Tax Professionals’ Forum

Chris Sanger (Chair), Philip Baker OBE QC, Malcolm Gammie CBE QC, Anita Monteith, Vincent Oratore, Andy Richens, Jonathan Riley, Richard Stratton. www.gov.uk/government/groups/tax-professionals-forum

The Rt Hon Jesse Norman MP
Financial Secretary to the Treasury
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

2 March 2021

Ref: lecs652
Your ref:

Direct line: 020 7951 0150

Email: csanger@uk.ey.com

Dear Minister

I am writing to you on behalf of the Tax Professionals’ Forum to present our findings in relation to the period from 17 November 2017 to 13 December 2019.

As always, the views and conclusions expressed are of the Independent Members of the Tax Professionals’ Forum and focus on the way in which policy has been developed and legislation has been made over the period under review.

In the report, we have continued our work to identify the elements of policy making that have been successful and those where there are lessons that can be learnt for future consultation. This report completes the review of the provisions introduced over the 2010 decade and provides both the key conclusions across the decade and completes the picture with our more detailed comments on the last two years of that decade.

In completing this report, we have also considered the drastic changes in the world, and their impact on policy making, over the last 12 months as a result of the coronavirus pandemic. In a forward-looking section, we have considered how the framework has fared under the pressure of the pandemic and the impact that the pandemic and other changes over the last decade will have on policy making. Based on this, it makes some recommendations in relation to changes which can be undertaken now, in advance of taking stock of the policy making over the last year.

The independent members trust that this Report contains helpful feedback to HM Treasury and HMRC and assists the Government in the process of tax policy making, thereby ensuring that tax reforms are increasingly responsive to the needs of taxpayers.

We look forward to the opportunity to discuss this with you further.

Yours ever,

Chris

Christopher Sanger
Chair, and on behalf of, the Tax Professionals’ Forum

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TAX PROFESSIONALS' FORUM

SEVENTH INDEPENDENT REPORT

MARCH 2021

FOREWARD

As we write this report, at the start of 2021, we can reflect on the first decade of policy making under "Tax Policy Making: A New Approach," as well as the drastic changes in the world, and their impact on policy making, over the last 12 months as a result of the coronavirus pandemic. This paper therefore considers both elements. They may be considered as separable by some, but the lessons of the past decade provide valuable insights into what good policy making looks like when subjected to the additional strains of a crisis environment.

In this paper, we have continued our work to identify the elements of policy making that have been successful and those where there are lessons that can be learnt for future consultation. This report completes the review of the provisions introduced over the 2010 decade and provides both the key conclusions across the decade and completes the picture with our more detailed comments on the last two years of that decade.

However, this report would not be complete without a forward-looking section that considers how the framework has fared under the pressure of the pandemic and the impact that the pandemic and other changes over the last decade will have on policy making. It therefore makes some recommendations in relation to changes which can be undertaken now, in advance of taking stock of the policy making over the last year. That review of policy making will follow, as we review the implementation of Finance Act 2021, but there are observations that can be taken on board now to improve the policy framework under pressure.

Chris Sanger

Christopher Sanger
Chair, and on behalf of, the Tax Professionals' Forum

EXECUTIVE SUMMARY

The independent members of HM Treasury's Tax Professionals' Forum welcome the continued commitment of the Government to the tax policy making process and to ensuring that this applies to all policies. This Report supplements the first six reports of the Forum and, in doing so, provides a complete review of the tax policies that have been introduced in Finance Acts over the 2010 decade.

The period covered by this report from 17 November 2017 to 13 December 2019 has seen great change. It covers three Budgets, two Spring Statements and two Finance Bills. Consideration has been given to the tax policies introduced over the past decade and a look ahead to the next decade is also included.

The Forum members believe that the targets of greater stability, predictability and effective consultation enshrined in the Treasury's "Tax Policy Making: A New Approach" document remain both appropriate and achievable. However, as this report shows, consideration needs to be given to the contents of the consultation framework as well as other tools such as the Protocol on Unscheduled Announcement of Changes to Tax Law. The Government should consider the implications of tax administration becoming increasingly digital, the use of the Office of Tax Simplification, and the need to retain flexibility in policy-making during uncertain times while providing effective consultation remains paramount.

Following consideration of tax policy creation over the period, this report makes four recommendations on the following topics:

- Consultation ahead of international tax legislation
- Use of guidance vs legislation
- Alternative mechanisms of delivering on the five stage model
- Understanding the wider consequences of new legislation

In looking to the future, the report makes observations about the benefit of clear process when making unscheduled announcements and the potential opportunities for enhancing consultation through the use of digital engagement.

The independent members trust that this Report contains helpful feedback to HM Treasury and HMRC and assists the Government in the process of tax policy making, thereby ensuring that tax reforms are increasingly responsive to the needs of taxpayers.

1. INTRODUCTION

This report, in contrast to our previous reports, covers two elements – first, as usual, a review of the latest sets of tax policies introduced by the Finance Acts (as legislated between 17 November 2017 and 13 December 2019) and secondly a review of the state of policy making under the pressure of COVID. This provides a mixture of evidence-based findings in the first part, and perspectives in the second. These are offered with a view to maintaining the ongoing debate into the policy making process and ensuring that policy improvements are not lost even as decisions need to be made under time pressure.

1.1. The role of the Forum

The remit of the Tax Professionals' Forum[1] is to identify improvements to the way in which tax policy is made. This includes:

- the way in which policy is developed;
- the way in which policy and changes to policy are communicated; and
- the way in which policy is legislated and implemented.

The Forum was established to assist with the prioritisation of improvements and the monitoring and implementation of these improvements to ensure that they have the intended effect. The Forum also has a role in providing contemporaneous feedback on whether the Government's stated principles and the new approach to tax policy making are being followed in practice.

