ministerial statement by the Financial Secretary to the Treasury, Rt Hon Jesse Norman MP, on 12 November 2020. This stated that the Government would need to "correct an unintended widening of the definition of an intermediary, which went beyond the intended scope of the policy",[4] and that a technical change to achieve this would be included in the next Finance Bill, to take effect from 6 April 2021 when the private sector off-payroll working rules come into effect.

8. Despite the Government having identified this problem before the statutory instrument was laid, it proceeded with and has not withdrawn the statutory instrument. This means that regulations were made despite the Government's knowledge that they did not fulfil the Government's policy intent.

9. Without further amendment, the new rules—requiring income tax and NICs to be deducted from payments made to affected workers, and employers' NICs paid—would apply in a way not intended under the policy. Because the new rules will come into force in April 2021, any amendment must be made before then to avoid such an outcome.

10. We were keen to learn more about the Government's approach to these rules, and why they proceeded with and had not withdrawn regulations which appeared to be out of keeping with Government policy. We took oral evidence from the Financial Secretary to the Treasury to explore this matter.

Evidence from the Financial Secretary to the Treasury

11. When asked if the Government had laid regulations knowing they were defective, the Financial Secretary stated:

> "We thought there was a concern about that aspect of it, and we were discussing that concern with stakeholders. That concern has proved well grounded. We have, therefore, acted to bring that to Parliament's attention as early as we sensibly could."[5]

12. The Financial Secretary denied that the law was 'defective', telling us: "What it does not do is represent the policy intent. That is why we are proposing to change the primary legislation and then change the implementing regulations".[6]

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3 IPSE, 'Off-payroll working update on s610' (16 October 2020): https://www.ipse.co.uk/resource/off-payroll-working-stakeholder-update-on-s61o---october-2020-pdf.html

4 HC Deb, 12 November 2020, WS572

5 Q130 (Financial Secretary to the Treasury)

6 Q122 (Financial Secretary to the Treasury)

13. When asked why the Government had not withdrawn the statutory instrument when the problem was identified, the Financial Secretary noted:

> "The current statutory instrument is 13 pages long and has been very widely welcomed by stakeholder groups … the bit we are talking about is one paragraph long, so the regulations are far broader than the specific issue that requires amendment".[7]

14. Chris Simons of HMRC also said that the Government decided to proceed with the laying of the statutory instrument because it was mindful of "how to give people certainty, and to give consistency with the primary legislation—the best approach felt like continuing with the SI as a whole".[8]

15. The Financial Secretary told us that the Government sought to inform Parliament of the issue "so that people could have a high level of transparency and visibility as to what it was early, without … disrupting the overall pattern of the legislative change for which primary legislation had been passed, and without creating more uncertainty in the marketplace".[9]

16. He added that withdrawing and replacing the statutory instrument only when a solution had been found would "require a considerable amount of further parliamentary time" and that, "it would be extremely disruptive more widely to other aspects of our legislative programme that may require parliamentary time", because of the requirement to amend primary legislation as well as the statutory instrument.[10]

17. When asked if he could guarantee that the law would be corrected by April 2021, the Financial Secretary said: "What we have done is put a Written Ministerial Statement before Parliament. That is as strong a guarantee as I can give".[11] When questioned as to whether people were being asked to privilege the words of written ministerial statements over law, he said: "I am not proposing a hierarchy … all I am doing is describing the very common-sense approach we have taken".[12]

18. When asked if he was aware of a precedent for the Government introducing legislation in the knowledge that it was defective, the Financial Secretary said: "I am certainly not aware of any situation in which a concern about legislation has come to light during the process of the passage of legislation … so to some extent we are breaking new ground, but we are doing so in what I think is a sensible, proportionate and transparent way".[13] When challenged on this point, he added: "There is no suggestion that we are setting any precedent here … misalignments of legislative intent occasionally arise".[14]

Further correspondence

19. Following our evidence from the Financial Secretary we received a letter from him on 8 December 2020.[15] This stated:

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7 Q120 (Financial Secretary to the Treasury)
8 Q131 (Chris Simons, HMRC)
9 Q132 (Financial Secretary to the Treasury)
10 Q127 (Financial Secretary to the Treasury)
11 Q128 (Financial Secretary to the Treasury)
12 Q130 (Financial Secretary to the Treasury)
13 Q133 (Financial Secretary to the Treasury)
14 *Ibid.*
15 The full letter can be found at Appendix 3.

> "The Government fully recognises the Committee's concern that laying legislation which then requires amendment before it comes into force is highly unusual. Let me say again that there is no intention here to set any precedent. Our goal is simply to address the issue identified while maintaining progress with an important, much needed and widely anticipated piece of legislation.
>
> I am clear that the Government has no desire or intention that it should be repeated … the Government is in the process of designing a solution in consultation with key stakeholders which directly addresses the issue … we intend and fully expect to have this in place by April 2021."

20. Subsequently we also received a note setting out the Government's initial proposal for a technical solution to the issue.

