The Forum recommends

General Features



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Vincent Oratore provides an overview of the Tax Professionals' Forum 2018 report to the Financial Secretary to the Treasury

Key Points

What is the issue?

The remit of the TPF is set by the Government but is essentially part of the 2010/2011 initiative to reform the framework and development of tax policy and the making of tax law. Specifically, the TPF is tasked with the review of Government performance.

What does it mean to me?

Tax law is a bit like entropy. Its natural state tends towards volume and complexity and it requires energy from all participants in the process to reverse the trend.

What can I take away?

The TPF considers that Government should ensure consultation occurs at each stage; address concerns raised and avoid 'patching' bad legislation; not place too much reliance on guidance as a substitute for a well thought through policy; and

avoid the temptation to pass complex legislation before political events.

The Tax Professionals' Forum ('TPF') was established in July 2010. Details on its membership, role and reports can be found on GOV.UK. The remit of the TPF is set by the Government but is essentially part of the 2010/2011 initiative to reform the framework and development of tax policy and the making of tax law. Specifically, the TPF is tasked with the review of Government performance against the criteria set out in the Tax Consultation Framework of March 2011 (section 10).

Why do we care about tax policy making and implementation?

I went to see *Hamilton* (the musical) a couple of weeks ago and I was reminded of a particular quote from James Madison, written for *The Federalist*: 'It will be of little avail to the people, that the laws made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.'

Sound familiar?

This is, of course, from the perspective of the taxpayer. Equally, the intent of Government can be frustrated if at any point in the multi-levelled process of tax law making the original policy gets delinked from the legislation (and the guidance).

Tax law is a bit like entropy. Its natural state tends towards Madison's description and it requires energy from all participants in the process to reverse the trend. This was very much recognised by the Government in 2010/2011 and processes put in place to improve the outcome.

Consultation

One of the major focuses of the TPF is the consultative process. In 2018 the primary recommendation of the TPF related to that process. Consultation is a key part of the tax policy making and implementation process. It enables the Government to access the maximum amount of expertise and data when making tax law. This is important because making tax law is *hard*.

The Tax Consultation Framework (March 2011) sets out the rules of engagement on the consultative process. In particular it sets out the five stages at which, if possible, consultation should occur:

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

Many of the comments set out below relate to a failure of engagement at different stages in the process. Generally, in any area of significant change (other than rate changes), consultation should start at Stage 1 and continue throughout. When, for whatever reason (usually time) this has not happened the results are often sub-optimal.

TPF 2018 report Primary Recommendation

The TPF expressed concern about the consistency of the consultation process while recognising that significant improvements had been made since 2011.

The report cited a number of examples (dealt with in detail in appendix 2 to the report) during the report period (16/9/16 – 16/11/17) as follows:

1. **Hybrid and other mismatches regime amendments**
   The initial consultation went well but the legislation did not reflect issues raised during the earlier consultation period and this was compounded by inaccuracies or divergent positions in the original draft guidance that was not amended and published in final format only 12 months after.

2. **The ‘cleansing’ legislation relating to the changes to the taxation of non-UK domiciled persons**
   Poor drafting cast doubt over whether the rules actually apply to most of the transfers to which the provisions are intended to apply. There are a number of other quasi-administrative provisions which have caused difficulty between the professional bodies and HMRC and confusion for advisers.

3. **The taxation of off payroll working**
   Few options were identified in the consultation document and few of the issues identified by commentators on the consultation were taken on board. The law has been implemented without addressing the problems identified.

4. **Offshore time limits**
   The extension of the assessment time limit to 12 years had no stage 1 consultation and limited stage 2 consultation. The opportunity was missed to discuss whether it is appropriate or proportionate to treat a mistake in the same way as deliberate behaviour.

5. **Non-resident capital gains tax**
   The taxation of non-resident direct and indirect holdings of commercial property was commenced at stage 3. This is a fundamental shift in UK taxation which would have benefitted from a stage 1 consultation.

There are further examples in Appendix 2 to the report. The following illustrates the process working well and working badly.

Tackling tax evasion

The new corporate offence of failure to prevent the criminal facilitation of tax evasion ('FTP' – not to be confused with the TPF!) was conceptually very difficult. As legislation carrying criminal penalties it needed very careful consideration and, ideally, tight drafting. Yet it needed to be wide enough to catch the type of behaviour which was its target. The consultation process was intense and, in different stages, lasted from July 2015 to April 2017. Importantly, revised guidance was published in September 2017 when the offence came into force.

This was a good example of process. The implementation of the FTP legislation was well organised because of the development of the guidance alongside the legislation which enabled taxpayers to consider how they would prepare for the new rules prior to their enactment so that they could be prepared ready for the coming into force of the legislation.

While guidance is not a substitute for properly drafted clear legislation, as a practical matter, this was the best possible outcome in the context of the FTP. This process should be compared and contrasted with the process for the 'enablers' legislation.

Enablers

The enablers provisions commenced with the announcement of the proposal at the 2016 Budget. There was a limited consultation between 17 August 2015 and 12 October 2016.

The consultation period was too short. The consultation was poorly developed and targeted, seeking to charge all advisers involved in transactions which failed with penalties potentially based in the tax proposed to be avoided. In anti-avoidance measures there is a balance to be struck between clearly hitting the target of the measure whilst drafting provisions which are proportionate to the evil sought to be countered. The provisions were extremely controversial in relation to their scope and how they were targeted, producing potential conflicts of interest for professionals.

The provisions were subsequently introduced in the original Finance Bill 2017 and finally legislated in the second Finance Act 2017. For provisions which were so controversial there was no second or further consultation on the rules, but a series of discussions with representative bodies. The final result, although far better than the initial position, may still have adverse effects outside the area which it is considered the rules are intended to target. This was not a good example of the legislative process.

There are two other areas referred to in the report:

1. The Government tends to rush through complex legislation before significant political events (potentially coming our way in March 2019). The TPF suggested the Government should minimise such legislation as the history of legislation introduced in such circumstances without proper consultation is dire.
2. Appendix 3 to the report contains proposals to clarify the protocol on unscheduled announcement of changes to tax law. Part of the remit of the TPF (paragraph 4.4 of the protocol) is to monitor the operation of the protocol. The report notes that there has been limited use of retrospection over the last few years but even so the protocol does need updating.

Any retroactive change must be compatible with the Human Rights Act and in this respect the jurisprudence of the European Court of Human Rights offers some guidance on the identification of such circumstances. Based on that jurisprudence the TPF consider that retroactive legislation might be appropriate in any of the

following cases, if the public interest in retroactive legislation outweighs the private interests of the taxpayers adversely affected by the retroactive change:

a. Abusive avoidance schemes with significant budgetary implications.
b. It is clear that a generally understood tax treatment is incorrect and it has significant budgetary implications.
c. To rectify a manifest error in legislation which has significant budgetary implications or in terms of the impact on existing arrangements.

Conclusion

Tax law would benefit from the Government:

1. Ensuring consultation occurs at each stage
2. Addressing concerns raised and avoid ‘patching’ bad legislation
3. Not placing too much reliance on guidance as a substitute for a well thought through policy
4. Avoiding the temptation to pass complex legislation before political events.