1.2. The Government's approach to Tax Policy Making

The new approach to policy making was set out in March 2011 "The Government's Tax Consultation Framework: Summary of Responses and Finalised Framework" ("the Framework"). The Framework requires early and continuing engagement on tax changes and the exploration of new ways of broadening public engagement with the development of the tax system. Except in the case of tax avoidance, five stages are to be followed in the development and implementation of tax policy:

1. Setting out objectives and identifying options
2. Determining the best option and developing a framework for implementation including detailed policy design
3. Drafting legislation to effect the proposed change
4. Implementing and monitoring the change
5. Reviewing and evaluating the change

The Framework states that, where possible, the Government will:

- engage interested parties on changes to tax policy,
- minimise the occasions on which it consults only on a confidential basis,
- set out its strategy for consultation (including informal discussions) and
- set out clearly at each stage of the consultation:
    - the policy objectives,
    - any relevant broader policy context,

[1] Details of the Forum and its members are set out in Appendix C.

- the scope of the consultation,
- its current assessment of the impact of the proposed change and
- which department and official is leading the consultation.

To enable legislation to be properly scrutinised, draft clauses for the Finance Bill will be published for scrutiny at least three months before the Bill is introduced to Parliament and the period for comment will be at least eight weeks.

It was also stated:

> "The Government will generally not consult on straightforward rates, allowances and threshold changes or other minor measures. It may also not consult on revenue protection or anti-avoidance measures."

The Government has, in addition, published a Protocol on Unscheduled Announcements which deals with changes to tax law outside the framework of the Budget process including retrospective tax legislation[2] (the "Protocol").

1.3. **The role of this Report**

This report is one way in which the Forum fulfils its role in policing the extent to which the policy-making aspirations set out in this section are complied with. The Report contains the views and conclusions of the Independent Members of the Tax Professionals' Forum on the way in which policy has been developed and legislation has been made over the period; and contains some suggestions and recommendations for change.

References to the Forum in the rest of this Report are to the Independent Members of the Forum.

[2] "The Protocol on Unscheduled Announcements of Changes in Tax Law", replacing the Rees Rules, which appeared in Chapter 4 of "Tackling Tax Avoidance", published by HMT and HMRC in March 2011.

2. REVIEW OF A DECADE OF POLICY MAKING EXPERIENCE

2.1. Coverage of this report

This Report supplements the first six reports of the Forum and, in doing so, provides a complete review of the tax policies that have been introduced in Finance Acts over the 2010 decade. The detailed comments on the policies implemented in the Finance Acts covered by this report, being those from 17 November 2017 to 13 December 2019 (being the end of the previous Government tenure), are included in Appendix 1, whereas the core lessons are covered in this Part.

The consultation programme during this period has been wide and varied. It includes three Budgets, two Spring Statements and two Finance Bills.

2.2. Findings from the most recent period

2.2.1. Recommendation 1 – Consultation ahead of international tax legislation

Although the UK has now left the European Union, the UK remains a member of the Inclusive Framework on Base Erosion and Profit Shifting (the "Inclusive Framework" or "IF") and a signatory to other international fora and initiatives in taxation. In the period under review, we saw significant activity undertaken by the Organisation of Economic Cooperation and Development ("OECD") and the IF.

As noted in our previous reports, the UK Government will be setting out its views in such fora in confidence. As such, it will need to understand the impact of these policies on UK taxpayers, something that the UK's consultation process is designed to achieve. This is a different form of consultation to that undertaken by the international bodies themselves, which are necessarily focused on international rather than national concerns. As such, consultations undertaken by international bodies should not be seen as a reason for the UK to abrogate its policy responsibility or to assume that it does not need to consult to understand the policy perspectives of UK taxpayers.

2.2.2. Recommendation 2 – Guidance vs legislation

Previous reports have frequently noted the issues in relying on tax policy guidance as opposed to the relative certainty delivered by legislation. Guidance can be changed without reference to Parliament, which can undermine the fairness of the tax system.

In this report we note the difficult position in which taxpayers are placed when operating provisions under self-assessment and reinforce the request that the Government ensures that new provisions are legislated appropriately. Where, as an exception, this is not possible at the time, the law should be reviewed with a view to providing legislation to address this (and potentially to simplify the provisions).

2.2.3. Recommendation 3 – Alternative mechanisms delivering the five stage model

Over recent years, our Reports have seen many good examples of consultation periods being used effectively as the policy process has become more established. The Government's response to our sixth Report stated that all five stages of the policy process are 'not always possible nor necessary to complete' as the 'benefits of consultation have been fulfilled in a less formal, but equally substantive way'.

However concrete issues have arisen which are highlighted in this report, showing why a robust consultation process is required:

- DAC6 - In the implementation of the EU Directive into national regulations, there was a need to adapt national law.
- MTD – The consultation period ran from December to February, a period with fewer working days and a busy time of year for tax professionals to input.
- Off-payroll working – Consultations may be too narrow from a taxpayer's perspective

We would reiterate the request that the Government goes through the five-stage process. Where other "equally substantive" ways are adopted, these should be reported and the Forum would be pleased to evaluate whether they do indeed provide sufficient certainty, clarity and predictability.

2.2.4. Recommendation 4 – Understand the wider consequences of new legislation

In our sixth Report, one lesson was the need to review the interaction of policies from the position of the taxpayer and anticipation of unexpected behavioural change that is not in line with Government intentions. In this Report, we note that, for off-payroll taxes, the consultation operated effectively but was limited to a narrow band of off-payroll working. As the economy has become increasingly digitalised, workers' employment status, rights and benefits are rapidly evolving. A broader consultation about future workers and the tax system would allow for legislation to be more aligned. This may also help mitigate the impact of other legislation as seen with Offshore Receipts in respect of Intangible Property.

