THE LAW SOCIETY OF ENGLAND AND WALES - WRITTEN EVIDENCE (DFE0019)

Draft Finance Bill 2020-2021 inquiry

Introduction and summary

New proposals for tackling promoters and enablers of tax avoidance schemes

- A campaign of public education about tax should be a priority for HMRC. All channels of communication should be explored.
- HMRC's work in tackling promoters would benefit from improved positive engagement with the public and with solicitors and other responsible advisers.
- Taxpayer safeguards should be protected in law, not only in practice.
- Some of the new proposals for tackling promoters and enablers are drafted very widely: more balanced legal safeguards and limits are needed in the Bill, including proportionate gateway provisions and checks on use of powers such as naming.

New tax checks on licence renewal applications

- Tax non-compliance in the hidden economy should be addressed.
- Conditionality is a big stick and there may be unintended consequences, so any measures introducing it should be strictly limited to prevent disproportionate effects.
- In our view the limit of this should be registration for tax. The range of information that HMRC can request in the current draft legislation appears to go well beyond that.
- There should also be a route to compliance for those who have so far been operating without being properly registered that does not immediately threaten their livelihood.

Amendments to HMRC's civil information powers

- The requirement for Tribunal consent is an important safeguard that is there for a purpose and we do not think the case has been made for its removal.
- The UK's performance on exchange of information does not seem overall to be materially worse than that of France or Germany.
- The tribunal process has been streamlined during the pandemic. These developments should at least be tried out fully before important safeguards are removed.

New notification requirements for uncertain tax treatments

- This proposal confers a wide degree of discretion on HMRC about what the new taxpayer obligations mean and effectively requires taxpayers to guess what HMRC might be thinking, with a penalty regime for those who fail to guess correctly, and no objective criteria for an appeal. It is not in accordance with the rule of law and should be reconsidered.

The use of retrospective provisions in other areas of the draft Bill

- There should be a high bar for introducing tax laws that impose taxation or obligations retrospectively. We are not convinced that bar is met in relation to the changes to the rules on enablers penalties.

Responses to specific questions and areas of interest

New proposals for tackling promoters and enablers of tax avoidance schemes

Q1. How effective are the existing powers of HMRC in tackling promoters and enablers of tax avoidance schemes?

1. HMRC's estimates of the tax gap associated with avoidance shows a reduction from £5bn in 2005-2006 to £1.7bn in 2018-2019 during a period of rapid expansion of HMRC powers. HMRC has stated that measures introduced to penalise promoters have helped to address the problem "with around 20 promoters leaving the tax avoidance since 2014". They say that there are 20-30 active promoters currently operating in the market.

Q2. What has been your experience of the Promoters of Tax Avoidance Schemes (POTAS) rules and the enablers rules in practice?

Q3. Are HMRC's communications likely to be effective in informing potential scheme users about schemes, and so deter them from participating?

2. HMRC communication with taxpayers is very important and could be improved. A campaign of public education about tax should be a priority for HMRC. All channels of communication should be explored. In particular, given the apparent move in promoters' activities towards the lower paid, HMRC should consider communicating via channels that the targets of schemes are more likely to actually encounter, which might include social media, consumer programmes on television and radio, features in newspapers etc. Simply publishing matters on the HMRC website will not be sufficient. The Law Society expanded upon a

similar point to HMRC in our recent [response to the call for evidence on raising standards in the tax advice market](#).

Q4. How effective will the proposed measures be against those who promote aggressive tax avoidance schemes, and in informing and deterring potential scheme users? What else could HMRC be doing in this area?

3. It is difficult to predict the extent to which the measures will be effective. Given that the 20-30 remaining promoters identified by HMRC appear to operate at the margins of legality it seems likely that they might ignore or seek ways to circumvent any rules of this type.
4. HMRC's work in tackling promoters would benefit from improved positive engagement with the public and with responsible agents and advisors and professional bodies, including solicitors. We have had reports from members that HMRC do not engage effectively with offers of information about promoters' activities whether from our members or from their clients. Continuing the theme on communication, while HMRC's March 2020 policy paper on avoidance contains details on how to report promoters and schemes, if you google "how can I tell HMRC about a tax scheme" there is no link to any relevant details, and most of what comes up is either irrelevant or confusing. A google of "tell HMRC about a tax dodge" brings up an online form for reporting tax fraud, which isn't obviously suitable for reporting schemes, but no contact details to talk to a human being. There is a willingness to assist HMRC in this effort, both amongst the tax profession and amongst disillusioned clients or potential clients of promoters, and HMRC do not have clear systems in place for accessing this help, or giving it enough senior level attention. There may be scope to learn from the FCA approach: there are clear (and multiple) reporting mechanisms and their consumer-facing ScamSmart scheme provides a lot of useful information and resources for consumers.

Q5. Are the safeguards being proposed sufficient to ensure an appropriate balance is struck between HMRC and taxpayer?