Conclusions and recommendations

21. **We believe the Government has seriously neglected a basic constitutional principle in making this statutory instrument: it should not make legislation which it knows in advance does not reflect its policy intent. We can find no precedent for this breach of good government.**

22. **The Government would have been better advised to withdraw the statutory instrument to correct the problem. This could have been done by immediately withdrawing and replacing it with a statutory instrument with the relevant paragraph removed. Alternatively, the Government could have withdrawn the statutory instrument altogether for now, and committed to replacing it at a later date when a solution to the problem had been found and with the remaining text unchanged.**

23. **Either option would have enabled sound planning for the implementation of the new rules. We do not share the Financial Secretary's view that either option would have required more Parliamentary time than will anyway be needed.**

24. **Instead, the Government has compounded the problem. Making the legislation now exacerbates uncertainty by requiring clarification even before it takes effect.**

25. **We are grateful that the Financial Secretary clarified that this is an unusual situation and that the Government has no desire that it should be repeated. The Financial Secretary said that the regulations will be amended before they come into force in April 2021 so as fully to reflect the Government's policy intent. We are grateful to have had sight of the Government's initial proposed solution, and hope this will be developed and finalised in time for the legislation to proceed smoothly and on schedule.**

26. **More broadly, this matter strengthens the view set out in our report on off-payroll working that the Government should consider the rise of self-employment in its wider context, and not just as a question of tax compliance. We hope that, as the new rules are implemented, the Government takes the opportunity to consider this broader picture.**

27. **We also note that the Government should shortly be publishing both the results of its independent research into the effects of the 2017 public sector off-payroll working rules and its revised policy costings. The Government should also ensure that HMRC takes this new information into account when supporting business in implementing the new rules.**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTERESTS

Members of the Finance Bill Sub-Committee

Baroness Bowles of Berkhamsted
Lord Bridges of Headley (Chair)
Lord Butler of Brockwell
Viscount Chandos
Lord Forsyth of Drumlean
Baroness Kramer
Lord Monks
Lord Rowe-Beddoe

Declarations of interests

Baroness Bowles of Berkhamsted
Director, London Stock Exchange plc

Lord Bridges of Headley (Chair)
Paid adviser, Banco Santander
Shareholder, Banco Santander
Paid member, KPMG's UK Advisory Council

Lord Butler of Brockwell
No relevant interests

Viscount Chandos
Director, Ambie Media Ltd
Chairman, Credit Services Association
Vice Chair, London Academy of Music and Dramatic Arts
Chairman, the Theseus Agency Ltd
Chairman, Thomson Foundation

Lord Forsyth of Drumlean
Chairman and Non-executive Director, Secure Trust Bank plc
Director, Denholm Enterprise Ltd (investment company whose principal investments are shares in J&J Denholm and Denholm Oilfield Services)
Non-executive Director, Denholm Logistics Group Ltd
Non-executive Director, J&J Denholm Ltd (parent company of Denholm Group which has four divisions: shipping, logistics, seafoods and industrial services)

Baroness Kramer
No relevant interests

Lord Monks
No relevant interests

Lord Rowe-Beddoe
Chairman, Board of Advisors, Clarke Capital Partners
Senior adviser, Orthios Group (Holdings) Ltd

Members of the Economic Affairs Committee

Baroness Bowles of Berkhamsted
Director, London Stock Exchange plc

Lord Burns
No relevant interests

Viscount Chandos

Director, Ambie Media Ltd

Chairman, Credit Services Association

Vice Chair, London Academy of Music and Dramatic Arts

Chairman, the Theseus Agency Limited

Chairman, Thomson Foundation

Lord Cunningham of Felling

No relevant interests

Lord Forsyth of Drumlean (Chair)

Chairman and Non-executive Director, Secure Trust Bank plc

Director, Denholm Enterprise Ltd (investment company whose principal investments are shares in J&J Denholm and Denholm Oilfield Services)

Non-executive Director, Denholm Logistics Group Ltd

Non-executive Director, J&J Denholm Ltd (parent company of Denholm Group which has four divisions: shipping, logistics, seafoods and industrial services)

Lord Fox

No relevant interests

Baroness Harding of Winscombe

No relevant interests

Baroness Kingsmill

No relevant interests

Lord Livingstone of Parkhead

No relevant interests

Lord Monks

No relevant interests

Lord Skidelsky

No relevant interests

Lord Stern of Brentford

Climate Adviser, the Royal Bank of Scotland/NatWest Group Director and Non-executive Chair, SYSTEMIQ Ltd (company's purpose is to catalyse good disruptions in critical economic systems)

Lord Tugendhat

No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests: https://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

Specialist advisers

Sarah Squires

Member of the Tax Law Committee of the Law Society of England and Wales

Consultant on tax issues to the British Property Federation

Robina Dyall

No relevant interests

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at: https://committees.parliament.uk/committee/230/finance-bill-subcommittee/publications/ and available for inspection at the Parliamentary Archives (020 7219 3074)

Oral evidence

Rt Hon Jesse Norman MP, Financial Secretary to the Treasury	QQ 119–137
Cerys McDonald, Director, Strategic Policy into Delivery, HMRC	
Chris Simons, Deputy Director, Off-Payroll Working Programme, HMRC	

APPENDIX 3: LETTER FROM RT HON JESSE NORMAN MP TO THE CHAIR

Dear Lord Bridges of Headley,

Following our discussion at the Committee on Monday I thought it might be helpful to address some of the Committee's core concerns in writing.

As I indicated, while the legislation is not formally defective, the Government fully recognises the Committee's concern that laying legislation which then requires amendment before it comes into force is highly unusual. Let me say again that there is no intention here to set any precedent. Our goal is simply to address the issue identified while maintaining progress with an important, much needed and widely anticipated piece of legislation.

I am clear that the Government has no desire or intention that it should be repeated.

As we discussed, and as Committee members have separately discussed directly with officials, the Government is in the process of designing a solution in consultation with key stakeholders which directly addresses the issue. As I made clear in my Written Ministerial Statement, we intend and fully expect to have this in place by April 2021, and will be very happy to share it with the Committee in good time before then.

With all good wishes,

Rt Hon Jesse Norman MP