In short, consultations should attempt to anticipate the unforeseen consequences of legislation.

2.3. Conclusions from the decade of findings

In the above, we have sought to limit the comments to the four key findings. A number of these have drawn on the findings from earlier reports, and are either further developments on the theme or, more regrettably, evidence that the recommendations of the past reports have not yet been generally adopted.

In order to help policy makers in their planning, we have included below a summary of the findings from the last decade, with a view that this can become a good checklist of things to avoid in ongoing work. This has been arranged within the framework that the Forum operates, namely:

- Development of tax policy
    - The process
    - The timing
    - Stability
- Communication of tax policy
- Legislation and implementation of policy

Table 1 - Consolidated recommendations (with report number)

The process	Developed Timing	Stability	Communicated	Implemented
Avoid inadequate and poorly designed consultations (#1)	More thought needs to be given to the timetable for the legislative process (#2)	Constant change leads to lack of stability and predictability (#1)	Take the opportunity during a consultation in a "Summary of Responses" document to set out in detail the Government policy in a particular area (#2)	Set the stage for Post Implementation Reviews and future work (#3)
Ensure consultation on proposed legislation goes through all five stages of the policy process (#2 and #7)	Longer periods of consultation can help to build consensus and understanding (#3)	Deliver on promises or provide explanations when not delivered (#4)		Do not place too much reliance on guidance in absence of a proper consultation (#5 and #7)
Avoid conflicts between reform and revenue protection (#3)	The policy development process needs to be flexible, both in timing and in outcome (#3)	Allow the tax system to settle and for new measures to 'bed in' before introducing new measures in the same area (#5)		
Clearly define the role of the OTS in the consultation and policy development process (#4)	Do not rush through complex legislation in a pre-election finance bill (#4)	Ward against complexity which makes the tax system complex to operate (#5)	Feedback is essential to building consensus and understanding (#3)	
Integrate international reform into the UK's consultation framework (#4 and #7)	All stages of the policy process matter and should be given sufficient time (#4)			
Ensure that the first stage of consultation is properly undertaken to avoid complexity at later stages (#5)	Avoid introducing complex legislation before significant political events to ensure legislation is not rushed through without proper debate (#7)			
Reinforce the links between policy makers to avoid inconsistency of approaches in consultations and policy development (#5)	Take into account external consultation timetable (#7)			
Address genuine concerns raised during the consultation process and avoid 'patching' bad legislation after it is passed (#7)				

3. PROTOCOL

The "Protocol on unscheduled announcement of changes to tax law" ("the Protocol" as set out in the Appendix) was published in March 2011 and, since then, has helped to provide greater clarity on the processes that Government has followed in considering unscheduled announcements. The result of this has been good policy making, with important inputs from key stakeholders being considered ahead of legislation being introduced.

The Protocol spans two distinct situations: first, where legislation is announced outside a Budget and, secondly, where legislation takes effect from a date earlier than the date of announcement (ie. retrospective). Whilst the protocol has been seen to be effective in relation to the first situation, the Forum remains concerned that the Protocol could be improved in relation to the use of retrospective legislation. This concern was first raised in our second report and is particularly relevant to this report as, since the last report, the Protocol has been tested by the courts and the Loan Charge Review has been published (see A.2). The Forum's fifth report (December 2016) stated that "greater clarity" was required to identify when retroactive legislation might be appropriate.

The Protocol is intended to reinforce "the Government's commitment to improve the stability of the tax system, at the same time as allowing decisive action when risks to the Exchequer are identified[3]". In order to achieve this, the Forum believes that the Protocol should be reconsidered in the light of the recent case law and supplemented to provide greater certainty for the taxpayer and the courts in determining when retrospective tax legislation is regarded as permissible.

In the particular loan charge case, although ostensibly prospective, the legislation clearly had a retrospective effect. The Protocol states that this should be "exceptional" but does not go on further to set out what might justify such exceptional action. In contrast, the Protocol does provide (in paragraph 2) what would justify an announcement of a change of law with immediate (or retrospective) effect outside a Budget.

In seeking to update the Protocol, the Government could consider confirming that no legislation will be introduced which will be retrospective in the sense of effectively reopening any years of assessment where the taxpayer has:

a) made a reasonable disclosure to HMRC, HMRC has taken no action and the period for enquiry has closed, or
b) entered into an arrangement which was not at that time contrary to legislation or overturned by case law, where HMRC had not made it known sufficiently widely that it regarded such arrangements as unacceptable tax avoidance and where the periods for enquiry and discovery had closed.

The TPF would welcome the opportunity to contribute to any initiative in revising the Protocol to allow these learnings to be addressed and to create a better tax consultation process.

[3] Tackling Tax Avoidance, HM Treasury and HM Revenue & Customs, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/197112/Tackling_tax_avoidance.pdf

4. RECOMMENDATIONS FOR THE FUTURE

This report provides the opportunity to comment on the future of the tax policy making process, having experienced the responses to the COVID pandemic and lockdown. In general, the Government, HM Treasury and HMRC are to be commended for the speed and volume of changes that have been implemented in extremely difficult conditions. The Forum recognises that there was a need for policy to be developed and deployed rapidly, and welcomes the professionalism shown by the Departments.

The Forum would make the following observations:

- Unscheduled announcements

  The pandemic led to a large number of unscheduled announcements, which were referred to by commentators as "mini-Budgets". These mini-Budgets could deploy significant Government resources and were only "mini" in terms of the number of provisions rather than the value of Government interventions.

  We understand the need for such interventions and that these may continue to be needed. We recommend that the Protocol on Unscheduled Announcements is supplemented to go beyond the single anti-avoidance measure that was the original basis for the Protocol and that it should set out clearly what process the Government will go through when announcing new provisions. This will ensure that the relevant information is readily available to those who need it, or where that information is not immediately available, the timing of availability will be known.