5. States exercise significant power in relation to the citizens in relation to tax, so safeguards in tax law should not be abandoned lightly. It is important for the rule of law that an appropriate balance is struck in the legislation itself, and not only in how it is implemented in practice. This is not to doubt HMRC's good motives in seeking the additional powers in this legislation.
6. HMRC has indicated their intention is that these rules should not affect the majority of the tax advisory profession, which we welcome. However, some of the rules are drafted very widely. For example:

- A provision in the draft Finance Bill indicating that significant DAC6 (i.e. EU Directive 2018/822) reporting failures would meet the threshold to bring a person within the POTAS rules, seems inappropriate given the serious uncertainties in the application of the new DAC6 regime (para 27(3) of the draft Schedule).
- The POTAS threshold conditions proposed in the Consultation document on Tackling Promoters of Tax Avoidance (at paragraphs 4.11 and 4.12) appear to set a very low bar.
- Paragraph 3.21 on the Promoters consultation document (linked above) proposes only narrow grounds for appeal against the new section 310D information notices within DOTAS.

7. There is also a proposed general power in the DOTAS rules to name those who receive an SRN before the appeal process has concluded (para 3.24 con doc). We consider that should be narrowed because it is not necessary or proportionate and we have suggested to HMRC possible ways to do that. This is important because the power to name currently applies to any person in the supply chain, including those with potentially peripheral involvement or limited knowledge of arrangements (but who may therefore be more visible and easier for HMRC to identify), and it would be difficult to undo reputational damage done as a result after the event.
8. In conclusion, more balanced legal safeguards and limits are needed, including proportionate gateway provisions and checks on use of powers such as naming. It is vital for the rule of law that the rules do not disincentivise tax solicitors and other responsible advisers from continuing to offer full and frank advice on tax matters, highlighting areas of risk and advising their clients on how to remain compliant with legislation. Do HMRC know enough about the 20-30 active promoters they refer to so that they could design a tougher regime that is more narrowly targeted at them, rather than extending the scope of already broad existing regimes and thereby adding to the risks compliance burdens of responsible advisers?

New tax checks on licence renewal applications

Q6. Are the proposals for tax checks on licence renewal applications fair and proportionate? How effective is the legislation likely to be, and is any amendment needed?

9. Tax non-compliance in the hidden economy (which accounts for a large proportion of the Tax Gap) should be addressed. Conceptually it does not seem unreasonable to require an applicant for a licence to prove that they are registered for tax (or that they are not required to be). It is perhaps comparable to the need to provide proof that you have

insured your car before you can pay your road tax. The government's policy paper suggests that the powers are aimed just at registration.

10. However, looking at the draft legislation, the range of information that HMRC can request appears to go well beyond simply ensuring that notice of chargeability to tax has been given (see paragraph 5). For example, it allows HMRC to request information about "any relevant authorised activity income" (see para 5(2)(d)) which, under para 5(4), can extend backwards in time to bring within scope income that arose "at any time before the information about it is requested" by HMRC under this regime). The draft legislation even gives HMRC power to require information to enable them to assess the effectiveness of the new rules in improving tax compliance (paragraph 5(1)(b)). A tax check is only complete (enabling the licensing authority to consider the application) once HMRC has confirmed that it is satisfied that it holds all the information that it has requested.
11. The timing requirements for making tax checks alongside licence renewal applications also appear to be potentially confusing for taxpayers and depend on dates not entirely within their control (see para 3(2) and 5(3) of the draft legislation).

Q7. What is your view of the principle of conditionality and its use in the tax system?

12. Budget 2020 stated: "Tax conditionality refers to a principle whereby businesses are granted access to government awards and authorisations (such as approvals, licenses, grants) only if they are able to demonstrate good tax compliance." We would question whether this principle really supports conditionality as proposed here. Simply because an area is regulated (e.g. to ensure minimum standards, consumer safety), does not mean that a person is being given access to government authorisations in this sense. A taxi driver does not benefit from "public goods" in the same way as, for example, a person requiring a licence to operate a nuclear power station or run a railway. If a person is not able to get a licence it may prevent them from doing their job and earning their livelihood, or force them into operating without a licence. Conditionality is therefore a big stick and there may be unintended and undesirable consequences. That makes it important that any measures introducing conditionality are strictly limited in order to prevent disproportionate effects. In our view the limit of this should be registration for tax (or the provision of such information as demonstrates that the person is not liable to be registered for tax). There should also be a route to compliance for those who have so far been operating without being properly registered that does not immediately threaten their livelihood.

Q8. How do you view the Government's stated intention to extend conditionality to Scotland and Northern Ireland, as well as to other trades?

13. For the reasons given in paragraph 12 above, we do not think that conditionality should be extended to other trades without very careful consideration. It is very hard to see where a line would sensibly be drawn given the extent of regulation within society. Would a childminder have to prove their tax status in order to be registered, even though the only criterion that people really care about is their suitability to look after their children?

Q9. Could the problems this measure is designed to address have been tackled effectively by other means? If so, what are they?