  The purpose of this revised Protocol is not to limit the ability of the Government to make such announcements but to provide a consistency of approach so that the policies can be readily understood and implemented. As with the current Protocol, there would be scope for exceptions, but these would be expected to be limited.

- Forms of digital consultation

  The move to lockdown has resulted in far greater use of digital technology. The Government should consider mechanisms for enhancing consultation through the use of digital engagement. The lockdown provisions were consulted upon in a very short period, with technology used to gather comments in a transparent and effective manner. Some of this best practice might be readily applied to HM Treasury and HMRC consultations, such as on the draft clauses of the Finance Bill.

  Care will need to be taken in developing such digital engagement not to stifle contributions, as has been seen in some non-UK consultations where the use of limited boxes in online forms can constrain the ability of interested parties to contribute.

  Furthermore, the rapid adoption of video conferencing provides an opportunity to enhance the consultation experience, potentially allowing many more interested parties to attend presentations in relation to areas under consultation. We suggest that the use of these tools should be built into best practice guides for undertaking a consultation and that these guides should be made public.

- Five stage model of consultation

  A consistent concern of the Forum has been that the five-stage model of consultation has not been adopted uniformly. Those occasions where this has not been adopted have generally correlated with policy areas which have ultimately given rise to greater concern.

  The response to our last report noted that there were other methods of achieving the early stages of consultation. We would welcome the Government recommitting to the five-stage process and to set out the ways in which the stages could be achieved.

  We have also noted that the reports of the Office of Tax Simplification ("OTS") can give rise to policy changes and that these changes will omit stages of the consultation framework, on the basis that consultation has been undertaken by the OTS. Many such reports will be driven solely by a simplification aim and therefore may not constitute a full, stage one consultation which would examine all policy concerns. The recent consultation on capital gains was a notable exception as the remit from the Chancellor particularly included a policy review, but again this was undertaken with a set framework (notably a reversion to neutrality).

  Again, we believe that the framework should set out how reports of the OTS fit within the framework.

  Finally, we note that the Government has issued more "Calls for Evidence". In principle, we welcome the move to gathering data to enhance evidence-based policy making. We would again recommend that the role of such "calls" are recognised in the five stage model.

APPENDIX A – SUMMARY OUTLINES OF POLICIES MENTIONED IN THIS REPORT

This Appendix considers the range of policies that have been developed over the period from 17 November 2017 and 13 December 2019. It first considers those areas that are less exposed to policy intervention from outside the United Kingdom and then focuses on those policies that are led or heavily influenced by international policy makers.

A.1 Matters of domestic taxation

1. Off-payroll working in the private sector

In 2000, the off-payroll working ("IR35") legislation was introduced to ensure that an individual who, if contracting directly would be classified as an employee, should pay the same level of income tax and national insurance even if they were to interpose a personal service company (PSC). In March 2016, the Government sought to change the rules as to who should test whether such an individual was indeed a "disguised employee", moving this obligation from the PSC to the company that received the benefit of the individual's labour. Government had conducted a consultation starting, for the public sector, in March 2016. The private sector measure started with a stage 1 consultation on 18 May 2018 but seemed to assume that the measure would go ahead given the 'success' of the public sector measure.

The consultation, which lasted until 10 August 2018, was good but limited itself to IR35/off-payroll working and did not take the opportunity of dealing with wider issues relating to the relevance of employment status on taxation and the differentials this produces. It is a complex "sticking plaster" on a much bigger problem.

On 5 March 2019, a further consultation was published and ran until 29 May 2019. This confirmed that off-payroll rules for the private sector would only come into force from 6 April 2020, subsequently deferred until 2021.

The Check Employment Status for Tax (CEST) tool was being used to assess the application of the rules. For some cases, this tool may provide inaccurate assessments of employment status since it does not take account of mutuality of obligation, multiple engagements, and contractual benefits (e.g. holiday pay).

These issues may be resolved by the new implementation date of April 2021 (delayed due to COVID-19) but there is still some concern about business readiness and how transferring liability for PAYE/NI down the supply chain will work (particularly as there is no defence for having taken reasonable care).

This policy development and implementation demonstrates the following:

- The benefit of consulting widely, and building reform generally

2. Loan Charge

The loan charge legislation is an anti-avoidance measure that aims to address the tax loss from disguised remuneration. The loan charge was enacted in Finance (No. 2) Act 2017, Schedule 11 and was amended, following recommendations made in Sir Amyas Morse's

Independent Loan Charge Review (the “Review”), in Finance Bill 2020 (the changes were announced on 20 January 2020).

The structure and effect of the loan charge was commented on in the Report of the Economic Affairs Committee of the House of Lords "The Powers of HMRC: Treating Taxpayers Fairly" (the “Report”), the Review and in the case of *R (on the application of Cartref Care Home Ltd and Others) v HMRC* [2019] EWHC 3382 (Admin) ("Cartref").

The Report and the Review both concluded that the loan charge contained an unacceptable element of retrospection. The loan charge applied to any loans made on or after 6 April 1999 and which remained “outstanding” (as defined). In broad terms, a loan remained outstanding unless it had been repaid; therefore, if a loan had been released, or not repaid, the charge would nevertheless apply, regardless of the fact that the arrangement might have been disclosed to HMRC or that the period for assessment or enquiry had passed. Both the Report and the Review recommended that this element of retrospection should be removed:

- the Report by proposing the exclusion of loans made in years where taxpayers disclosed their participation in these schemes to HMRC or which would otherwise have been “closed”, and
- the Review by recommending that the charge should not apply to loans made before 9 December 2010 or to loans made between 9 December 2010 and 5 April 2016 where reasonable disclosure had been made to HMRC and the enquiry period had closed without an HMRC investigation.

Retrospection

The applicants in the Cartref case sought permission to bring an action for judicial review, the substantive claim being that the loan charge was in breach of human rights legislation. The court did not conclude whether or not the loan charge was retrospective but did note that there was a dispute over whether the Rees Rules were complied with; no reference was made to the Protocol.

The APVCO case (*R (on the application of APVCO 19 Ltd and Others) v HMT and HMRC* [2015] EWCA 648) did consider the Protocol in the light of a claim that retrospective changes to the SDLT rules were in breach of human rights. The Protocol was not found to assist the claimants. The court approached the Protocol in the context of considering whether the changes considered in the APVCO case were lawful in the context of human rights, that is whether the changes were accessible, precise and foreseeable. It was argued that the Protocol rendered the changes unforeseeable. As an extra-statutory "promise made by Government," the court clearly thought this was unlikely but examined the Protocol in any event.

The court considered that, while the Protocol generally only allowed for retrospective legislation in “wholly exceptional” circumstances, the three bullet points in paragraph 2[4], which could apply separately, also applied to retrospective changes to tax law. The court considered that the circumstances leading to the legislation were wholly exceptional, that

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[4] http://taxnews.lexisnexis.co.uk/TaxNewsLive/Members/BreakingNewsFullText.aspx?id=3443&css=1&xml=0

as the bullet points only applied "normally" they arguably did not apply as the situation was far from normal, but that in any event one or more of the bullet points was satisfied in the circumstances as the SDLT schemes represented either a significant loss or significant risk to the Exchequer. The court agreed with the proposition put by counsel that the "Protocol has no legal force and its true operation is confined to the political sphere. Failure to adhere to it will result in the Minister concerned being held accountable to Parliament, but at the end of the day the decision whether or not to pass the legislation, with or without compliance with the Protocol, is a matter for Parliament".

This experience reinforces the Forum's continued view that the Protocol should be reviewed, as discussed in the body of this report.

3. Private residence relief – change to final period exemption

The private residence relief "final period exemption" (FPE) was introduced for those individuals trying to move to a new house, to ensure they were not disadvantaged during a housing slump. Previous changes to the FPE were linked to the state of the housing market.

A stage 3 consultation document was published on 1 April 2019. At the time no objectives were set out and policy options were not identified.

Following the consultation, it was proposed that the FPE duration be reduced from 18 months to 9 months for disposals on or after 6 April 2020. This may be due to the fact that the summary of responses document noted the average time to sell a property is 4.5 months. Of course, such an average takes no account of a number of variables, including location, time of year, or price bracket. It was also not a statistically significant sample.

If the reason for the restriction is in response to concerns on misuse of the private residence relief, it would be preferable for the relief to be subject to a full review commencing at stage one.

4. Private residence relief – change to letting relief

The Forum has commented in previous reports that, while there may be occasions when a retroactive change to tax law is justified, appropriate and lawful, these would be rare. The restriction to lettings relief whereby the owner must share occupation with the tenant for disposals on or after 6 April 2020 has a retroactive impact, effectively withdrawing relief that may have accrued before the budget date announcing the change, which is not equitable.

5. Reporting and payment window for residential property gains

An announcement was made at the 2015 Autumn Statement that a '30 day from completion' CGT payment window for residential property gains would be introduced. At Budget 2017, the start date was deferred to April 2020.

This allowed for an eight-week consultation to be conducted from 11 April 2018 to 6 June 2018. The summary of responses document in July 2018 stated that HMRC would liaise with representative bodies on how best to raise taxpayers' awareness of the change.

The change follows the 30-day reporting and payment regime introduced for non-resident CGT on disposals of UK residential property from April 2015 (discussed in paragraph 13 below). The number of non-residents affected by this was relatively small. Widening the scope to UK residents will substantially increase this number. Advisers reported a lack of awareness of the change and the HMRC report 542 of April 2019 on capital gains tax communications research showed a lack of understanding of both the UK and non-UK HMRC policy documents on the change. While there are pages setting out the change on gov.uk, these are only useful if the taxpayer is aware of the new deadline.

In most cases, UK taxpayers will have to report the gain on disposal twice; first within 30 days of the disposal, and then again later on a self-assessment tax return. This is non-intuitive, and it should be possible to just report once in a digital tax system.

Stage 5 of the process enables the Government to carry out a post-implementation review. The Forum would encourage Government to review whether the 30 day deadline is reasonable given:

- The number of taxpayers failing to meet the deadline
- The additional pressure of obtaining a valuation in the case of an inheritance or gift of property
- The need to obtain professional advice in calculating the gain and make the 'reasonable estimates' necessary to arrive at the taxpayer's CGT rate (linked to an estimate of the taxpayer's taxable income for the year), in order to compute the notional tax on the disposal.

Regard should also be paid to the administration necessary when reporting the first gain under this system, where the individual does not already have a Government gateway ID and password. These are needed to set up a CGT on property account online. Those taxpayers unable to access online services would need to contact HMRC for a paper alternative. If the window is considered problematic, consideration should be given to revising the deadline.

6. Entrepreneur's relief (now Business Asset Disposal relief)

The Tax Professionals Forum report of December 2016 noted that a number of amendments were made to Entrepreneur's Relief (ER) in Finance Act 2015 which did not adhere to the Government's tax policy making procedures and consultation process, resulting in the need for corrections in Finance Act 2016 to resolve the unintended consequences arising.

Further changes to the relief were announced in the 2018 Budget, relating to:

- The allowing of ER on gains before dilution, which followed a consultation process (referred to in Appendix 2 paragraph 6 of our November 2018 report),
- A lengthening of the qualifying period, and
- A change in the definition of 'personal company' for shareholders claiming the relief.