14. We would question whether HMRC's existing powers of enquiry are insufficient to tackle these issues in a more targeted way, for example by themselves cross-checking tax details against the relevant registers of licence holders, which seems unlikely to be more onerous to HMRC than responding to individual taxpayer requests for tax checks. In any case, this measure should not go beyond what is necessary to tackle the issues identified in relation to the hidden economy. For example, it should not be used in order to shift a broader compliance burden from HMRC on to taxpayers, especially given its focus on lower income taxpayers and the recognition in the government's summary of impacts that the measure "could have an impact on family formation, stability or breakdown if individuals will no longer be licensed and individuals and their families would have less disposable income."
15. We support the proposal that for first time applicants, the licensing authority should give them information about their potential liability to be registered for tax. This seems to us a helpful addition to public awareness of tax issues.

Amendments to HMRC's civil information powers

Q10. What is your view of the removal of the requirement to obtain tax tribunal approval before issuing a Financial Institution Notice? Are the safeguards promised instead adequate and, if not, what more should be done?

16. We do not think the case has been made for removal of this safeguard. The powers in question are important and often used by HMRC appropriately, but they are also intrusive and resource consuming for all involved. The requirement for Tribunal consent is there for a purpose: to provide independent oversight and thereby to protect the taxpayer from unwarranted "fishing expeditions" by HMRC. Our members do see instances where HMRC ask for information which

is not relevant to the taxpayer's liability in issue, which might become more common if the constraint of Tribunal consent is removed.

17. The taxpayer is not present in the tribunal process, so timing is largely in the control HMRC and the tribunal. The tribunal process has been streamlined during the pandemic. The cases are being heard remotely, so a court room is not needed. There is now a standard document which HMRC has to populate. Further, we understand that the Tribunal has trained more judges to deal with these applications. These developments should be tried out fully before important safeguards are removed.

Q11. Is the scope of the new power in terms of the information to be reported to HMRC appropriate and sufficiently clear?

Q12. How can the need for adequate taxpayer safeguards and timely international exchange of information be balanced? What steps should be taken to ensure that taxpayer safeguards are not treated as dispensable when they make it more difficult to meet other obligations?

18. In addition to trying out the streamlined tribunal processes, every effort should be made to work with exchange of information partners internationally and to support the tax tribunals to avoid a conflict between timely international exchange of information and taxpayer safeguards.

19. We note that delay seems to be the exception rather than the rule in relation to those exchange of information requests. The OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes peer reviewed the UK in 2018 and:
   - The review says that during the review period "the UK continues to be able to rely on HMRC's extensive information databases and resources as well as on the informal (voluntary) co-operation of taxpayers to reply… This has enabled the UK to provide timely responses to most EOI [exchange of information] requests." [para 275]
   - In 76 out of more than 5,200 exchange of information requests during the review period HMRC needed to seek tribunal approval to collect the information. [para 5 and para 276]
   - Six out of 36 Exchange of Information partners that provided input to the review noted that this process continued to delay effective exchange of information [para 276].
   - HMRC has already developed a document setting out information that requesting jurisdictions can provide to support HMRC's application for tribunal approval. Reading between the lines of the review document, there may be further scope to explore whether

that process could be improved in collaboration with international partners. [para 277]

20. We would also note that the UK's performance on EOI does not seem overall to be materially worse than that of France or Germany as described in their most recent peer reviews. France's statistics can be accessed here, and Germany's can be accessed here.

New notification requirements for uncertain tax treatments

21. This proposal confers a wide degree of discretion on HMRC about what the new obligations mean and effectively requires taxpayers to guess what HMRC might be thinking, with a penalty regime for those who fail to guess correctly, and no objective criteria for an appeal. It goes beyond international comparators and accounting principles, and fails to meet the principles of clear design. Our views on these proposals are set out in more detail in our consultation response on these proposals of August 2020, but in summary we consider that it is not in accordance with the rule of law.

22. Furthermore, our understanding is that it is aimed at a handful of businesses who have not engaged with collaborative working with HMRC, and we do not think it is proportionate to impose this level of compliance burden on the rest of business just to deal with a few outliers.

The use of retrospective provisions in other areas of the draft Bill

23. In general, retrospective taxation places the rule of law at risk and jeopardises the predictability, stability and simplicity of the tax system. However, the proposed change to the corporate interest restriction rules does not appear to impose taxation or obligations retrospectively. Instead, it introduces a normal taxpayer safeguard in the form of a reasonable excuse defence, so it is not damaging of taxpayer trust and confidence in the law in the way a retrospective imposition of tax or related obligations would be.

24. Paragraph 6.28 of the government's Consultation document on Tackling Promoters of Tax Avoidance asks for views about possible retrospective application of changes to the rules on enablers penalties. While we understand the reasoning for the enablers provisions change, it is quite different from the 'reasonable excuse' change in that it does impose onerous obligations by significantly lowering the bar for the application of penalties. The Protocol on unscheduled announcements in tax law (page 19) states that changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be "wholly exceptional". We think that is a principled approach which protects the rule of law. There should be a high bar for introducing retrospective tax laws, and while we have sympathy for

the government's reasons for considering retrospectivity here we are not convinced that the bar is met.

7th October 2020