The latter change was not included within the consultation and was introduced with immediate effect. Unsurprisingly, given the experience above, the draft legislation had an unintended consequence, whereby normal family company shareholding arrangements in which different classes of share were held (in order that different rates of dividend may be voted) would have been denied relief. Once again, representations were made by the professional bodies, and the Government tabled an amendment on 21 December 2018 to correct the problem, but considerable uncertainty existed for business transactions in the meantime.

This is a further example showing the importance of following the consultation process.

7. Annual investment allowance

The Finance Act 2019 increased the limit for the annual investment allowance (AIA) from £200,000 to £1 million, for a temporary period from 1 January 2019 to 31 December 2020. Towards the end of this period, on 12 November 2020, HM Treasury announced a 12-month extension to the temporary period. In our December 2016 report, we noted that frequent changes to the level of the allowance was confusing for business taxpayers. The Office of Tax Simplification October 2014 review of the competitiveness of the UK tax administration made a similar observation (paragraph 3.52) and noted the complicated rules that must be applied to reflect the date the AIA changes.

Unfortunately, this complication is repeated within the transitional rule at Schedule 13 paragraph 2 FA 2019. An accounting period straddling the date of change, 31 December 2021, is deemed to form two notional accounting periods, with expenditure in the latter period that qualifies for relief needing to be restricted to the proportion of the accounting period falling after 31 December 2021 x £200,000. This would mean a company with a year end of 31 March, would have a maximum capital spend qualifying for the AIA of just £50,000 in the period January to March 2022, considerably less than what its entitlement would have been had no temporary increase applied.

This points to the need for the comments on past legislation to be considered in the design of new and related provisions.

8. Structures & buildings allowance

Budget Day 2019 included an announcement, introducing this new relief with immediate effect. There had been no prior consultation. It is a welcome allowance, filling a gap identified in the OTS review into the competitiveness of the UK tax administration, and in subsequent reports, although it does not remove the administrative burden of identifying plant and machinery within the building on acquisition.

We note that the term 'insignificant' qualifying use (s270CE(2) CAA 2001) is not defined in the legislation, and repeat the lesson set out in previous Forum reports of not placing too much reliance on guidance.

A.2 Matters of tax administration

9. Making Tax Digital

The Making Tax Digital (MTD) programme has been operating for several years. The original policy was for digital record keeping, starting with quarterly reporting for income tax (by all but the very smallest and very largest businesses) and then to extend the requirements to VAT. After further consultation and consideration, the Government decided to begin with VAT from April 2019, leaving income tax until 2021 at the earliest. This was a good example of constructive consultation with a pragmatic outcome.

Draft legislation (The Value Added Tax (Amendment) Regulations 2018) was published on 18 December 2017, together with a draft VAT Notice. The consultation ran to 9 February 2018, allowing less than the usual time for consultation and included the Christmas holiday period and the busiest month of the year for many tax professionals. This excluded the very population with most interest in the policy from the discussion.

The regulations to mandate VAT were laid on 28 February 2018, although further consultation continued on the VAT Notice.

MTD for VAT reporting was a major change for business, and few businesses had properly understood that it required accounting records themselves to be digitalised. Genuine concerns were expressed about mandating this change which, while bringing benefits to some taxpayers, seemed only to impose a burden for others. Many questioned whether the implementation process had been fully understood by HMRC systems designers. The necessary tools for agents were added piecemeal and the process of bringing their clients into MTD was laborious and frustrating for many. It has now become clearer that this relates to the ongoing transfer of VAT customer data to HMRC's Enterprise Tax Management Platform.

The concept of digital links, in particular, has continued to challenge the many businesses which use VAT schemes such as partial exemption and the Tour Operators Margin Scheme. Today there are hundreds of products listed on HMRC's website, and the software market, already difficult to navigate and choose from, now looks very crowded.

The addendum to the draft VAT notice on MTD for VAT anticipated a "soft landing" period of 12 months from the 2019 start date to allow businesses to upgrade systems, so that links between software could be digital. While the soft landing, extended to 31 March 2021, has been very welcome and necessary for business, we question whether legislation, which needs guidance and the provision of an immediate soft landing, is really in accordance with the Tax Policy Making New Approach.

Any decisions in relation to MTD for income tax self-assessment (ITSA) and corporation tax should be informed by the results of pilots for those taxes. The types of businesses potentially in MTD for ITSA differ significantly from those in MTD for VAT and it is the success and experience of the MTD for ITSA pilots that should be the main factor in deciding on how MTD for income tax is implemented. Consultation to implement these changes needs to begin again at an early stage in the process. Draft income tax regulations were published for comment in 2017; a version with only minor revisions was published in December 2020 and there is currently a very curtailed consultation period on these regulations.

Policy making process

At this stage, the key lesson to be learnt from the implementation of MTD for VAT is that there are two distinct elements to MTD, being the requirements for digital record keeping and for quarterly reporting. The quarterly reporting aspects of MTD for VAT allow VAT to be collected, reported and paid in much the same way as before.

MTD for VAT has highlighted the problems many businesses have with creating digital links which must be used to join up the electronic flow of information through the accounting system. Many of these have been resolved, some at considerable cost to business, but the complexity of VAT means that digital links are unlikely to be possible in all cases and exemptions will continue to be needed for some time.

Extending quarterly reporting to income tax will prove more complex. The policy development for this is already at stage 3 and it is unclear how some of the issues with differing basis periods, such as those for taxing property income and VAT reporting for business income, can be resolved without primary legislation.

The experience of MTD for VAT should be used to inform the consultation process for further MTD. In particular, consideration could be given to the two different aspects of the MTD policy. Whilst the move to digital record keeping might be pursued at the current pace, the past experience in MTD could be used to inform further policy consultation on the simplifications to income tax that would make quarterly reporting more manageable. Such a two-stage move to mandation could demonstrate the strength of the policy framework, with lessons learnt not just from the policy consultation but also the policy implementation of similar policies.

A.3 Matters that are under consideration with other governments

10. Inclusive Framework discussion of taxation of digitalised economy

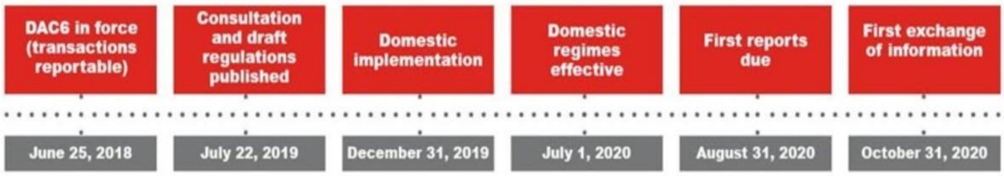
The Forum's fourth report, written in the context of the original Base Erosion and Profit Shifting ("BEPS") report of the Organisation of Economic Cooperation and Development ("OECD"), noted that the Government should consult in the UK in relation to commitments that it would make in international fora about areas of taxation where the UK would have consulted had the tax decision been made solely by the UK. This message was then reinforced in the fifth report, as work developed at the level of the European Union.

During this period, the international consultation continued, with the OECD producing a consultation, followed by a work programme in May 2019. This policy discussion has migrated beyond the OECD to the Inclusive Framework on BEPS, established in 2016 and now encompassing 139 countries.

Whilst the OECD has been undertaking consultations, the Forum remains of the view that consultation at the OECD level does not remove the benefit of consulting within the UK (or indeed set aside the commitment in the Government's approach to consultation).

11. DAC6 Legislation

In order to implement the European Union (EU) Directive 2018/822 on the mandatory disclosure and exchange of cross-border tax arrangements (referred to as DAC6 or the Directive), the UK legislated "The International Tax Enforcement (Disclosable Arrangements) Regulations 2020," which came into force on 1 July 2020, as shown below:



However, due to the COVID-19 pandemic, the EU agreed an extension to the deadlines for DAC6 reporting.

There have been many issues highlighted regarding the way in which the UK implemented the Directive, including retrospective effect, reporting obligations, changing legislation and post-Brexit transition.

The implementation timeline provided for implementation with retrospective effect, such that the disclosure obligations were "live" from 25 June 2018, before any implementing legislation or guidance had been published.

Concerns have been expressed around whether the reporting obligations created by DAC6 was both proportionate and clear, in particular:

- Application of DAC6 to standard transactions with no particular tax motive.
- Reliance on use of guidance to tackle many of the concerns raised in the consultation rather than dealing with them in the regulations directly – it should be noted that an intermediary relying on guidance is not in the same legal position as one relying on legislation.

Following engagement with the Law Society, Legal Advice Privilege (LAP) legislation had to be revised for an improved exception for an intermediary where the relevant information would be subject to LAP. Such revisions were required even though the interaction of disclosure regimes with LAP was well known and had been addressed with the introduction of the UK's own Disclosure of Tax Avoidance Schemes (DOTAS) legislation in 2004.

Whilst the precise development of this policy was outside the direct control of the UK Government, consultation with taxpayers is an area within the Government's control. It was disappointing that taxpayers, and indeed intermediaries, were not more integrated into the process of the international policy development. The UK could have taken a key role in developing a regime that would have been workable, and one that reduced the burdens on taxpayers but was nevertheless consistent with the overarching policy aims.

Although the final scope of the provisions was restricted following the end of the Transition Agreement, there were nevertheless lessons that could be learnt from the process. This includes:

- Anticipating the development of international legislation and ensuring known taxpayer stakeholders were engaged in informing the UK's policy position
- Better use of the consultation process in order to address the proportionality element of the proposed legislation when it was first published in 2017

A.4 Matters relating to international income, gains and payments

12. Offshore Receipts in respect of Intangible Property ('ORIP')

This policy, which imposes income tax withholding on payments by large multinational groups, aims to tax the proportion of income referable to sales made in the UK derived from intangible property held in low tax jurisdictions.

The measure was announced at Autumn Budget 2017 and a consultation ran for the full twelve weeks, from 1 December 2017 to 23 February 2018. The summary of responses document was published on 29 October 2018, alongside the legislation which was enacted in the Finance Act 2019. The provisions came into effect from 6 April 2019. The legislation included a regulatory power to make technical changes to the detailed provisions to alleviate any unintended outcomes. Draft regulations were subject to consultation from 24 May to 19 July 2019 and many were brought into effect from 6 April 2019.

The consultation started at stage 3, and the legislation and regulations suffered significantly because of the lack of stage 1 or 2 consultation. Whilst it is understood that ORIP could be classified as "anti-avoidance" legislation and therefore outside the need for consultation, the consultation at stage 3 indicates that consultation was indeed possible and appropriate.

At meetings in November 2018 it was recognised that the draft legislation (subsequently enacted) went beyond its stated aims and the scenario analysis suggested a lack of clarity in the underpinning policy (which had not been open to consultation).

At that time, it was recognised that amendments would be required in order to correctly implement the policy intentions. Subsequently, draft regulations were put out to consultation to clarify, improve and/or correct the legislation.

Notwithstanding the regulations, the charging provisions remain very broadly drafted, something which is commonly the case when there is insufficient time to target the legislation effectively and Government is concerned to ensure that the intended activity is captured. HMRC guidance in this area is helpful in identifying the intent but such guidance is not a substitute for clearly drafted law. This is particularly the case for the ORIP provisions as the ORIP charge is applied under self-assessment and therefore requires the taxpayer (companies) to apply the law as it is written.

In November 2018 suggestions were made as to how to reword the Targeted Anti-Avoidance Rule (TAAR) in order to make it more consistent with the expressed policy. This was to address the fact that, in common with other TAARs, the underlying policy is not clear where it had been very widely worded.

In an open letter to the CBI (7/2/19), the then Financial Secretary (Rt Hon Mel Stride MP) confirmed that:

> 'the Government intends to use [the regulation-making power in the legislation] to make several amendments. These include changes to clarify the scope of the anti-avoidance provisions … including to clarify that the rules apply in the same way to a transfer of IP to the UK as they do to a transfer to a territory with which the UK has a full tax treaty.'

The regulations do not propose any changes to address these issues.

This policy development and implementation demonstrates the following:

- Lack of consultation at stage 1 and stage 2
- A resulting lack of clarity as to the precise targeting of the consultation
- A corresponding lack of targeting of the legislation
- Leading to confusion over the application of the law; and
- The use of guidance to ameliorate the excessive provisions of the law, in a way that leaves taxpayers without the rule of law upon which to rely.

13. CGT on non-residents

The Tax Professional Forum's report in November 2018 noted the extension of CGT to all UK land (including indirect holdings of both residential and non-residential property) and was a fundamental shift in the taxation of UK property. However, the consultation was a stage 3 consultation (defined as drafting legislation to effect the proposed changes, although draft legislation was not published at that time). Stages 1 and 2 of the process were not engaged.

Draft legislation was published late in the process, core provisions being published on 6 July 2018 with significant tranches later, allowing limited time for technical consultation before the implementation date of 6 April 2019.

This contrasts with an earlier consultation on non-resident companies chargeable to income tax and non-resident CGT, which allowed companies with property income a further year to 6 April 2020 to familiarise themselves with the regime and its requirements. This non-alignment has resulted in piecemeal reforms in this area and ran contrary to the stated aim in the consultation document for a unified approach to rationalisation.

This extension to the CGT tax base brings those non-UK residents affected into the 30-day reporting requirements. The number of recent cases before the Tribunal appealing penalties for failure to submit a non-UK resident CGT return indicates a lack of awareness of these requirements, which could have been eased had the full 5 stage process been followed. Further comments on CGT 30 day reporting are set out in paragraph 5 above.

14. Digital Services Tax

At Budget 2018 the Government announced that it would implement a Digital Services Tax (DST) from April 2020. The aim of the DST was to take action, pending reform of the relevant international tax rules. The Government set out that the DST would be a 2% tax on the revenues derived from providing a social media platform, search engine or online marketplace to UK users. It would only apply to businesses whose global revenues from these in-scope business activities are greater than £500 million and where more than £25 million of these revenues are derived from UK users.

The Government published a consultation on the detailed design of the DST on 7 November 2018 which ran for 16 weeks (until 28 February 2019) and held a number of meetings with stakeholders.

The draft legislation was then published on Legislation Day in 2019, alongside a Tax Information and Insight Note, and subject to technical consultation through to 5 September 2019.

This tax is a contentious tax, as it seeks to impose a turnover tax in the absence of the UK's ability to tax profits which are argued to be attributable to the UK market. However, the consultation process on this tax was well structured and built from a number of policy design documents. This provided the ability for the basis of the tax to be understood by taxpayers, even if the merits of the tax were strongly debated.

The tax spans both direct taxes (in that the tax seeks to be a proxy for taxation of profit) and indirect taxation (in that the mechanism used to impose the tax is not profit but turnover). As such, this is a novel approach and care needs to be taken for taxes of this nature to ensure that consultations covers both the principle and the practical interpretation.

APPENDIX B – PROTOCOL ON UNSCHEDULED ANNOUNCEMENTS OF CHANGES IN TAX LAW

The Government has made clear its aim to strike the right balance between restoring the UK tax system's reputation for predictability, stability and simplicity and preserving its ability to protect the Exchequer by making changes where necessary. In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional.

1. Ministers undertake to observe the following criteria when considering a change to tax law which will:
   - Be announced other than at Budget; and
   - Take effect before the legislation implementing the change is enacted.

2. Such changes to tax law will normally only be announced other than at Budget where:
   - There would otherwise be a significant risk to the Exchequer;
   - Significant new information has emerged to identify the risk or indicate its scale; and
   - Changing the law immediately is expected to prevent significant losses to the Exchequer.

   Announcements will usually take the form of a Written Ministerial Statement to Parliament before 2pm.

3. Legislative changes announced in this way will be confined to addressing the risk to the Exchequer that has been identified. A change in HMRC's interpretation of the law (unless prompted by a Court ruling) will not be regarded as 'significant new information'.

4. Where Ministers believe that such a change is justified, the process will be as follows:
   - A Minister will make a public announcement of the intention to change the law and make clear that the change will take effect before the legislation is enacted;
   - The public announcement will be accompanied by the technical detail necessary to amount to a sufficiently clear warning of the nature of the change and its timing;
   - HM Revenue & Customs (HMRC) will publish the Written Ministerial Statement and draft clauses on the HMRC website as soon as practicable after the announcement to Parliament. If, exceptionally, draft clauses cannot be published on the day of the announcement, a detailed technical note explaining the nature of the proposed change and the reasons for it will accompany the announcement; and
   - Legislation to give the measure effect will be included in the next available Finance Bill.

5. Whilst the Government will not invite comment on the intention to legislate, the nature of the change or on its timing, it will consult after the announcement to establish whether the draft legislation would achieve its objective and change the law as intended. Subject to the risk of forestalling, consideration will be given to consulting informally in confidence before an announcement is made.

6. As part of the normal Budget process, the Office for Budget Responsibility will scrutinise the estimates of Exchequer impact associated with any change to tax policy.

APPENDIX C – MEMBERS OF THE FORUM

The current membership is:

- Chris Sanger (Member Chair)
- Philip Baker OBE, QC
- Malcolm Gammie CBE, QC
- Anita Monteith
- Vincent Oratore
- Andy Richens
- Jonathan Riley
- Richard Stratton